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Court-Packing Time? Supreme Court Legitimacy and Positivity Theory

Stephen M. Feldman
University of Wyoming

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Court-Packing Time? Supreme Court Legitimacy and Positivity Theory

STEPHEN M. FELDMAN†

ABSTRACT

Many progressives have decided they need to change the Supreme Court to break the conservative justices' lock on judicial power. Yet those same progressives disagree about the best way to change the Court. This Essay begins by comparing straight-forward court-packing—adding justices to shift the partisan balance on the Court—to other possible Court changes, such as court-curbing measures that would reduce the Court's power. Court-packing has multiple advantages over these other possibilities, not the least of which is that even the current Roberts Court would almost certainly hold court-packing, unlike other potential changes, to be constitutional. Even so, some progressives view court-packing as the most extreme or radical option. They fear that court-packing would undermine the Court's sociological legitimacy: public approval and acceptance of the Court's authority and decisions. This Essay therefore delves deeply

†Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming. This Essay is derived in part from my forthcoming book: *PACK THE COURT! A DEFENSE OF SUPREME COURT EXPANSION* (forthcoming 2021). I thank the two anonymous reviewers and Greg Goelzhauser, all from Temple University Press, for their helpful comments on the book manuscript.

into a burgeoning area of political science literature on the Court's legitimacy: Positivity theory states that the American people embrace the Court with a favorable bias of good will. From this perspective, diffuse support for the Court as an institution is resilient, even when support for specific Court actions wavers. A handful of legal scholars have touched on the recent research in this area, but given our current political moment and recent Court developments, a more comprehensive exploration of this complicated literature seems necessary, particularly as it bears on the possibility of court-packing. Ultimately, this research suggests that court-packing is unlikely to weaken the American people's support for the Court as a judicial institution.

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Many progressives have decided they need to change the Supreme Court. For some, the last straw was the Merrick Garland debacle. After Justice Antonin Scalia's death in February 2016, President Barack Obama nominated Judge Garland (of the United States Court of Appeals for the District of Columbia) to fill the seat, but Senate majority leader, Republican Mitch McConnell, with the cooperation of all eleven Republican members of the Senate Judiciary Committee, refused even to open hearings on Garland's possible confirmation.¹ For other progressives, the subsequent confirmations of Neil Gorsuch and Brett Kavanaugh—the Kavanaugh confirmation hearings were especially contentious—convinced them that Court change was necessary.² Yet, for other progressives, the Senate Republicans' rushed confirmation of Amy Coney Barrett barely a week before election day in 2020 was the definitive final step. And still other progressives found that the ongoing deep and wide conservatism of the Court's decisions pushed them over the edge, despite Chief Justice Roberts occasional feints to the middle.³

1. Ron Elving, *What Happened with Merrick Garland in 2016 and Why it Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

2. *E.g.*, STEPHEN M. FELDMAN, *THE NEW ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION* 243–44 (2017) [hereinafter FELDMAN, *FAILING*] (discussing Gorsuch's conservatism); MARK TUSHNET, *TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW* 211 (2020) (stating that Kavanaugh's nomination led some Democrats to conclude something needed to be done about the Court).

3. For a smattering of examples of conservative decisions, see *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2185 (2020) (holding that a for-cause limitation on the President's power to remove the Director of the Consumer Financial Protection Bureau—CFPB—violated the separation of powers); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding that political gerrymandering was a nonjusticiable political question); *Town of Greece v. Galloway*, 572 U.S. 565, 570 (2014) (upholding the opening of town board meetings with overtly sectarian Christian prayers); *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (invalidating key provision in Voting Rights Act); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010) (holding that restrictions on corporate campaign spending violate free expression); *Crawford v.*

While many progressives now agree that the Court must be transformed, these same progressives have not reached a consensus as to the appropriate change. This Essay argues in favor of one specific approach: straight-forward court-packing—simply adding justices to shift the partisan balance on the Court.⁴ If the Democrats sweep the November 2020 elections, gaining control of both houses of Congress and the presidency, they should add at least four justices to the Court, increasing its size to thirteen. They should then nominate and confirm four progressive justices. A progressive bloc of seven justices would then control the new Roberts Court. If the Democrats do not sweep the 2020 elections, they should pack the Court whenever they are able to do so (assuming that, at some point in the future, they will control Congress and the presidency).

Numerous Democrats, both moderate and more progressive, have expressed support for court-packing. In a celebrated amicus brief to the Supreme Court, Senator Sheldon Whitehouse of Rhode Island and four other Democratic senators suggested they would favor court-packing if the Roberts Court did not change its ways.⁵ During

Marion Cty. Election Bd., 553 U.S. 181, 204 (2008) (holding states could constitutionally require individuals to show photo identification before voting); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (invalidating race-based affirmative action programs for public schools); see also Brief of Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents, *New York State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020) [hereinafter Brief]; FELDMAN, FAILING, *supra* note 2, at 173–86 (summarizing the early Roberts Court’s conservative decisions); Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL’Y REV. 195 (2015).

4. Thomas M. Keck, *Court-Packing and Democratic Erosion* (February 19, 2020) (available at SSRN: <https://ssrn.com/abstract=3476889>); Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE BLOG (Oct. 15, 2018), <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court>. There are other ways to define court-packing. *E.g.*, David Kosař & Katarína Šipulová, *How to Fight Court-Packing?*, 6 CONST. STUD. 133, 135 (2020).

5. Brief, *supra* note 3, at 17–18; see also Ian Millhiser, *Five Democratic Senators Just Declared All-Out War on the Supreme Court*, THINKPROGRESS (Aug. 15, 2019, 10:48 AM), <https://archive.thinkprogress.org/five-democratic-senators-just-declared-all-out-war-on-the-supreme-court-7601fed719e6/>.

the 2019 presidential campaign season (leading up to the 2020 election), at least two Democratic hopefuls, Senators Elizabeth Warren and Kamala Harris, supported the possibility of court-packing.⁶ And former Attorney General Eric Holder recommended that Democrats “should consider expanding the Supreme Court.”⁷ To be sure, other Democrats then campaigning for the presidential nomination (as well as some progressive commentators) remained more circumspect. They acknowledged that something must be done about the Court, but please, “No court-packing”; it is too extreme or radical.⁸ Pete Buttigieg and Beto O’Rourke supported adding justices but only in a stylized fashion that would supposedly “de-politicize” the Court,⁹ while Senator Bernie Sanders suggested that the current justices could be

Senator Whitehouse had previously criticized the Roberts Court for politicizing adjudication. Whitehouse, *supra* note 3.

6. Rashaan Ayesh, *Court Packing: Where the 2020 Candidates Stand*, AXIOS (Oct. 2, 2019), <https://www.axios.com/court-packing-where-2020-candidates-stand-aff0e431-7624-42f0-b37f-a9091d1652f9.html>; Kevin Uhrmacher et al., *Would You Support Adding Justices to ‘Pack’ the Supreme Court?*, WASH. POST: WHERE DEMOCRATS STAND, <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-packing/> (last updated Apr. 8, 2020).

7. Russell Wheeler, *Pack the Court? Putting a Popular Imprint on the Federal Judiciary*, BROOKINGS (Apr. 3, 2019) (quoting Holder); Michael Scherer, *‘Court Packing’ Ideas Get Attention from Democrats*, WASH. POST (Mar. 11, 2019) (discussing Holder).

8. For commentators discussing court-packing, for and against, see Jonathan Bernstein, *Don’t Pack the Supreme Court. Fix It.*, BLOOMBERG (Sept. 18, 2019, 6:30 AM), <https://www.bloomberg.com/opinion/articles/2019-09-18/democrats-shouldn-t-pack-the-supreme-court-they-should-fix-it>; Jamelle Bouie, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even is to Pack the Court*, NY TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html>; Larry Diamond, *Don’t Mess With the Supreme Court*, THE HILL (May 20, 2020, 4:30 PM), <https://thehill.com/opinion/judiciary/498707-dont-mess-with-the-supreme-court>; Mondaire Jones, *To Save Our Democracy, We Must Expand the Supreme Court*, SALON (Apr. 26, 2020, 4:00 PM), <https://www.salon.com/2020/04/26/to-save-our-democracy-we-must-expand-the-supreme-court/>; Kevin D. Williamson, *The Partisan Majoritarianism of Jamelle Bouie’s Court-Packing Argument*, NATIONAL REVIEW: THE CORNER (Sept. 17, 2019, 10:55 AM), <https://www.nationalreview.com/corner/civic-miseducation-from-the-new-york-times/>.

9. Ayesh, *supra* note 6.

demoted to lower federal courts.¹⁰ Most important, the Democratic nominee, Joe Biden, opposed court-packing (more on that in the conclusion).¹¹

One key criticism of court-packing is that it will undermine the Court's "sociological legitimacy": public approval and acceptance of the Court's authority and decisions.¹² The people must, as a matter of fact, respect and

10. Ian Millhiser, *Bernie Sanders's Radical Plan to Fix the Supreme Court*, VOX (Feb. 11, 2020, 8:10 AM), <https://www.vox.com/2020/2/11/21131583/bernie-sanders-supreme-court-rotation-lottery>.

11. Adam Shaw, *Biden Bucks Dem 2020 Field on Court Packing, Decriminalizing Border Crossings*, FOX NEWS (July 6, 2019), <https://www.foxnews.com/politics/biden-bucks-dem-field-on-court-packing-decriminalizing-border-crossings>. Julian Castro was another Democratic candidate opposing court-packing. Uhrmacher, *supra* note 6.

12. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21–24 (2018). Political scientists have extensively studied the Court's legitimacy, though their various conclusions sometimes do not harmonize with each other. I will draw on the following sources: BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE (2020); TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (2010); JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE (2009) [hereinafter GIBSON & CALDEIRA, CITIZENS]; Alex Badas, *Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan*, 48 J. LEGAL STUD. 377 (2019); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184 (2013); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992) [hereinafter Caldeira & Gibson, *Etiology*]; Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403 (2015); Tom S. Clark & Jonathan P. Kastellec, *Source Cues and Public Support for the Supreme Court*, 43 AM. POL. RES. 504 (2015); James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120 (1992) [hereinafter Gibson & Caldeira, *Blacks*]; James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195 (2011) [hereinafter Gibson & Caldeira, *Realism*]; James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592 (2017) [hereinafter Gibson & Nelson, *Reconsidering*]; James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162 (2015) [hereinafter Gibson & Nelson, *Legitimacy*]; James L. Gibson et al., *On the*

obey the Court's decisions, or the Court will no longer be able to fulfill its function within the American constitutional system. Regardless of the historical and analytical justifications that might be offered in support of court-packing, Democratic court-packing would be ill-advised if it would cause the American people to lose faith in the Court as a judicial institution. Hence, the more precise goal of this Essay: to defend court-packing against the charge that it would seriously impair the Court's sociological legitimacy. To be sure, I will touch on other reasons to support court-packing—for instance, court-packing has advantages over other potential Supreme Court changes—yet a comprehensive defense of court-packing is beyond the scope of this Essay. Such a full defense would require a book.¹³

A premise of this argument is that law and politics dynamically interact in Supreme Court decision-making.¹⁴ In most cases, the justices sincerely interpret the relevant legal texts—the Constitution, statutes, executive orders, and so on—but interpretation is never mechanical. No algorithmic method reveals the correct meaning of the text.¹⁵ Constitutional interpretation, in particular, is never merely two plus two equals four. Instead, the justices' political preferences always influence their interpretations of the Constitution and other texts, so law and politics always intertwine in the adjudicative process.¹⁶ If politics writ large

Legitimacy of National High Courts, 92 AM. POL. SCI. REV. 343 (1998); Colin Glennon & Logan Strother, *The Maintenance of Institutional Legitimacy in Supreme Court Justices' Public Rhetoric*, 7 J.L. AND CTS. 241 (2019).

13. STEPHEN M. FELDMAN, *PACK THE COURT! A DEFENSE OF SUPREME COURT EXPANSION* (forthcoming 2021) [hereinafter *PACK THE COURT*].

14. Stephen M. Feldman, *Fighting the Tofu: Law and Politics in Scholarship and Adjudication*, 14 CARDOZO PUB. L., POL'Y & ETHICS J. 91, 91 (2015); Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics Into Mayonnaise*, 12 GEO. J.L. & PUB. POL'Y 57, 69–70 (2014).

15. HANS-GEORG GADAMER, *TRUTH AND METHOD* 295, 309, 365 (Joel Weinsheimer & Donald Marshall trans., 2d revised ed. 2004); Ronald Dworkin, *How Law is Like Literature*, in *A MATTER OF PRINCIPLE* 146, 160 (1985).

16. TUSHNET, *supra* note 2, at 219 (“Everyone ought to agree that decisions on highly contentious matters blend law and politics.”); Gibson & Caldeira, *Realism*,

is the purposeful and overt pursuit of political goals—think of members of Congress trying to enact a statute—then Supreme Court decision-making is typically politics writ small. Politics shapes the justices’ interpretive conclusions even though the justices focus on the law. Politics writ small inheres in legal interpretation, or to put it conversely, legal interpretation is politics writ small. Unsurprisingly, then, the justices’ legal interpretations and judicial conclusions ordinarily coincide with their respective political preferences.¹⁷

Unquestionably, many judges, legal scholars, and other Americans still believe in a law-politics *dichotomy*—the idea that law and politics must remain separate and independent—rather than a law-politics *dynamic*.¹⁸ From

supra note 12, at 196 (“[N]o serious analyst would today contend that the decisions of the justices of the Supreme Court are independent of the personal ideologies of the judges. In this sense, legal realism has carried the day.”). Thus, the approach, accepted in this Essay—that the Supreme Court decides pursuant to a law-politics dynamic—rejects the attitudinal model of political science, which posits that in most cases politics alone determines Supreme Court outcomes. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 38, 39 (2005). A growing number of political scientists and legal scholars now recognize that law and politics mix in Supreme Court adjudication. *E.g.*, CHARLES GARDNER GEYH, *COURTING PERIL* 8 (2016); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1443–45 (2001). See generally MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011); LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008* (2009); Lawrence Baum, *Law and Policy: More and Less Than a Dichotomy*, in *WHAT’S LAW GOT TO DO WITH IT?* 71 (Charles Gardner Geyh ed., 2011); Howard Gillman, *What’s Law Got to Do With It? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465 (2001).

17. Certainly, some Supreme Court decisions appear to be more politics writ large than writ small. The standard example is *Bush v. Gore*, 531 U.S. 98 (2000), which decided the 2000 presidential election. HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* 2–5, 141–43, 185–89 (2001); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1725 (2001); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 759 (2001).

18. Originalists insist that their interpretive method produces purely legal conclusions and removes politics from adjudication. ROBERT BORK, *THE TEMPTING*

this more traditional vantage, the justices must decide cases by neutrally applying the rule of law. Politics is a disease that threatens the health of the judicial process.¹⁹ If politics infects a Supreme Court case, then the decision is tainted.²⁰ Even so, an increasing number of legal scholars and political scientists have repudiated the law-politics dichotomy and

OF AMERICA 5–6, 143–44 (1990); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comment 47 (2006); see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

19. Therefore, regardless of public perceptions of the Court, many commentators worry that court-packing will politicize the Court—by undermining the law-politics dichotomy—and therefore destroy the Court’s legitimacy (this legitimacy is legal or moral rather than sociological). See FALLON, *supra* note 12, at 22–24. Unsurprisingly, then, some Democrats nowadays worry that if they seize an opportunity to pack the Court, the Republicans will respond tit-for-tat, re-packing the Court with new conservative justices when they get the opportunity; once the Court is politicized, there will be no going back. See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 172 (2019); David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 949, 950 (2019); Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 499–502 (2018) (questioning the tit-for-tat reasoning). Joe Biden has opposed court-packing partly because of a concern that Republicans will respond in kind. Jordain Carney, *Democrats Warn Biden Against Releasing SCOTUS List*, THE HILL (June 12, 2020, 6:00 AM), <https://thehill.com/homenews/senate/502380-democrats-warn-biden-against-releasing-scotus-list>. Bernie Sanders worried about the Republicans responding to Democratic court-packing tit-for-tat and delegitimizing the Court. Millhisser, *supra* note 10. Notice that if the Court decides cases pursuant to a law-politics *dynamic*—and the law-politics *dichotomy* is a myth—then the worry that court-packing will politicize the Court’s decision-making process is misplaced.

20. Chief Justice Roberts, for instance, recently reiterated the law-politics dichotomy: “We will continue to decide cases according to the Constitution and laws without fear or favor. That’s necessary to avoid the politicization of the Court.” His message was unambiguous: Politics corrupts adjudication, and the justices will have none of it. Ariane de Vogue, *John Roberts Says Supreme Court Doesn’t Work in a ‘Political Manner,’* CNN POLITICS (Sept. 24, 2019, 10:51 PM), <https://www.cnn.com/2019/09/24/politics/john-roberts-new-york/index.html>; Richard Wolf, *His Supreme Court Divided Like the Country, Chief Justice John Roberts Prepares for Outsized Role as Umpire*, USA TODAY (Sept. 25, 2019, 5:00 AM), <https://www.usatoday.com/story/news/politics/2019/09/25/chief-justice-john-roberts-straddles-supreme-courts-left-and-right/2422156001/>.

have subscribed to some notion of a law-politics dynamic.²¹ They view the notion that the Court decides cases pursuant to pure law, bereft of politics, as a myth. Crucially, though, the reality of the law-politics dynamic in Supreme Court decision making does not lessen concerns about the Court's sociological legitimacy. In other words, court-packing might still undermine the public's faith in the Court, even if the law-politics dichotomy is a myth.

Given the law-politics dynamic, we can readily understand why the Roberts Court consistently hands down conservative decisions.²² Political science empirical studies underscore the political tilt of the Court. Ever since the conservative Clarence Thomas replaced the liberal Thurgood Marshall in 1991, conservative blocs of justices have controlled the Rehnquist and Roberts Courts.²³ These conservative justices have interpreted (and continue to interpret) the Constitution and other legal texts from within their conservative political horizons. Therefore, corporations and the wealthy usually win; the poor might not even get into

21. See *supra* text accompanying note 16 (giving examples of political scientists and legal scholars who accept some form of a law-politics dynamic).

22. Brief, *supra* note 3, at 12 ("With bare partisan majorities, the Court has influenced sensitive areas like voting rights, partisan gerrymandering, dark money, union power, regulation of pollution, corporate liability, and access to federal court, particularly regarding civil rights and discrimination in the workplace. Every single time, the corporate and Republican political interests prevailed.").

23. For rankings of Supreme Court justices based on political ideology, see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 106–16 (2013) (listing and explaining rankings of Supreme Court justices based on political ideology including Martin-Quinn scores (accounting for changes over time) and Segal-Cover scores (quantifying Court nominees' perceived political ideologies at the time of appointment)); Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1431–32 (2013).

court.²⁴ Employers win; unions and employees lose.²⁵ Whites win; people of color lose.²⁶ Men win; women lose.²⁷ Christians win; non-Christians lose.²⁸ Republicans with entrenched political power win; Democratic voters lose.²⁹ Gun owners

24. *Horne v. Dep't of Agric.*, 570 U.S. 350, 370 (2015) (holding that government restriction on the sale of raisins, based on a 1937 statute, was a taking and required just compensation); *Comcast Corp. v. Behrend*, 569 U.S. 27, 38 (2013) (interpreting Federal Rules of Civil Procedure to limit class actions against corporation); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (invalidating state law restricting corporate sale of medical data); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010) (invalidating restriction on corporate campaign expenditures); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 (2008) (limiting punitive damage awards against corporations); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642–43 (2007) (imposing restrictive time bar for employment discrimination lawsuits against corporations).

25. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (holding that workers cannot be forced to pay union fees related solely to collective bargaining representation even though the workers benefit from the representation); *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 322 (2012) (holding that public employee union could not impose a special assessment fee to support political advocacy even if union members could opt out); *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 399 (2011) (limiting government employee's First-Amendment right to petition the government); *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (limiting free-speech rights of government employees by distinguishing between speech as a citizen and speech as an employee).

26. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (invalidating race-based affirmative action programs).

27. *June Med. Servs., LLC v. Gee*, 139 S. Ct. 663, 662 (2019) (mem) (Kavanaugh, J., dissenting) (Kavanaugh, Gorsuch, Thomas, and Alito voted to deny a stay of an admitting-privileges statute that would force the closure of abortion facilities); *Ledbetter*, 550 U.S. at 642–43 (2007) (holding that woman's sex discrimination claim under Title VII was time barred).

28. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019) (public display of 32-foot Christian cross is constitutional); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (upholding travel ban primarily targeting Muslims); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1747–48 (2018) (protecting Christian baker from anti-discrimination statute after he refused to bake a cake for a same-sex couple); *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (allowing city to refuse to display a minority-religion monument when already displaying the Ten Commandments).

29. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (refusing to invalidate extreme partisan gerrymandering); *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (upholding Texas voting restrictions).

win; everybody else loses.³⁰

If the Democrats were to gain control of both houses of Congress and the presidency in 2021 or later, they would undoubtedly begin enacting statutes implementing a progressive agenda. They might pass laws creating universal health care, strengthening environmental protections and fighting climate change, combatting structural and unconscious racism, protecting public health from pandemics (like the novel coronavirus), restricting gun ownership, restoring and fortifying voting rights, and protecting documented and undocumented immigrants.³¹ The Roberts Court, with its current personnel, could invoke and construct constitutional barriers that would threaten all of these laws.³² In the fall of 2019, conservative political commentators began laying the seeds for such a judicial backlash, arguing that Elizabeth Warren's progressive agenda, for example, showed "open contempt for legal and constitutional boundaries."³³

30. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (applying Second-Amendment protections against state and local governments); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects an individual right to own firearms).

31. The Democrats might need to eliminate the Senate cloture (or filibuster) rule to facilitate enactment of progressive legislation. Molly E. Reynolds, *What is the Senate Filibuster, and What Would it Take to Eliminate It?* BROOKINGS: POLICY 2020 (Sept. 9, 2019), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/>. While Joe Biden has previously expressed support for the filibuster, he recently suggested being open to eliminating it. Max Cohen, *Biden Signals Openness to Eliminating Senate Filibuster*, POLITICO (July 14, 2020, 10:28 AM), <https://www.politico.com/news/2020/07/14/joe-biden-2020-filibuster-360587>.

32. For progressives worrying about the Roberts Court, see Klarman, *supra* note 4; SAMUEL MOYN & AARON BELKIN, *THE ROBERTS COURT WOULD LIKELY STRIKE DOWN CLIMATE CHANGE LEGISLATION 2* (2019).

33. Rich Lowry, *Elizabeth Warren's Threat to the Constitution*, NATIONAL REVIEW (Oct. 11, 2019, 6:30 AM), <https://www.nationalreview.com/2019/10/elizabeth-warren-shows-contempt-for-legal-constitutional-boundaries/>. In a recent decision, Justice Alito expressed a desire to resurrect the non-delegation doctrine as a means of limiting congressional power, even though the Court had not invoked the doctrine since 1935. *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment).

Yet, with control of both houses of Congress and the presidency, the Democrats could also enact a court-packing statute, adding at least four justices to the Supreme Court. Part I of this Essay compares court-packing to other possible Court changes, such as court-curbing measures that would reduce the Court's power. Court-packing has multiple advantages over these other possibilities, especially from a progressive standpoint. One of the advantages is that even the current Roberts Court would almost certainly hold court-packing, unlike other potential changes, to be constitutional.

Part II focuses on the key criticism of court-packing, that it would undermine the Court's sociological legitimacy. A central purpose of this Essay is to delve deeply into a burgeoning political science literature on the Court's legitimacy. According to positivity theory, the American people embrace the Court with a favorable bias of good will. Diffuse support for the Court as an institution is therefore resilient, even when support for specific Court actions wavers.³⁴ A handful of legal scholars have touched on the recent research in this area,³⁵ but given our current political moment and recent Court developments, a more comprehensive exploration of this complicated literature seems necessary, particularly as it bears on the possibility of court-packing. Ultimately, this research suggests that court-packing is unlikely to weaken the American people's overall support for the Court. The Essay ends with a brief conclusion.

A caveat about the politics of this Essay might be helpful at the outset. The Essay focuses on defending court-packing, in our current political and judicial environment, from one important objection. Namely, the Essay argues that

34. GIBSON & CALDEIRA, *CITIZENS*, *supra* note 12, at 3, 39; Gibson & Nelson, *Reconsidering*, *supra* note 12, at 595.

35. *E.g.*, FALLON, *supra* note 12, at 21–23; TUSHNET, *supra* note 2, at 219–21; Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 *VAND. L. REV.* 465, 505–45 (2018) [hereinafter Grove, *Origins*]. *See generally* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 *HARV. L. REV.* 2240 (2019).

Democratic court-packing will not undermine the Court's sociological legitimacy. In theory, the argument could of course be turned around to support Republican court-packing in some hypothetical future world. But that hypothetical world does not currently exist. As will be mentioned in Part II, no specific set of criteria must be satisfied to justify court-packing. Rather, the determination must and will be made politically, and the Court itself necessarily plays a significant role in that political determination. In short, court-packing and the Court's legitimacy necessarily revolve around politics, and the politics of the current moment augur favorably for Democratic court-packing. Conjecturing about whether Republicans could *justifiably* pack the Court in some indeterminate future—without undermining the people's diffuse support for the Court—would venture beyond this Essay into the world of fiction.³⁶

36. For a discussion of whether the Republicans might respond tit-for-tat to Democratic court-packing, see *infra* note 111. For a fuller explanation of the politics justifying Democratic court-packing in our current environment, see *PACK THE COURT*, *supra* note 13.

I. COURT-PACKING COMPARED TO OTHER POSSIBLE
SUPREME COURT CHANGES

Progressive commentators have proposed numerous potential changes to the Court. One possibility is straightforward court-packing: simply adding justices to shift the partisan balance on the Court.³⁷ But there have been other proposals, which fall into two general categories. First, dozens of times throughout American history, Congress has attempted to limit or reduce the scope of the Court's power. The specifics of these court-curbing efforts typically reflected the particular contemporary political disputes. For instance, during the Progressive era of the early-twentieth century, Congress considered a bill that would have required at least a two-thirds majority of the justices to invalidate congressional (presumably Progressive) legislation.³⁸ More frequently, Congress has considered bills that would carve away part of the Court's subject matter jurisdiction—for all cases involving abortion, to take one example, or for all cases involving national security, to take another.³⁹ If these court-curbing bills had been enacted into law, then the Court would have been precluded from hearing and deciding cases in the designated areas. The most extreme of these proposals would completely remove the Court's power to decide constitutional issues.⁴⁰

37. Klarman, *supra* note 4. *See generally* Keck, *supra* note 4.

38. Stephen E. Sachs suggests some limit on the Court to this effect when he writes: “[W]e should precommit to limiting the Court’s freedom of action, binding it to some discrete set of preexisting rules until there is a *very* broad consensus for changing them.” Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J. FORUM 93, 107 (2019).

39. STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 448–49 (2008) [hereinafter FELDMAN, FREE EXPRESSION] (jurisdiction-stripping bills focused on national security during Red Scare); Clark, *supra* note 12, at 36–42 (types of court-curbing); Sheldon D. Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME L. REV. 597 (1958); Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965).

40. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

Second, particularly in recent years, commentators have suggested changes to the Court's size and makeup that would ostensibly "save" or "preserve" the Court's institutional role as an apolitical, "nonpartisan," or "neutral" judicial decision maker.⁴¹ These proposals can be subdivided into two basic types. First, some recommend term limits for the Supreme Court justices. While the specifics can vary, the typical proposal suggests staggered eighteen-year terms so that each president appoints a justice every two years.⁴² Second, several commentators propose expanding the number of justices in some stylized fashion so the expansion does not amount to straight-forward court-packing. For instance, Tracey George and Chris Guthrie recommend increasing the Supreme Court to fifteen justices who would function more like judges on a federal Circuit Court of Appeals. In other words, randomly selected panels of three justices would decide most cases, while all the justices sitting en banc would decide the unusual or special case.⁴³ Daniel Epps and Ganesh Sitaraman have developed two alternative schemes also based on a stylized Court expansion. One they call the "Supreme Court Lottery"⁴⁴: Every judge currently on a federal Circuit Court of Appeals would literally become a Supreme Court justice (there are currently 179 circuit court

41. Epps & Sitaraman, *supra* note 19, at 151–52.

42. See Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467, 467–70 (Roger C. Cramton & Paul D. Carrington eds., 2006); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 822–30 (2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323–24 (2007); Pozen, *supra* note 19, at 951–52.

43. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1457–58, 1465–66 (2009). See also Jonathan Turley, *Unpacking the Court: The Case for the Expansion of the United States Supreme Court in the Twenty-First Century*, 33 PERSP. ON POL. SCI. 155, 155–56 (2004) (recommending Court expansion).

