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## Court-Packing: An American Tradition?

Joshua Braver

University of Wisconsin Law School, [joshua.braver@wisc.edu](mailto:joshua.braver@wisc.edu)

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# COURT-PACKING: AN AMERICAN TRADITION?

JOSHUA BRAVER

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# COURT-PACKING: AN AMERICAN TRADITION?

JOSHUA BRAVER\*

**Abstract:** This Article provides the first comprehensive and conceptual account of all increases and decreases to the Supreme Court's size. In today's debate over court-packing, proponents assert and opponents concede that there is ample precedent for the tactic. Against this prevailing consensus, I argue that although the Court's size has changed seven times, court-packing is nearly novel in American history, and it would pose unprecedented dangers if enacted today. I define court-packing as manipulating the number of Supreme Court seats primarily in order to alter the ideological balance of the Supreme Court. Court-packing's distinct danger is that it will lead to a tit-for-tat downward spiral of packing, ballooning the Court's size so large that its legitimacy pops.

Previous changes to the Court's size fall into two groups. The first group is tied to the practice of circuit-riding, a now obsolete system that required the addition of Supreme Court Justices to staff newly created circuit courts. The circuit-riding justification created a set of norms regulating when and how the size of the Supreme Court could be changed, limiting the opportunities for partisan machinations. The second group consists of attempts to pack the Court. While the 1801 court-packing attempt failed, the 1869 one succeeded. This lone example of successful court-packing occurred, however, in an extraordinarily low-risk situation in which the President lacked the support of either major political party, thereby lessening the threat of any partisan retaliation. Previous changes to the Court's size presented few of the perils that packing poses today.

The Article concludes by explaining why the elected branches have sought and how they have managed to curb the Supreme Court without permanently tainting the Court's legitimacy. In an age of rising populism, the next step for scholars of

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\* Associate Professor, University of Wisconsin Law School; Climenko Fellow, Harvard Law School; PhD, Yale Political Science; J.D., Yale Law School.

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constitutional hardball and departmentalism is to set outer boundaries for the attacks on the Court that they encourage.

## INTRODUCTION

Most of the time, the elected branches accept the Supreme Court's decisions as final and legitimate. The People's representatives may condemn the decision and carp on it to score political points, but they ultimately resign themselves to it. Occasionally, however, the conflict escalates, and Congress and the President decide that they must concretely respond to or even retaliate against the Supreme Court. But how?

Striking back against the Supreme Court poses risks for the stability of the constitutional system as a whole. Retaliation may damage the legitimacy of the Supreme Court, putting under strain the Court's central function of settling disputes. The elected branches must then contemplate how far they are willing to go, how much and what kind of stress are they willing to put upon the Court in order to achieve their ends. Responsible political action entails asking about the implications that different forms of retaliation have for the health of the constitutional order.

The most radical form of retaliation is court-packing.<sup>1</sup> Court-packing is the manipulation of the Supreme Court's size primarily in order to change the ideological composition of the Court.<sup>2</sup> This definition captures the pertinent features of the paradigmatic case of court-packing attempted during the New Deal, as well as the calls by today's progressives to alter the Supreme Court's size.

Since the New Deal and until recently, court-packing has been taboo—a tactic that no serious politician would ever publicly entertain. Now, however, progressive calls to pack the Supreme Court proliferate. In the midst of rebuilding their own political movement, some hard-nosed progressives are ready to play “dirty” and advocate that a future Democratic President and Congress increase the number of Supreme Court seats and fill them with progressive jurists to counteract what they argue are President Donald Trump's ill-begotten appointments.<sup>3</sup> They cite as precedent the seven previous instances of

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<sup>1</sup> See *infra* Part IV.C.

<sup>2</sup> For further thoughts on the definition of court-packing, see *infra* note 136.