44. Epps & Sitaraman, *supra* note 19, at 181–82 (adding another requirement: "only a 6-3 supermajority of the Court, rather than a simple majority, could hold a federal statute (and possibly state statutes, depending on how one weighs federalism values) unconstitutional.").

judges). Out of this pool, random panels of nine would decide cases. Panels, though, would be politically restricted: “each panel would be prohibited from having more than five Justices nominated by a President of a single political party (that is, no more than five Republicans or Democrats at a time).”⁴⁵ The second scheme they call the “Balanced Bench.” It would increase the Court to fifteen justices, including five Republicans and five Democrats. “These ten Justices would then select five additional Justices chosen from current circuit (or possibly district) court judges. The catch? The ten partisan-affiliated Justices would need to select the additional five Justices unanimously (or at least by a strong supermajority requirement).”⁴⁶

Putting aside straight-forward court-packing, all of these proposed changes to the Court—whether a court-curbing measure, an imposition of term limits, or a stylized expansion—are problematic. Most if not all of them are of questionable constitutionality.⁴⁷ Epps and Sitaraman admit that even their own proposals, the Supreme Court Lottery and the Balanced Bench, might be unconstitutional.⁴⁸ Given this, one might expect the Roberts Court to invalidate any enacted change: After all, these proposals would diminish the power of either the current justices or the Court as a whole. The Roberts and Rehnquist Courts have been, on the one hand, wary of congressional enactments and, on the other hand, protective of judicial power, so the justices would likely be hostile to any congressional tampering with the

45. *Id.* at 182.

46. *Id.* at 193. Among the Democrats campaigning for president in 2019, Pete Buttigieg and Beto O'Rourke seemed to support the Balanced Bench approach, David A. Graham, *The Democrats Discover the Supreme Court*, THE ATLANTIC (June 4, 2019) <https://www.theatlantic.com/ideas/archive/2019/06/buttigieg-supreme-court-plan-and-democratic-party/590905/>. One article suggested Bernie Sanders might consider something like the Supreme Court Lottery. Millhiser, *supra* note 10.

47. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 162–81 (6th ed. 2019); DAVID O'BRIEN, *STORM CENTER* 357–65 (12th ed. 2020).

48. Epps & Sitaraman, *supra* note 19, at 185–92, 200–05.

Court itself.⁴⁹ Some of the proposals have problems unique to them. For example, any court-curbing reduction of the Court's subject matter jurisdiction would only dent the Court's power. If Congress were to attempt to eliminate the Court's power to adjudicate the constitutionality of race-based affirmative action programs, to take one illustration, the Court would still be empowered to protect the wealthy and the economic marketplace, to protect mainstream Christians rather than religious minorities, and to protect men but not women. Historically, such court-curbing measures have rarely been enacted and have achieved only "relative success"—with that limited success typically arising only because one or more justices shifted their judicial positions in response to the court-curbing threat.⁵⁰ In the words of political scientist David O'Brien, if Congress seeks to control a recalcitrant Court, "[c]ourt-curbing legislation is not a very effective weapon."⁵¹ To be sure, in these highly polarized times, we cannot reasonably anticipate a court-curbing threat to induce one of the conservative justices to shift leftward—whether Chief

49. For cases showing the Court's protectiveness toward judicial as opposed to congressional power, see *Trump v. Mazars*, 140 S. Ct. 2019 (2020) (remanding the House of Representatives' demand for Trump's income tax returns while constraining congressional reach); *Trump v. Vance*, 140 S. Ct. 2412 (2020) (remanding New York prosecutorial demand for Trump's income tax returns but recognizing grand jury's power to demand the returns); *Boumediene v. Bush*, 553 U.S. 723 (2008) (invalidating congressional act stripping habeas corpus jurisdiction from the federal courts for enemy combatants); *Clinton v. Jones*, 520 U.S. 681 (1997) (holding that president is not immune to lawsuits for conduct prior to becoming president); see also THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY 2* (2004); O'Brien, *supra* note 47, at 30–32; Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737 (2012). Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 325 (2007) (compiling a list of federal statutes invalidated by the Court from 1981 to 2013); Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 Notre Dame L. Rev. 2219 (2014).

50. Nagel, *supra* note 39, at 926, 943.

51. O'BRIEN, *supra* note 47, at 363; see also CLARK, *supra* note 12, at 256–58 (many court-curbing bills are introduced as mere political posturing).

Justice Roberts or anybody else.⁵²

Finally, any change to the Court that would ostensibly return the Court to apolitical or neutral decision-making will necessarily fail. As discussed in the introduction, the Court always decides cases pursuant to a law-politics dynamic. Apolitical Supreme Court adjudication is a myth. At best, some of the proposed stylized expansions of the Court will leave us with a plethora of five-to-four or eight-to-seven decisions in politically salient cases (or some other partisan split, depending on the total number of justices). In fact, even supposedly neutral decisions are likely to be conservative because polarization has pushed Republican justices more rightward than Democratic justices leftward.⁵³

52. For cases suggesting Roberts is the most likely conservative justice to shift leftward, see *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891 (2020) (Roberts opinion holding Trump administration rescission of DACA violated APA procedural requirements); *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (Roberts opinion holding Trump administration addition of citizenship question to census violated APA procedural requirements); see also Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into A Partisan Court*, 2016 SUP. CT. REV. 301 (2016) (emphasizing how polarization has changed the Court). Nevertheless, Roberts's supposedly liberal opinions often construct deeply conservative doctrines. Stephen M. Feldman, *Chief Justice Roberts's Marbury Moment: The Affordable Care Act Case (NFIB v. Sebelius)*, 13 WYO. L. REV. 335 (2013). For discussions rejecting the notion that Roberts is liberal, see Michael C. Dorf, *Two Cheers for the Roberts Concurrence in the Judgment in June Medical*, DORF ON LAW (June 29, 2020), <https://www.dorfonlaw.org/2020/06/two-cheers-for-roberts-concurrence-in.html> (emphasizing Roberts's discussion of stare decisis); Hugh Hewitt, *Chief Justice Roberts is no Liberal and the Conservative Judicial Project Isn't Dead*, WASH. POST (June 19, 2020), <https://www.washingtonpost.com/opinions/2020/06/19/chief-justice-roberts-is-no-liberal-conservative-judicial-project-isnt-dead/>; Leah Litman, *It Wasn't Roberts that Changed this Term. It was the Cases SCOTUS Heard*, SLATE (July 13, 2020), <https://www.slate.com/news-and-politics/2020/07/roberts-scotus-conservative-cases.html>; Jay Michaelson, *No, Chief Justice John Roberts Isn't Liberal—He's a Different Kind of Conservative*, THE DAILY BEAST (June 29, 2020), <https://www.thedailybeast.com/no-chief-justice-roberts-isnt-liberalhes-a-different-kind-of-conservative>; Kimberly Strawbridge Robinson, *Yes, Roberts is in the Middle. No, He's not a Liberal*, BLOOMBERG LAW (July 9, 2020), <https://www.news.bloomberglaw.com/us-law-week/yes-roberts-is-in-the-middle-no-hes-not-a-liberal>.

53. Devins & Baum, *supra* note 52, at 305–06 (on the Court's shift rightward); see also Osita Nwanevu, *We're Not Polarized Enough*, THE NEW REPUBLIC (May

From the Democratic standpoint, when straight-forward court-packing is compared to the possible alternative changes to the Court, court-packing is superior in two important ways.⁵⁴ First, only court-packing would assure that an altered Court—a new progressive Roberts Court—would be able to counter the conservative legacy of the current Roberts Court. The Court has handed down numerous conservative decisions and constructed conservative constitutional doctrines that, if left untouched, can lead to conservative results in the Supreme Court and the lower courts for decades.⁵⁵ Democrats can guarantee a change in direction only by establishing a progressive majority on the Court. In fact, if the current Roberts Court were to feel threatened, whether by a court-packing or court-curbing bill, the conservative justices might be motivated to imminently construct even more and deeper conservative doctrines before it is too late. For instance, the conservative justices might reach for an abortion case that would allow them to overturn *Roe v. Wade* and eliminate a woman's right to choose abortion, or they might reach for a Second-Amendment case that would allow a strengthening of gun rights.⁵⁶ Only outright Democratic court-packing could overcome the current Court's substantial conservative legacy.

Second, the constitutional arguments recognizing

19, 2020), <https://www.newrepublic.com/article/157599/were-not-polarized-enough-ezra-klein-book-review> (arguing to accept polarization and working from there, rather than trying to counter it). One commentator has suggested reducing the Court to eight justices to avoid partisan decisions. Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018). Of course, in this situation, the Court might be unable to actually decide politically salient cases.

54. Depending on how one defines court-curbing, it is possible to categorize court-packing as a type of court-curbing. Clark, *supra* note 12, at 28, 37–39, 52–54.

55. See *supra* note 3 (listing multiple conservative Roberts Court decisions).

56. *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527–28, 1541–42 (2020) (Alito, J., dissenting) (arguing that the Court should clarify Second-Amendment protections).

Congress's power to change the size of the Court—without any of the stylized alterations suggested by other commentators—are overwhelmingly strong. Even the current Court, consistently hostile to congressional enactments, would find it difficult to invalidate a statute simply adding justices to the Court.⁵⁷ Nothing in the constitutional text limits congressional power to set the size of the Court.⁵⁸ Moreover, history reveals that the Court has fluctuated between a minimum of six and a maximum of ten seats. Before 1869, Congress enacted statutes changing the Court's size seven times, often for political reasons.⁵⁹ During one politically volatile decade, the 1860s, Congress increased the Court to ten seats, dropped it to seven, then settled on nine. To be sure, besides court-packing, Democrats could attempt to change the makeup of the Court through one other clearly constitutional approach: impeachment. The Constitution allows Congress to impeach and remove Supreme Court justices and other federal judges.⁶⁰ But the

57. 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, 74–75, 79 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (acknowledging that text and history support the constitutionality of court-packing).

58. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court . . .”).

59. TUSHNET, *supra* note 2, at 214 (“Most of the changes in the Court’s size were done for good-government reasons, with a soupçon of politics.”). He then modified this view by acknowledging that multiple changes “were purely political.” *Id.* Joshua Braver is a legal scholar who supports court-curbing rather than court-packing. He argues that prior congressional changes to the Court’s size were insufficiently political to support any historical argument supporting court-packing. Joshua Braver, *Court-Packing: An American Tradition?*, (Harvard Pub. Law Working Paper No. 19-44), 10, 25–39 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483927. One problem with his analysis is a failure to account for the influence of extreme polarization in today’s political climate as opposed to the past. *See* CLARK, *supra* note 12, at 25–61 (on the politics of numerous court-curbing episodes); Clark & Kastlelec, *supra* note 12, at 509–10, 524–27 (arguing polarization is likely to influence public opinion of the Court’s legitimacy). *See generally* Devins & Baum, *supra* note 52 (emphasizing that polarization has changed the Court).

60. U.S. CONST. art. I, § 2, cl. 5 (House power to impeach); U.S. CONST. art. I,

only Supreme Court justice the House has ever impeached was the Federalist Samuel Chase in 1804. Impeachment was based on Chase's notorious partisanship, yet the Republican-controlled Senate could not muster the required two-thirds supermajority to convict him.⁶¹ Ever since, the odds of impeaching a justice solely on political grounds have been practically nil.

Although the textual and historical arguments for the constitutionality of court-packing are strong, some commentators nonetheless argue that history—usually centered on the 1937 failure to enact President Franklin Roosevelt's court-packing plan—has established a norm against court-packing.⁶² This argument has three

§ 3, cl. 6 (Senate power to try impeachments).

61. S. JOURNAL, 8th Cong., 2d Sess. 524–27 (1805); ERIK W. AUSTIN, POLITICAL FACTS OF THE UNITED STATES SINCE 1789, at 50 (1986) (refer to Table 1.20 for a partisan composition of the United States Senate); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 699 (1993); 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, FOUNDING–1890, at 200 (2d ed. 2002); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 422–25 (2009); James Haw, *Chase, Samuel*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 103 (Roger K. Newman ed., 2009); see FELDMAN, FREE EXPRESSION, *supra* note 39, at 70–100 (explaining the Sedition Act controversy). Chase had displayed his partisanship while conducting several Sedition Act trials of Republicans in 1800. Later, while riding circuit, Chase charged the Republicans with leading the nation toward “mobocracy,” and purportedly denigrated President Jefferson during an 1803 grand jury charge. UROFSKY & FINKELMAN, *supra*, at 199. Seeking retribution, House Republicans impeached Chase in early 1804 on eight counts. *Id.* Republicans at the time held twenty-one of the thirty-four Senate seats, but they could not muster the two-thirds supermajority needed to convict on any count (a slight majority supported conviction on two of the counts). *Id.* at 200. If the Senate had convicted, some Republicans were supposedly ready to attempt to remove Chief Justice John Marshall from office too. *Id.* 200–01.

62. Dorf, *supra* note 57, at 74 (suggesting there is a norm or convention against court-packing); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 321–22 (2017) (without reaching a conclusion, authors recognize that some commentators would argue that there is a constitutional norm against court-packing); Grove, *Origins*, *supra* note 35, at 512–14; see also STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 130–32 (2018) (arguing norms of forbearance should preclude court-packing).

weaknesses.⁶³ First, even if such a norm existed, Mitch McConnell and the Senate Republicans already shattered it in 2016 and 2017, when they refused to open confirmation hearings for Merrick Garland. McConnell and the Republicans de facto reduced the Court to eight justices for more than a year. When given a chance to confirm a conservative Republican, Neil Gorsuch, they returned the Court to its nine-justice size.⁶⁴

Second, this anti-court-packing position disregards much of American history, when Congress was expressly changing the Court's size. This slighting of history and bloated emphasis on the legislative defeat of FDR's court-packing plan seems especially tenuous given that leading contemporary legal scholars and key members of Congress supported FDR's plan. Legal realists like Karl Llewellyn, who had been questioning the Court's legal formalism for years, approved of FDR's approach to the Court.⁶⁵ More important from a political standpoint, FDR's plan had enough congressional support to give it a reasonable chance of passage. New Dealers in the House of Representatives largely supported the plan. While the Senate was more divided, several key senators, including Democratic Senate Majority Leader Joe Robinson, Hugo Black of Alabama, and Robert M. La Follette of Wisconsin, avowed their support, although the chances for enactment evaporated when Senator Robinson suddenly passed away.⁶⁶

63. TUSHNET, *supra* note 2, at 216–18.

64. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, NY TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

65. KARL N. LLEWELLYN, *THE BRAMBLE* Bush 12–13 (1930) (criticizing legal formalism); see KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE* 69–73, 111 (2004) (realists supported FDR's plan).

66. *Labor Strife Laid to Supreme Court*, NY TIMES, Mar. 25, 1937, at 21, <https://www.nytimes.com/1937/03/25/archives/labor-strife-laid-to-supreme-court-present-unrest-largely-due-to.html> (discussing views of Wisconsin Senator Robert M. La Follette); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 135 (1995) [hereinafter LEUCHTENBURG, REBORN]; JEFF SHESOL, *SUPREME POWER:*

Finally, if a norm against court-packing were to exist, it would be based on a fallacy, that the Supreme Court should be a pristine legal institution, free of politics. But political considerations pervade the makeup of the Court and its decision-making process.⁶⁷ If anything, we should understand the threat of court-packing as an important aspect of the separation of powers, part of the Constitution's checks and balances. The possibility of court-packing gives the people a political check on the Court for when it departs too far from the dominant national political alliance.⁶⁸ Rather than interpreting history, whether the failure to enact FDR's plan or other events, as establishing a norm against court-packing, we should recognize that history shows the Court engaged in a type of dialogue with Congress, the President, and the public about the scope of judicial power.⁶⁹

FRANKLIN ROOSEVELT VS. THE SUPREME COURT 514 (2010); TUSHNET, *supra* note 2, at 216 (assessing support in House and Senate); Grove, *Origins*, *supra* note 35, at 509. A recent study concluded that more Americans would have preferred a constitutional amendment rather than FDR's statutory court-packing plan. William D. Blake, *The Law: "Justice Under the Constitution, Not Over It": Public Perceptions of FDR's Court-Packing Plan*, 49 PRESIDENTIAL STUD. Q. 204, 216–17 (2019). Even so, Congress might have passed FDR's plan if it had been less ambitious—for instance, seeking an additional two rather than six justices. LAURA KALMAN, *GHOST OF COURT PACKING PAST* (Oxford University Press forthcoming 2021) (book title tentative).

67. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II*, at 2–3 (5th ed. 2008); MITCHEL A. SOLLENBERGER, *JUDICIAL APPOINTMENTS AND DEMOCRATIC CONTROLS* 12 (2011); *see supra* text accompanying notes 14–17 (on law and politics in Supreme Court decision-making).

68. CLARK, *supra* note 12, at 5–6, 16; BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 14 (2009); *see infra* note 71 and accompanying text (discussing political science regimist approach, emphasizing the Court's congruence with the dominant national political alliance).

69. *See* FRIEDMAN, *supra* note 68, at 14–15, 367 (explaining constitutional meaning as arising from a dialogue between the people and the justices); Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679, 722–31 (on dialogue). *See generally* Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243 (1993) (emphasizing importance of dialogue in constitutional

II. SUPREME COURT LEGITIMACY AND COURT-PACKING

Even if the Democrats' best means for changing the Court is straight-forward court-packing, should the Democrats hesitate? Lacking the power of either the purse or the sword, the Court depends on its sociological legitimacy.⁷⁰ Without sufficiently widespread public approval of the Court as an institution, the Court's authority to decide disputes will dissipate.⁷¹ What if Democratic court-packing might cause many people to lose faith in the Court's legitimacy?

Steven Levitsky and Daniel Ziblatt's important recent book, *How Democracies Die*, bolsters this criticism of court-packing. Similar to Robert A. Dahl and other post-World War II democratic theorists, they argue that democracy depends on the preservation of certain cultural (democratic) norms, including "norms of forbearance" that preclude "constitutional hardball."⁷² From their perspective, court-

jurisprudence).

70. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 199–243 (2d ed. 1986).

71. FALLON, *supra* note 12, at 21–24. This emphasis on the Court's sociological legitimacy resonates with a political science approach linking Supreme Court decision making to regime politics. In a seminal empirical study of cases where the Court invalidated congressional statutes, Robert A. Dahl observed that, contrary to common assumptions, the Court did not protect minorities from majoritarian overreaching. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284 (1957). Instead, the Court usually decided cases in harmony with the interests and values of that dominant political alliance or regime. *Id.* at 293. An example is *Brown v. Board of Education*, which held unconstitutional de jure racial segregation in public schools. 347 U.S. 483, 493–95 (1954). Regimists maintain that *Brown* did not show the Court boldly championing the rights of a black Americans in the face of white majoritarian pressures. Dahl, *supra* at 294. Instead, the Court in *Brown* followed the interests and values of a dominant national political coalition or regime that favored the eradication of Jim Crow. Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 LAW & SOC. INQUIRY 273, 288–90 (2010). White southerners who supported legalized racial segregation had become national outliers; the Court forced them to acquiesce to more mainstream views, as understood from a national vantage. *Id.* at 298–99.

72. LEVITSKY & ZIBLATT, *supra* note 62, at 8–9, 97–117. Mark Tushnet is

packing would contravene such norms of forbearance and lead to “democratic breakdown.”⁷³ For that reason, autocrats such as Recep Tayyip Erdoğan in Turkey and Viktor Orbán in Hungary have sought to pack and weaponize the courts, using the law to protect themselves while attacking opponents.⁷⁴ In such situations, the people typically lose faith in the courts as well as other democratic institutions. Court-packing, in short, is likely to contribute to the degradation and eventual destruction of democracy and its institutions. In our contemporary United States, then, court-packing could undermine the Court’s institutional (or sociological) legitimacy.⁷⁵

Four reasons undermine this objection to court-packing. First, we should be wary about attaching too much significance to public opinion about the Supreme Court. Polls leave much ambiguity regarding public perceptions of the Court. Some polls show that Americans hold wildly diverse opinions about the Court, though the poll questions rarely distinguish between public perceptions of the Court as an institution and perceptions of specific and recent Court decisions.⁷⁶ To be certain, many polls suggest that most

usually credited with coining the term, constitutional hardball. *See generally* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004). For Dahl and other postwar theorists see ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 4, 143 (1956); ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 48–49 (1985); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 172 (1989); *see also* DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS 162 (1953) (emphasizing a “genuine community of our values”); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 129, 138, 512–13 (2d ed. 1971) (emphasizing the rules of the game for democracy).