<sup>3</sup> See, e.g., DAVID FARIS, IT'S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS 94 (2018) (suggesting that Democrats should expand the “Supreme Court to whatever number is necessary to secure a liberal majority”); Janelle Bouie, Opinion, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html> [<https://perma.cc/JCU5-6WTT>] (suggesting that court-packing is the best way to “neutralize” Republican ideological preferences on the Court). Relatedly, others have proposed adding seats as part of a

changes to the Court's size: if the number of seats has been changed seven times, why not an eighth? Opponents of court-packing readily acknowledge these precedents, but evaluate them differently: they belong to a vicious political era that culminated in the Civil War.<sup>4</sup> For that reason, no expansions or contractions of the Court have occurred for more than 150 years; the time when politics was a "field of blood" has been superseded and is better left behind.<sup>5</sup>

This dubious consensus over court-packing's history has led the debate astray. It has disguised what is untested and risky about today's court-packing proposals. This Article sets the record straight by giving the first comprehensive and conceptual overview of all increases and decreases of the number of seats on the Supreme Court. This Article shows that both proponents and opponents of court-packing have misinterpreted the history. With perhaps one exception, Congress has never passed, and the President has never signed, a court-packing bill.<sup>6</sup> Previous changes to the Court's size were based on a different logic that presented fewer of the perils than packing poses today.

Through historical analysis, I develop a schema to distinguish between types of changes to the Supreme Court's size. Most size changes involve political calculations, but the extent to which those calculations lend themselves to restraint are remarkably different.

Once the definition and history of court-packing is clear, its unique dangers—dangers not posed by other forms of court resizing—become apparent. When done in a partisan way, court-packing could cause long-lasting, perhaps irreparable, damage to the Supreme Court's legitimacy.<sup>7</sup> Because Justices have life tenure, packing is irreversible. If progressives pack the Court in 2020, then conservatives will have every incentive to expand the Court again to regain a majority. This cycle would continue until the Court became so large that its

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large package of reforms that are justified for non-partisan reasons. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* 148, 175–77 (2019).

<sup>4</sup> *See, e.g.*, Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, *HARV. L. REV. BLOG* (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/> [<https://perma.cc/9J2S-GVBT>] (emphasizing how post-reconstruction America has avoided the kind of political conflicts that "escalated all the way to the point of ultimate crisis").

<sup>5</sup> JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR 2* (2018).

<sup>6</sup> For a discussion of the possible exception that occurred during Reconstruction and why it has limited value as a precedent for court-packing today, see *infra* Part III.B.

<sup>7</sup> Packing is uniquely dangerous when it has a partisan valence because it is the partisanship that creates the downward spiral of retaliation. Bipartisan packing, a moment in which both parties agree to change the Court's size in order to change its ruling, would not pose the same danger. I thank Akhil Reed Amar for this point. For a game theory analysis of retaliation and court-packing, see Matthew A. Seligman, *Constitutional Politics, Court Packing, and Judicial Appointments Reform* (Cardozo Legal Studies, Working Paper No. 548, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3210665](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3210665) [<https://perma.cc/H5YF-8SXQ>].

legitimacy pops.<sup>8</sup> A Court without legitimacy is a toothless institution. Unable to enforce its rulings and vulnerable to political attacks, it may slowly wither away into a state of irrelevance.

The seven previous changes to the Court's size did not raise these same dangers, at least not nearly to the same degree. I divide these ostensible precedents into two groups. The first group is tied to the practice of circuit-riding, a now obsolete system that required the addition of Supreme Court Justices to staff newly created circuit courts for recently admitted states. The expanding party would gain an appointment or two on the Court to ensure that enough Justices were available to preside over circuit cases, but this did not swing the ideological majority on the Court, and because the practice was seen as legitimate, there was little danger of retaliation.

The second group of changes consists of attempts to court-pack. There are two examples. In both, to prevent a future appointment, Congress passed a law that reduced the number of seats on the Supreme Court. The action is similar to the Senate's refusal to confirm a presidential nominee to the Court. President John Adams and the Federalists' 1801 efforts to block President-elect Thomas Jefferson's future Supreme Court appointment ultimately failed and serves as no type of precedent. Where Adams was thwarted, the Reconstruction Republicans succeeded. Indeed, the Reconstruction Republicans not only blocked two of President Andrew Johnson's appointments by abolishing the vacant seats, but also after winning the Presidency at the next election, Republicans then restored the Court's size and filled the new seats. However, there was less risk of initiating a downward spiral of packing because Johnson lacked the support of either major political party.

This disaggregation of court-sizing is not a mere matter of semantics. The distinction removes one significant weight on the scale in favor of court-packing. Proponents' normalization of court-packing is reassuring; it tells us that since we have been there before, we should not be worried about going there again. But court-packing is almost unprecedented, and U.S. history provides little evidence about its effects on the legitimacy of the Supreme Court.