73. LEVITSKY & ZIBLATT, *supra* note 62, at 127.

74. Kosař & Šipulová, *supra* note 4, at 134–35.

75. LEVITSKY & ZIBLATT, *supra* note 62, at 130–32. Court-packing, in other words, could contribute to democratic or constitutional “degradation” or “rot.” FELDMAN, FAILING, *supra* note 2, at 231 (discussing degradation). *See generally* Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147 (2017) (discussing rot).

76. Bruce Drake & John Gramlich, *5 Facts About the Supreme Court*, PEW RESEARCH CENTER FACTANK (Oct. 7, 2019) <http://www.pewresearch.org/fact-tank/2016/09/26/5-facts-about-the-supreme-court/>; *Supreme Court*, GALLUP,

Americans know and care little about the Court. A 2018 C-SPAN survey showed fewer than one-half of likely American voters could name at least one Supreme Court justice; the same was true in a 2009 survey.⁷⁷ One 2016 poll revealed that almost 10 percent of college graduates believed the television judge, Judge Judy, sat on the Court; the percentage rose to 13.1 percent when the poll expanded beyond college graduates.⁷⁸ A 2015 poll found that 32 percent of Americans could not identify the Supreme Court as a branch of the United States government, while 28 percent believed 5-4 Court rulings were “sent back either to Congress for reconsideration or to the lower courts for a decision.”⁷⁹

My own (anecdotal) experience suggests the need for skepticism when evaluating public perceptions of the Court. Shortly after Justice Scalia’s death, I happened to go to my dentist, an articulate man in his mid-30s and obviously a graduate of college and dental school. Knowing I am a law professor, he disclosed that he believed Scalia had been a “great” justice. By coincidence, I had recently published an article on the history of originalism, so with trepidation I asked if he would be interested in reading my article.⁸⁰ My dentist’s response? He had never heard of originalism. At that point, I decided not to ask him why he admired Scalia. Quite possibly, my dentist had responded to “partisan source cues.”⁸¹ Knowing his family of origin, I suspect that he was politically conservative, and conservative commentators and

<http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited Mar. 6, 2017).

77. Robert Green & Adam Rosenblatt, *Supreme Court Survey: Agenda of Key Findings*, C-SPAN/PSB (Aug. 2018); Penn, Schoen & Berland Assocs., *C-SPAN Supreme Court Survey* (July 9, 2009).

78. AM. COUNCIL OF TRS. & ALUMNI, A CRISIS IN CIVIC EDUCATION 19 (Jan. 2016).

79. Press Release, The Annenberg Pub. Policy Ctr. of the Univ. of Pa., *Is There a Constitutional Right to Own a Home or a Pet? Many Americans Don’t Know* (Sept. 16, 2015).

80. Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 *BYU J. PUB. L.* 283 (2014).

81. Clark & Kastellec, *supra* note 12, at 507.

political leaders had long heaped praise on Scalia's jurisprudence. Such source cues can apparently engender concern for as well as support for the Court. Exit polls from the 2016 presidential election revealed that 21 percent of voters named Supreme Court appointments as the most important factor in determining their votes, a greater percentage than in the 2008 election. Even so, prior to the 2016 election, surveys suggested that Supreme Court appointments was only the ninth most important issue.⁸²

In any event, recent political science studies suggest caution when evaluating public knowledge about the Court. Evidence shows that many people have general knowledge about the Court—for instance, that justices are appointed rather than elected—while those same people know few specific details, except when the details directly affect them.⁸³ My dentist illustrates this phenomenon: He knew something about the Court—in fact, he knew that Scalia had been a justice—but he did not know the details of Scalia's originalist jurisprudence.⁸⁴ Most important, perhaps, this widespread general knowledge of the Court entails strong diffuse support for the Court as an institution rather than specific support for particular case decisions. This diffuse support or loyalty to the Court is grounded on, in the words of James L. Gibson and Gregory A. Caldeira, “broader

82. *Top Voting Issues in 2016 Election*, PEW RESEARCH CTR. (July 7, 2016), <https://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/>; see also *Election 2016, Exit Polls*, CNN POLITICS, <http://www.cnn.com/election/results/exit-polls> (last updated Nov. 23, 2016); *NBC News Exit Poll: Future Supreme Court Appointments Important Factor in Presidential Voting*, NBC NEWS, (Nov. 8, 2016), <http://www.nbcnews.com/card/nbc-news-exit-poll-future-supreme-court-appointments-important-factor-n680381>. On the politics of individual viewpoints, see generally Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485 (2016) (arguing that vigorous institutional commitments—for example, to federalism—change when necessary to fit one's political ideology).

83. GIBSON & CALDEIRA, *CITIZENS*, *supra* note 12, at 17–35.

84. Stephen M. Feldman, *Justice Scalia and the Originalist Fallacy*, in *THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA* 189 (Howard Schweber & David A. Schultz eds., 2018).

commitments to democratic institutions and processes, and more generally in knowledge of the role of the judiciary in the American democratic system.”⁸⁵

The importance of this diffuse support for the Court leads to a second reason not to be overly worried about public perceptions of court-packing. Regardless of how much people know and care about the Court, we should not condescend to those who do know and care. The crux of the objection to court-packing—that it would cause the public to lose faith in the Court—is grounded on an assumption that the public (or that segment of the public with reasonable knowledge of the Court) could not handle the truth about judicial decision making—that the justices’ political views matter in the Court’s decisions. But if the law-politics dichotomy is a myth, if the Court instead decides pursuant to a law-politics dynamic, then must we still propagate the myth for fear the people need its comfort? If God is dead—or never existed—must we nonetheless encourage the people to keep praying? If so, then we might as well as renounce democracy. Tell the people the truth, as we understand it, and let the people decide. Sociological legitimacy might even increase if people understood the truth, that Supreme Court decision making is politics writ small.⁸⁶

In fact, political science studies suggest that the public’s diffuse support for the Court is resilient, sustained by “a reservoir of favorable attitudes or good will.”⁸⁷ A “positivity

85. GIBSON & CALDEIRA, *CITIZENS*, *supra* note 12, at 61. For the distinction between diffuse and specific support, see *id.* at 39–40; CLARK, *supra* note 12, at 17.

86. A majority of Americans appear to believe in a type of legal realism to some degree. Gibson & Caldeira, *Realism*, *supra* note 12, at 206–08. That is, “[m]ost [Americans] believe that judges have discretion and that judges make discretionary decisions on the basis of ideology and values . . .” *Id.* at 207–08. While Bartles and Johnston criticize Gibson and Caldeira on other matters, they agree that many Americans accept a type of legal realism. CURBING, *supra* note 12, at 69–70.

87. GIBSON & CALDEIRA, *CITIZENS*, *supra* note 12, at 39 (quoting DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965)). For studies generally

bias” helps the Court maintain this good will and institutional legitimacy. According to positivity (bias) theory, “anything that causes people to pay attention to courts—even controversies— winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts.”⁸⁸ Even when the Court issues a decision contrary to an individual’s personal views, that individual is unlikely to lose faith in the Court. If anything, when news of Court activities draws an individual’s attention, then that attention (to the Court) will likely reinforce the individual’s positive views of the institution. In a sense, the more one knows about the Court, the more one is likely to find its decisions legitimate (the opposite is true for Congress).⁸⁹

To be sure, the Court’s legitimacy is not bulletproof: It depends on a perception that the Court is not merely another political institution. For instance, a confirmation battle in the Senate is unlikely to damage the Court’s legitimacy, but if widely viewed advertisements (related to the confirmation battle) attack the Court as purely political, then diffuse support for the Court is likely to diminish.⁹⁰ Thus, while a politically salient Supreme Court decision might offend some Americans based on political ideology,⁹¹ a lack of specific

supporting the resilience of the Court’s diffuse support, see GIBSON & CALDEIRA, CITIZENS, *supra* note 12 at 64–66, 69–71, 88–95; Badas, *supra* note 12; Christenson & Glick, *supra* note 12, at 409; Gibson & Caldeira, *Realism*, *supra* note 12; Gibson & Nelson, *Reconsidering*, *supra* note 12; Gibson & Nelson, *Legitimacy*, *supra* note 12; Gibson et al., *supra* note 12. Bartles and Johnston challenge the conclusion that the Court enjoys a reservoir of good will. CURBING, *supra* note 12, at 64–67, 89. Still, they admit that trust in the Court remains high. *Id.* at 70–71. Ultimately, they argue the Court does not lack support, but it is not as deep and wide as others maintain. *Id.* at 248–49.

88. GIBSON & CALDEIRA, CITIZENS, *supra* note 12, at 3.

89. *Id.* at 7–10, 121–23; Gibson & Nelson, *Reconsidering*, *supra* note 12, at 612–15 (reconfirming positivity theory).

90. CLARK, *supra* note 12, at 18; GIBSON & CALDEIRA, CITIZENS, *supra* note 12, at 61–62, 119–20, 124–25; Gibson & Caldeira, *Realism*, *supra* note 12, at 199–200; Gibson & Nelson, *Reconsidering*, *supra* note 12, at 595, 604–05, 612.

91. Clark & Kastellec, *supra* note 12, at 505–06, 510–11.

support for that decision does not translate into a meaningful reduction of diffuse support. Only those Americans who already reject the Court as an institution—those individuals who have not developed a favorable attitude and good will toward the Court—are likely to denigrate it because of a small number of specific decisions. For the most part, the Court is able to maintain its institutional legitimacy despite “the ideological and partisan cross-currents that so wrack contemporary American politics.”⁹² Even so, sustained disappointment with the Court’s decisions over the long term, especially in politically salient cases, can weaken diffuse support for the Court. To take one example, diffuse support for the Court diminished among black Americans during the post-Warren Court years (consider the Burger, Rehnquist, and Roberts Courts’ consistent hostility toward race-based affirmative action).⁹³

Significantly, the people’s diffuse support for and loyalty to the Court does not depend on the myth of pure law—that is, the myth of the law-politics dichotomy. To the contrary, many Americans seem to understand that Supreme Court

92. Gibson & Nelson, *Legitimacy*, *supra* note 12, at 173. Gibson and Nelson criticize the conclusions of Brandon L. Bartels & Christopher D. Johnston, who had argued that an individual’s political ideology determined his or her diffuse support for the Court. Bartels & Johnston, *supra* note 12, at 196–97. Gibson and Nelson add, though, that for a small group of people, ideological disagreement can affect perceptions of the Court’s legitimacy. Gibson & Nelson, *Reconsidering*, *supra* note 12, at 613. They define legal realists as those individuals who “understand that Supreme Court decisions are based on the justices’ ideologies, values, and opinions on the issues at litigation.” *Id.* at 597. Then they conclude that a subset of legal realists are most likely to be influenced by perceived ideological differences from the Court: namely, those legal realists who measure highest or strongest (on the measures for belief in realism) and who simultaneously do not view the Court as just another political institution. *Id.* at 607–09. Bartels and Johnston have responded and elaborated their emphasis on political ideology. CURBING, *supra* note 12.

93. CLARK, *supra* note 12, at 18; Caldeira & Gibson, *Etiology*, *supra* note 12, at 640 & n.7; Gibson & Caldeira, *Blacks*, *supra* note 12, at 1140–41; Glennon & Strother, *supra* note 12, at 243. For decisions invalidating race-based affirmative action programs, see generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Univ. of Calif. Regents v. Bakke*, 438 U.S. 265 (1978).

decision making entails a combination of law and politics—the law-politics dynamic. As Gibson and Caldeira conclude: “[T]he American people seem to accept that judicial decisionmaking (sic) can be discretionary and grounded in ideologies, but also principled and sincere. Judges differ from ordinary politicians in acting sincerely”⁹⁴ This insight into the Court’s institutional legitimacy has enormous implications for Democratic court-packing. Although a court-packing controversy would undoubtedly entail debates over the Court’s politically-charged decisions, the Court’s overall diffuse support would probably remain relatively stable. Most likely, in these hyper-polarized times, individuals’ political ideologies—leaning Republican or Democratic—would influence reactions to a Democratic court-packing plan. Republicans of course would oppose it, but many Democrats would likely support it, especially if Democratic politicians emphasized that they sought to return the Court to sincere and principled decision making.⁹⁵ To the extent that individual views of the Court’s legitimacy might change in response to a court-packing plan, partisan shifts would likely cancel each other out. In the end, despite divergent views of the court-packing plan, the overall legitimacy of the Court itself would likely be sustained (or even grow) whether because of a positivity bias favoring the Court or a

94. Gibson & Caldeira, *Realism*, *supra* note 12, at 214. “[M]any Americans believe that the Court is influenced by both political and legal considerations.” CURBING, *supra* note 12, at 70.

95. Clark & Kastellec, *supra* note 12, at 525 (political ideology can influence individual reactions to issues related to diffuse support—such as court-curbing measures—even if diffuse support for the Court itself remains relatively resilient). Based on a survey experiment focused on packing the lower federal courts (not the Supreme Court), Amanda Driscoll and Michael J. Nelson concluded that Democratic court-packing would be unlikely to harm the Democratic party. Democratic voters would likely support Democratic court-packing, especially if there were apolitical justifications given (such as managing the court’s caseload). Amanda Driscoll & Michael J. Nelson, *These Two Arguments Make Americans Less Opposed to Court Packing*, WASH. POST (Mar. 27, 2019) (based on the following study: Amanda Driscoll & Michael J. Nelson, *The Costs and Benefits of Court Curbing: Experimental Evidence from the United States* (2018)).

widespread Democratic (policy) opposition to the Roberts Court's conservatism (as well as Democratic abhorrence toward recent Republican Senate maneuvers, including the rushed confirmation of Barrett, which resulted in an ironclad six-justice conservative bloc).⁹⁶

Hence, a third reason not to worry about the effect of court-packing on the Court's legitimacy: Our views of court-packing should be based on the political turn necessary for court-packing to be considered in the first place. In other words, if the Republicans retain control of the presidency or the Senate or both in the 2020 election, then the Democrats will be unable to try court-packing in 2021. Only if and when the Democrats sweep, gaining control of the presidency plus both houses of Congress, can the Democrats even attempt to pack the Court. Whenever a Democratic sweep occurs, whether in 2020 or subsequently, the thrust of public opinion might have shifted sufficiently in a progressive direction so as to make court-packing publicly palatable.

To be clear, I have not attempted to delineate a specific

96. CHRISTENSON & GLICK, *supra* note 12, at 416. See CURBING, *supra* note 12, at 18–28 (emphasizing political ideology as the key to securing support for court-curbing); GIBSON & CALDEIRA, CITIZENS, *supra* note 12, at 3 (emphasizing positivity bias); TUSHNET, *supra* note 2, at 219–21 (questioning whether Democratic court-packing would undermine the Court's legitimacy). Ironically, if Democratic court-packing were to engender a threat to the Court's legitimacy, it would likely arise from hyperbolic Republican attacks emphasizing the undermining of the Court's legitimacy rather than from the court-packing itself. CLARK, *supra* note 12, at 18; GIBSON & CALDEIRA, CITIZENS, *supra* note 12, at 61–62, 119–20, 124–25. For a recent empirical survey regarding potential court-curbing proposals—albeit taken before Justice Ginsburg's death—see LEE EPSTEIN ET AL., PUBLIC RESPONSE TO PROPOSALS TO REFORM THE SUPREME COURT (2020). With regard to empirical studies supporting positivity theory, while some surveys asked about confidence in the Court's leaders, more recent surveys ask multiple questions that indirectly manifest support (or disdain) for the Court. See generally James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003). Some of those questions typically relate to support for court-curbing, yet those questions are always supplemented by other questions. *Id.* at Table 2, Appendix B; Gibson & Nelson, *Reconsidering*, *supra* note 12, at Appendix A. Thus, a high level of support for the Court should not be equated with a necessary opposition to court-curbing, much less court-packing.

set of criteria that must be satisfied to justify court-packing. To the contrary, the determination must and will be made politically. The Court itself, of course, plays a significant role in this political determination. Have the justices been deciding cases that politically depart from a national political alliance? Most likely, “abusive judicial review”—issuing decisions denigrating and weakening rather than protecting and strengthening democracy—would provoke public concern.⁹⁷ Yet even abusive judicial review would not be a prerequisite to court-packing; rather, in a still-functioning democracy, the totality of political circumstances would be determinative. In the end, as positivity theory suggests, sustained disappointment with the Court’s decisions, especially in politically salient cases, would weaken diffuse (political) support for the Court.⁹⁸ Consequently, if and when the Democrats sweep, Democratic voters would likely have soured on the conservative Roberts Court—which after all followed the conservative Rehnquist Court. In fact, although the Democrats have won the popular vote in six out of the last seven presidential elections, a conservative bloc of justices has controlled the Court for nearly thirty years.⁹⁹ A Democratic sweep, quite possibly, would manifest in part public support to “rein in” the conservative justices of the Roberts Court.¹⁰⁰ Historical evidence shows that, in the 1930s, New Deal voters generally supported FDR’s court-packing plan.¹⁰¹ More recently, during the decade of the 2010s, at least ten states attempted court-packing in their respective state judiciaries, with two states being

97. David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1317 (2020).

98. CLARK, *supra* note 12, at 18; Caldeira & Gibson, *Etiology*, *supra* note 12, at 640 & n.7; Gibson & Caldeira, *Blacks*, *supra* note 12, at 1140–41.

99. Klarman, *supra* note 4.

100. CLARK, *supra* note 12, at 4.

101. Badas, *supra* note 12 at 392, Table 2; *see* Blake, *supra* note 66 and accompanying text.

successful.¹⁰² If the people vote for a Democratic Congress and president, they very well might support a move to pack the Court.

Without question, in the political atmosphere after a Democratic sweep, a Democratic court-packing plan would contribute to the ongoing dialogue over Supreme Court power and decision making. As a matter of political strategy, congressional Democrats would not need to falsely celebrate the law-politics dichotomy—the myth of pure law—but they would likely benefit by emphasizing that the current Court has departed from principled decision making.¹⁰³ The result of a Democratic court-packing plan would likely be an increase in the size of the Court, but another possible result would be the shifting of one or more justices to a more progressive outlook, though such a shift seems unlikely, as mentioned above.¹⁰⁴ Either way, the Court would be forced to bend to the political realities: If and when the Democrats electorally sweep Congress and the presidency, the Court will need to bend to Democratic political power. That necessity, that reality, is baked into the checks and balances of our tripartite national government. And history amply illustrates the operation of those constitutional grants of power to Congress and the president in the nomination and confirmation processes as well as in setting the size of the Court.¹⁰⁵

The final reason not to reject court-packing for fear of public reaction paradoxically rests on a concern for the

102. Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1135–45 (2020).

103. *E.g.*, Brief, *supra* note 3, at 11–12; *see* CURBING, *supra* note 12, at 19 (politically motivated individuals would likely legitimize support for court-curbing with process-based claims).

104. *See supra* note 52 and accompanying text (explaining that Roberts is unlikely to shift left).