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<sup>8</sup> Here, legitimacy refers to the public's perception of the Supreme Court. Political scientists call this "diffuse support," which "refers to a reservoir of favorable attitudes or good will that helps" citizens and the public accept Supreme Court decisions with which they disagree. James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 204 (2014) (quoting Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992)). "Diffuse support, or legitimacy, then, provides a cushion that buffers the Court against public backlash that can spring from unpopular opinions." *Id.* at 204–05. Diffuse legitimacy is separate from normative legitimacy, where the issue is not what people perceive, but what actually should be legitimate. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 22–24 (2018).

By contrast, what this Article calls “court-curbing” measures, such as jurisdiction-stripping or narrowly interpreting cases, do have a long and promising history. Because such tactics are reversible and seek to check rather than colonize the Court, they are less likely to cause a legitimacy crisis.

This Article proceeds in four parts. Part I lays out the standard and erroneous account of court-packing’s history. Parts II and III correct the standard account by presenting the first conceptual history of all seven modifications to the Supreme Court’s size, demonstrating how all previous changes posed little risk of partisan retaliation. In particular, Part II argues that three court expansions—those of 1807, 1837, and 1863—were regulated and limited by the practice of circuit-riding. Part III covers the four remaining changes to the Court’s size, which were attempts at court-packing. Part IV explains why the elected branches have sought and how they have managed to successfully curb the Supreme Court without leaving a permanent taint on its legitimacy. In an age of rising populism, the next step for scholars of constitutional hardball, departmentalism, and popular constitutionalism is to set outer boundaries on the attacks on the Court that they encourage.

### I. A DEAD TRADITION?

No work has systematically explored the history of the Supreme Court’s size. Nonetheless, there is a common academic narrative that has shaped debates over the legitimacy of court-packing. The narrative maintains that there is a long history of court-packing. Proponents and opponents of court-packing interpret this “historical fact” differently. They disagree on whether court-packing is a live tradition worth preserving or a dead tradition better left buried.

The narrative’s central turn is President Franklin Roosevelt’s 1937 failed effort at court-packing.<sup>9</sup> In order to overcome and preempt Supreme Court rulings against New Deal measures, Roosevelt tried to persuade Congress to pass legislation that would effectively add six Justices to the Court, creating a majority of what Roosevelt believed would be pro-New Deal Justices. In pushing for the packing, Roosevelt put all his political capital on the line, but his own party turned against him, the legislation never made it out of committee, and

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<sup>9</sup> See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 270–73 (2017); Laura A. Cisneros, *Transformative Properties of FDR’s Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. L. 61, 62–63 (2012); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 512 (2018) (explaining how political attitudes towards court-packing changed in response to Roosevelt’s failed packing attempt); Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEG. STUD. 421, 425 (2012) (“[T]he rejection of Roosevelt’s court-packing plan in 1937 . . . is said by many to have created an unwritten constitutional norm against court-packing.”).

the failure left the progressive legislative agenda decimated for rest of Roosevelt's presidency.<sup>10</sup>

According to the standard history of court-packing, what Roosevelt had tried was not novel. Before Roosevelt, according to Tara Grove, "court-packing was an appropriate and even desirable method of dealing with a recalcitrant Supreme Court."<sup>11</sup> Adrian Vermeule claims that packing was a constitutional power that only "atroph[ie]d over time."<sup>12</sup> This narrative cites a few or even all of the seven previous changes to the Court's size as examples of packing.<sup>13</sup> Legal histories that focus on particular eras have added fuel to this narrative. In his book, *Lincoln's Supreme Court*, David Silver argues that because the Supreme Court had a pro-southern bias, President Abraham Lincoln believed that "prudence . . . dictated a packed Court."<sup>14</sup> Likewise, Gerard Magliocca's book-length study of antebellum constitutional thought concludes that President Andrew Jackson pulled off the "first successful example of [c]ourt-packing in our history" and that it was a "major milestone for the Jacksonian generation."<sup>15</sup>

The standard narrative holds that Roosevelt's court-packing fiasco tainted the legitimacy of the long-standing practice of court-packing: it created a "negative precedent" and "de facto bar" on court-packing that solidified in the 1950s.<sup>16</sup> Until recently, "[n]o serious person, in either major political party, suggest[ed] court packing as a means of overturning disliked Supreme Court decisions."<sup>17</sup> The idea was "unthinkable" and "especially out of bounds."<sup>18</sup> If

<sup>10</sup> The two foundational accounts of Roosevelt's court-packing are JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938), and WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995).

<sup>11</sup> Cisneros, *supra* note 9, at 62; Grove, *supra* note 9, at 468. Grove's central argument is that there was no norm against court-packing until the 1950s. *See id.* at 469. Because of how Grove defines norms, even if there are no examples of court-packing, her thesis may still hold. Grove argues that a norm exists when both political parties agree that a practice is barred. *Id.* All she needs to show is that "if a government official . . . propose[d]" court-packing, she would not have been "publicly condemned not only by political opponents but also by political supporters." *Id.*

<sup>12</sup> Vermeule, *supra* note 9, at 421.

<sup>13</sup> *See, e.g.,* Bradley & Siegel, *supra* note 9, at 272–73 (discussing the previous changes to the Supreme Court as suggesting that "Congress has extensive authority to alter the size of the Court . . . for the purpose of changing its ideological composition"); Grove, *supra* note 9, at 507 (listing five changes to the Court's size as evidence that "throughout the nineteenth century, Congress modified the size of the Supreme Court, and often did so in part for partisan reasons"); Thomas M. Keck, *Court-Packing and Democratic Erosion* (Feb. 19, 2020) (unpublished manuscript) [<https://perma.cc/2LHD-EDLF>] (citing five previous instances of court-packing in the United States).

<sup>14</sup> DAVID M. SILVER, *LINCOLN'S SUPREME COURT* 84 (1956).

<sup>15</sup> GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* 68 (2007).

<sup>16</sup> *See* Grove, *supra* note 9, at 470, 512.

<sup>17</sup> Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1064 (2014).

<sup>18</sup> David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 15 n.50, 34 (2014).



any government official had proposed court-packing, the idea would have been treated as ridiculous and the official would have been condemned by both sides of the political aisle.<sup>19</sup>

The traditional narrative always left an opening, a possibility that court-packing might be revived. From the descriptive history, it is a short hop to a normative argument. After all, if court-packing had been a sanctioned method of reining in the courts for the majority of our constitutional history—from the Founding Era until its discrediting during the New Deal—then perhaps it should be resurrected. Akhil Reed Amar, writing a few years before court-packing became a matter of serious public debate, argued that the elected branches have the right to retaliate “against . . . a string of dubious rulings and judicial overreaches” because the “Constitution was designed precisely to allow Congress to . . . resize a Court that Congress believes has acted improperly.”<sup>20</sup> He notes that “several legal changes in Court size have in fact been made by Congresses who were exquisitely aware of how the changes would likely affect the substantive rulings of the Court.”<sup>21</sup> He cites examples during the presidencies of John Adams, Thomas Jefferson, Andrew Johnson, and Ulysses S. Grant.<sup>22</sup>

There was also occasionally stray popular commentary arguing for court-packing. For example, in a 2007 *New York Times* editorial, historian Jean Smith argued that Congress should pack the Supreme Court because the Court, led by Chief Justice John Roberts, was “thumbing its nose at popular values.”<sup>23</sup> He legitimized his strategy by calling court-packing “a hallowed American political tradition” and argued that “the method most frequently employed to bring the [C]ourt to heel has been increasing or decreasing its membership.”<sup>24</sup> Still, such attempts in popular intellectual commentary to insert court-packing in the Overton window were isolated ones that inspired no response. They had little political traction, and for those reasons did not become the foundation for a true rethinking of the taboo. They were quickly forgotten.

Today, however, the bipartisan norm against court-packing is under significant pressure. At no time since the New Deal has the possibility of court-packing been under such serious discussion. A significant number of progressive law professors and pundits believe that Democrats should pack the Court

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<sup>19</sup> Grove, *supra* note 9, at 505–17.

<sup>20</sup> AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 355 (2012).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Jean Edward Smith, Opinion, *Stacking the Court*, N.Y. TIMES (July 26, 2007), <https://www.nytimes.com/2007/07/26/opinion/26smith.html> [<https://perma.cc/7U6P-4DUA>].