105. Clark & Kastlelec, *supra* note 12, at 524–27 (emphasizing the Court’s sensitivity to cues about its power). In a similar vein, Clark underscores “the interaction among the public, Congress, and the Court” in understanding judicial power and independence. CLARK, *supra* note 12, at 15.

public. If we are truly concerned with public opinion, we should be worried about the integrity of our democratic process—through which public opinion is most clearly expressed and manifested. Yet the conservative justices on the Roberts Court have consistently denigrated democratic government (while protecting wealth and the economic marketplace).¹⁰⁶ Whether in relation to voting rights,¹⁰⁷ gerrymandering,¹⁰⁸ respect for Congress’s representation of the people,¹⁰⁹ or economic equality in political campaigns,¹¹⁰ the Roberts Court has refused to bolster democracy. If we

106. See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (holding requirement that CFPB’s director was removable only for cause violated separation of powers); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 562, 580 (2011) (holding that legislative prohibition on pharmaceutical data mining violated free expression); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 364–65, 371 (2010) (holding that corporate campaign spending limits violated free expression). The early Roberts Court ranked as the most pro-business Supreme Court since World War II. J. Mitchell Pickerill & Cornell W. Clayton, *The Roberts Court and Economic Issues in an Era of Polarization*, 67 CASE W. RES. L. REV. 693, 693–94 (2017). The five conservatives ranked among the top ten justices most favorable to business from the 1946 through the 2011 terms. *Id.* at 697–98. Alito and Roberts stood first and second on the list. *Id.* at 714; see also J. Mitchell Pickerill, *Is the Roberts Court Business Friendly? Is the Pope Catholic?*, in BUSINESS AND THE ROBERTS COURT 35 (Jonathan H. Adler ed., 2016) (empirical study concluding Roberts Court is business friendly though it continues a trend starting years ago with Nixon’s appointees); Corey Ciocchetti, *The Constitution, the Roberts Court, and Business*, 4 WM. & MARY BUS. L. REV. 385, 460, 472 (2013); Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449–51, 1472–73 (2013).

107. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2634 (2013) (invalidating key provision in Voting Rights Act); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (holding states could constitutionally require individuals to show photo identification before voting).

108. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding that political gerrymandering was a nonjusticiable political question).

109. *Trump v. Mazars*, 140 S. Ct. 2019, 2036 (2020) (holding that House could not subpoena President Trump’s income tax records); *Holder*, 133 S. Ct. at 2634 (2013) (invalidating key provision in Voting Rights Act because of inadequate congressional findings); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (holding that the Affordable Care Act’s individual mandate was beyond Congress’s commerce power and that the ACA’s Medicaid expansion was beyond the spending power).

110. *Citizens United*, 558 U.S. at 364–65, 371 (holding that restrictions on corporate campaign spending violate free expression).

must choose between protecting the Court (from court-packing) and protecting democratic government (from the Roberts Court's conservative decision making), the choice is clear. We must preserve and enhance democracy. If the Court demonstrates hostility toward democratic government, then it is the Court that must be sacrificed.¹¹¹

But in reality, the Court need not be sacrificed. To the degree that Levitsky and Ziblatt argue, in *How Democracies Die*, that court-packing is necessarily a tool of autocrats that will undermine our democratic norms, they overstate their case. Unquestionably, Court-packing can be useful for an autocrat, but court-packing alone does not transform a duly elected president into an autocrat. If Joe Biden were to become president and the Democrats were to pack the Court, Biden would not instantly become an autocrat. It would depend on the functioning of the Court as well as Biden's other actions.¹¹² And even after court-packing, the Court

111. On current threats to democratic government see TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 1–5, 237–45 (2018); RICHARD L. HASEN, *THE VOTING WARS* 10 (2012); LEVITSKY & ZIBLATT, *supra* note 62, at 206–12; Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629, 654–55 (2018). On the Court as a threat to democracy see FELDMAN, *FAILING*, *supra* note 2, at 199–226. It should be noted that politics and democracy answer the common concern that Democratic court-packing will provoke a later round of Republican court-packing—tit-for-tat court-packing. See *supra* note 19 and accompanying text (explaining the tit-for-tat concern). If and when the Democrats sweep, then the Republican party will inevitably go through a period of transformation. Meanwhile, a Democratic-controlled national government would be able to protect voting rights to a greater degree than ever before—especially if the Democrats also pack the Court, so the conservative justices cannot block democracy-enhancing legislation. If, subsequently, the Republicans ever control Congress and the presidency, it will likely be a different Republican party from the ultra-polarizing and reactionary Republican party of today. See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* (2012) (arguing that Republican and Democratic parties have not been equally guilty in breaking norms—Republicans have been far worse); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018) (arguing that constitutional hardball has been asymmetric, with the Republicans pushing more strongly against traditional norms). That new (and improved) Republican party might not want to engage in tit-for-tat court-packing.

112. See Kosař & Šipulová, *supra* note 4, at 156–57 (arguing against court-

should continue to decide cases as it has always done, in accord with a law-politics dynamic, as discussed in the introduction. A thirteen-justice Court should be, in this regard, no different than a nine-justice Court. The justices should continue to sincerely interpret the relevant legal texts (with politics writ small working in the background). In the end, Levitsky and Ziblatt fail to account for situations where a high court, such as the United States Supreme Court, itself threatens democratic government. The relationship between court-packing and democracy necessarily turns on the specific factual circumstances surrounding the court-packing and the subsequent actions of the reconstituted court. In 1937, when political pressure, whether from FDR's court-packing plan or otherwise, induced the Court to shift its jurisprudential position, FDR and the New Dealers did not seek to undermine democratic government.¹¹³ To the

packing in general but acknowledging that it can be legitimate in certain circumstances).

113. Historians have wondered whether Justice Owen Roberts and the Court changed direction because of political pressure—especially because of the threat of court-packing. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (emphasizing legal doctrine); LEUCHTENBURG, *REBORN*, *supra* note 66 (emphasizing political pressure). As some have noted, even though the Court issued its key decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), after FDR publicly announced his court-packing plan, Roberts and the other justices had already met in conference to discuss the case, on December 19, 1936, and cast their votes, before the president's announcement. Regardless, to think the justices were oblivious to the political rumors that had been swirling around Washington for weeks stretches credulity. Almost three weeks before the case conference, the *New York Times* reported that the administration and Congress were considering possible legislative means for controlling the Court. *Roosevelt to Quit in 1940, Creel Says*, NY TIMES, Nov. 30, 1936, at 4. According to the *Times* article, advocates for change realized “Congress can enlarge the Supreme Court, increasing the number of justices from nine to twelve or fifteen.” *Id.* The *Times* report was not anomalous. For a couple of years, dating back to early-1935, the press had been reporting similar rumors on a regular basis. Barely a week before the Court's December 19 conference, the *Washington Post* reported an Institute of Public Opinion poll concluding that 41 percent of Americans favored “a constitutional amendment to curtail the power of the Supreme Court.” *Highlights of Today's Polls*, WASH. POST, Dec. 13, 1936, at B1; CUSHMAN, *supra*, at 18; LEUCHTENBURG, *REBORN*, *supra* note 66, at 114–31, 143, 310–11, n.17; see also SHESOL, *supra* note 66, at 96 (discussing earlier reports of administration

contrary, they sought to have the Court accept democracy and the legislative outcomes of the democratic process.¹¹⁴ Given this, if Congress had enacted FDR's plan, he would not have instantly been transformed from a popularly-elected president into an autocrat.¹¹⁵

III. CONCLUSION

In the current political climate, many progressives want to change the Supreme Court. Straightforward court-packing has many advantages over other proposed changes, including court-curbing measures, impositions of term limits, and stylized expansions. Yet, many observers fear court-packing as the most extreme of the possible changes and, as such, the most likely to undermine the Court's sociological legitimacy—the public support for the Court as a judicial institution. Yet, recent political science research shows that, empirically, the American people's diffuse support for the Court is resilient. In fact, this positivity bias protects the Court sufficiently so that court-packing is unlikely to threaten this support to any serious degree.

discussions on controlling the Court). By the end of January 1937, Washington was buzzing with rumors about a pending Roosevelt announcement concerning the Court. Significantly, a statistical study concluded that political pressure pushed Owen Roberts to shift temporarily leftward, but the pressure arose largely from FDR's landslide victory rather than the court-packing plan itself. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. OF LEGAL ANALYSIS 69, 69–72 (2010).

114. MCMAHON, *supra* note 65, at 14 (FDR pushed the Court to accept a “more inclusive democracy”); Landau & Dixon, *supra* note 97 at 1383–84 (FDR did not attack democracy). On the ambiguity of court-packing in relation to democracy, see GINSBURG & HUQ, *supra* note 111, at 4, 218–22; Aziz Huq & Tom Ginsburg, *How to Lose A Constitutional Democracy*, 65 UCLA L. REV. 78, 84–86 (2018); Keck, *supra* note 4.

115. Of course, many conservatives believe the Court's 1937 change amounted to the abandonment or destruction of the American constitutional system. Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON U. L. REV. 5 (1988); Douglas H. Ginsburg, *Delegation Running Riot*, 1 REGULATION 83, 84 (1995) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)) (arguing for a return to the so-called Constitution-in-exile).

Is this entire discussion of court-packing moot, however, because the Democratic nominee, Joe Biden, has already opposed court-packing?¹¹⁶ In other words, even if the moderate Biden is elected and becomes president in January 2021—and the Democrats gain control of both houses of Congress—is the possibility of court-packing already dead because of Biden’s opposition? No, for three reasons. First, Democrats in Congress might pass a court-packing bill, and Biden, when confronted with the bill, might acquiesce to the wishes of his party. Second, and related to the first point, Biden’s vice president (and other advisers) might persuade Biden to change his position and support court-packing. Finally, if (or when) the Roberts Court, as currently constituted, starts invalidating Democratic statutes passed under Biden’s watch, the Court itself might provoke him to recognize the need for court-packing. Biden’s campaign statements have suggested a willingness to shift in more progressive directions when necessary or useful, so he might ultimately be persuaded to accept or even advocate for court-packing, especially when he realizes that it will not weaken the Court’s public legitimacy.¹¹⁷

116. Shaw, *supra* note 11.

117. For instance, Biden recently expressed openness toward the elimination of the Senate filibuster, although he previously had opposed such a change. Cohen, *supra* note 31.