<sup>24</sup> *Id.*

if given the chance because the Supreme Court threatens a future reinvigorated Democratic Party, and because one, two, or all three of Donald Trump's Supreme Court appointments are illegitimate.<sup>25</sup> In the early stages of the Democratic Presidential primary, eight candidates refused to rule out some form of court-expansion, including Senator Kamala Harris, Senator Elizabeth Warren, Mayor Pete Buttigieg, and Senator Kirsten Gillibrand.<sup>26</sup> Former Attorney General Eric Holder has argued that "when Democrats retake the majority they should consider expanding the Supreme Court."<sup>27</sup> For liberal activist groups,

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<sup>25</sup> See Vanessa A. Bee, *Court-Packing Is Necessary to Save Democracy*, CURRENT AFF. (Oct. 10, 2018), <https://www.currentaffairs.org/2018/10/court-packing-is-necessary> [<https://perma.cc/TSK7-95ES>]; David Faris, *Democrats Must Consider Court-Packing When They Regain Power. It's the Only Way to Save Democracy.*, WASH. POST (July 10, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/07/10/democrats-must-consider-court-packing-when-they-regain-power-its-the-only-way-to-save-democracy> [<https://perma.cc/U2M9-5BSX>]; Mehdi Hasan, *Pack the Supreme Court*, THE INTERCEPT (Sept. 30, 2018), <https://theintercept.com/2018/09/30/pack-the-supreme-court> [<https://perma.cc/RE3L-XCLV>]; Michael Klarman et al., *Forum: What's the Matter with the Supreme Court?*, THE NATION (Sept. 5, 2018), <https://www.thenation.com/article/forum-whats-the-matter-with-the-supreme-court/> [<https://perma.cc/JFF6-ZMVS>]; Michael J. Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), <http://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court> [<https://perma.cc/LB9B-7NCE>]; Ian Samuel, *Kavanaugh Will Be on the US Supreme Court for Life. Here's How We Fight Back*, THE GUARDIAN (Oct. 9, 2018), <https://www.theguardian.com/commentisfree/2018/oct/09/kavanaugh-us-supreme-court-fight-back-court-packing> [<https://perma.cc/VP2Y-PPJB>]; Mark Sherman, *New Campaign Seeks Support for Expanded Supreme Court*, ASSOCIATED PRESS (Sept. 16, 2018), <https://www.boston.com/news/politics/2018/10/16/new-campaign-seeks-support-for-expanded-supreme-court> [<https://perma.cc/9EYF-RYER>]; Mark Tushnet, *Court-Packing on the Table in the United States?*, VERFASSUNGSBLOG (Apr. 3, 2019), <https://verfassungsblog.de/court-packing-on-the-table-in-the-united-states/> [<https://perma.cc/CFR3-F8ZH>].

<sup>26</sup> See Rashaan Ayesh & Ursula Perano, *Court Packing: Where the 2020 Candidates Stand*, AXIOS, <https://www.axios.com/court-packing-where-2020-candidates-stand-aff0e431-7624-42f0-b37f-a9091d1652f9.html> [<https://perma.cc/W62K-C5CV>] (last updated Oct. 2, 2019); Burgess Everett & Marianne Levine, *2020 Dems Warm to Expanding Supreme Court*, POLITICO (Mar. 18, 2019), <https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625> [<https://perma.cc/568Q-UE7M>]. The plan that received the most attention for expanding the Court was by Pete Buttigieg and called for expanding the number of Justices from nine to fifteen, with five Democratic appointees and five Republican appointees. The plan is ostensibly non-partisan and does not explicitly aim to change the ideological balance of the court. If true, that falls outside this Article's definition of court-packing. See Josh Lederman, *Inside Pete Buttigieg's Plan to Overhaul the Supreme Court*, NBC NEWS (June 3, 2019), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491> [<https://perma.cc/A6WN-9GQY>]. The plan draws on the argument put forth in Epps & Sitaraman, *supra* note 3.

<sup>27</sup> Chris Mills Rodrigo, *Holder Says Next Dem President Should Consider Packing Courts*, THE HILL (Mar. 7, 2019), <https://thehill.com/regulation/court-battles/433124-holder-says-next-dem-president-should-consider-packing-courts> [<https://perma.cc/LG4U-NEGW>].

court-packing is a standard demand,<sup>28</sup> and it has become an issue of serious debate within legal blogs, editorials, and even law review articles.<sup>29</sup>

The court-packing debate often centers on whether a partisan expansion of the Court is against the foundational principles of the Constitution, that is, whether it threatens judicial independence, undermines the separation of powers, and violates norms of forbearance necessary for a stable democracy.<sup>30</sup> Both sides of the debate invoke history, though they are rarely explicit about why it is relevant. The unspoken premise is that because the United States has respected the fundamental principles of the Constitution, historical practice is evidence of what is in accordance with them.<sup>31</sup> History is also the place to gather evidence about the consequences of court-packing and to determine whether it is as worrisome as its opponents claim.

Proponents argue that court-packing has “gone hand in hand with the most vibrant periods of our democracy.”<sup>32</sup> Journalist Dylan Matthews points out that “some of the most heroic figures in American history—Lincoln, Radical Republicans in Congress like Thaddeus Stevens and Charles Sumner, Grant—engaged in the practice,” that is “to ‘pack the Court in order that the policies of the government in power would be upheld as constitutional.’”<sup>33</sup> Another proponent asks the rhetorical question, “how can you call court packing a ‘nuclear option’ when six U.S. presidents—including Jefferson, Lincoln, and Trump’s own hero Jackson—signed off on it?”<sup>34</sup>

Proponents also occasionally invoke the past to rebut the charge that court-packing would lead to a tit-for-tat downward spiral. To them, “reality

<sup>28</sup> See Alex Thompson, *Progressive Activists Push 2020 Dems to Pack Supreme Court*, POLITICO, <https://politi.co/2Te4R4l> [<https://perma.cc/ZUM8-CSCM>] (last updated Feb. 27, 2019).

<sup>29</sup> See, e.g., Smith, *supra* note 23 (discussing court-packing as a possible modern course of action to restrain the Supreme Court).

<sup>30</sup> See Noah Feldman, *Don’t Pack the Supreme Court, Democrats. You’d Live to Regret It.*, BLOOMBERG (Mar. 28, 2019), <https://www.bloomberg.com/opinion/articles/2019-03-28/supreme-court-packing-would-backfire-on-democrats> [<https://perma.cc/Q6ZV-28FG>]; Neil Siegel, *The Anti-constitutionality of Court-Packing*, BALKINIZATION (Mar. 26, 2019), [https://balkin.blogspot.com/2019/03/the-anti-constitutionality-of-court\\_36.html](https://balkin.blogspot.com/2019/03/the-anti-constitutionality-of-court_36.html) [<https://perma.cc/3CBL-47XX>].

<sup>31</sup> See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 9–25 (1982).

<sup>32</sup> Tim Burns, *Court-Packing Is Not a Threat to American Democracy. It’s Constitutional.*, NEW REPUBLIC (Mar. 15, 2019), <https://newrepublic.com/article/153325/court-packing-not-threat-american-democracy-its-constitutional> [<https://perma.cc/W2MR-VXY4>].

<sup>33</sup> Dylan Matthews, *Court-Packing, Democrats’ Nuclear Option for the Supreme Court, Explained*, VOX (July 2, 2018), <https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court> [<https://web.archive.org/web/20180702144732/https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court>].

<sup>34</sup> Hasan, *supra* note 25.

tells another story” because repeated bouts of packing are “not what has happened throughout history, when the size of the court has been adjusted.”<sup>35</sup>

Opponents do not dispute these ample precedents, but they argue that they belong to a bygone era, and the precedents have been superseded by new norms that have lasted almost 150 years. John Yoo and James Phillips acknowledge that the “[t]he number [of seats has] varied partly because of [c]ourt-packing schemes by the party holding, or leaving, power,” but emphasize that the number of seats has been stable since 1869.<sup>36</sup> Richard Primus argues that court-packing was abandoned precisely because it was dangerous and belonged to a political system that continuously veered out of control. As he puts it:

Yes, it’s true that early in the history of the Republic, Congress altered the size of the Supreme Court several times in order to shift partisan control. But it’s also true that the America in which those things occurred was an America in which political parties often saw each other not as legitimate rivals but as threats to the Republic—and, not coincidentally, an America on the road to civil war, or cleaning up after one.<sup>37</sup>

In essence, opponents, whether liberal or conservative, argue that with court-packing the past is a foreign country that tells us more about how politics has progressed than what politics is and should be today.

Despite the frequent invocation of court-packing’s past, no scholarly work has yet tried to plumb the depths of the historical examples or put them into a comprehensive framework. It is time to take a closer and more exacting look at these reductions and expansions so as to extract the correct lessons about the role, or lack thereof, of court-packing in United States history. In what follows, I argue that previous changes to the Court’s size did not pose the same threat to the stability of the Supreme Court as does the prospect of court-packing today. To help the reader follow along, Table 1, *infra*, offers a conceptual schema of changes to the Court’s size that parallels the organization of this Article.

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<sup>35</sup> Bee, *supra* note 25; Hasan, *supra* note 25 (quoting Ian Samuel); see also Burns, *supra* note 32.

<sup>36</sup> John Yoo & Robert Delahunty, *The Foolish Court-Packing Craze*, NAT’L REV. (July 19, 2018), <https://www.nationalreview.com/2018/07/court-packing-ideas-threaten-judicial-independence> [<https://perma.cc/F7Y8-6446>].

<sup>37</sup> Primus, *supra* note 4.

Table 1. Conceptual Schema of Changes to the Supreme Court's Size.

**CIRCUIT-RIDING**

| <b>Year</b> | <b>Structural Change</b>                      | <b>States Added</b>   |
|-------------|---|---|
| 1807        | From 6 to 7 Circuits and Supreme Court Seats  | Kentucky, Tennessee, Ohio   |
| 1837        | From 7 to 9 Circuits and Supreme Court Seats  | Louisiana, Indiana, Mississippi, Illinois, Alabama, Maine, Missouri, Arkansas, Michigan |
| 1863        | From 9 to 10 Circuits and Supreme Court Seats | California, Oregon, Florida, Texas, Iowa, Wisconsin, Minnesota, Kansas                  |

**REDUCTIONS FOLLOWED BY RESTORATIONS***The Failure of 1801/1802*

| <b>Year</b> | <b>Structural Change</b>                    | <b>Political Party</b> |
|-------------|---|------------------------|
| 1801        | Reduction from 6 to 5 Supreme Court Seats   | Federalist             |
| 1802        | Restoration from 5 to 6 Supreme Court Seats | Jeffersonian           |

*The Success of 1866/1869*

| <b>Year</b> | <b>Structural Change</b>                   | <b>Political Party</b> |
|-------------|--|------------------------|
| 1866        | Reduction from 10 to 7 Supreme Court Seats | Republican             |
| 1869        | Increase from 7 to 9 Supreme Court Seats   | Republican             |

## II. CIRCUIT-RIDING

Three consecutive increases to the Supreme Court's size—from six to seven in 1807, seven to nine in 1837, and nine to ten in 1863—were tied to the practice of circuit-riding. Circuit-riding created a set of widely understood norms regulating the size of the Supreme Court, limiting the opportunities for partisan machinations. The rough rule was that the number of Supreme Court seats would only increase with and be proportionate to the admission of new states.<sup>38</sup> The origins of this system lie in the Judiciary Act of 1789, which established the foundations of the judicial system.<sup>39</sup> The statute created Supreme Court Justices and district court judges, but no circuit court ones. Rather than a separate tier of circuit judges, which we have today, the statute directed that the intermediate appellate courts be staffed by district judges and Supreme Court Justices sitting together to hear a case. The Supreme Court Justices “rode circuit” in their designated states.<sup>40</sup> The system was a compromise between nationalists who wanted a strong centralized judiciary and supporters of state rights who feared that a national judiciary would side with mercantile interests.<sup>41</sup> Circuit-riding was a way to keep government small and ensure that Supreme Court Justices did not become unmoored from the sentiments and laws of their states.

By 1802, the system had evolved so that there was a one-to-one correspondence between the number of Supreme Court Justices and the number of circuit courts. Circuit cases were heard by one Supreme Court Justice and one district judge.<sup>42</sup> Each Supreme Court Justice was assigned to one circuit, and for reasons of expertise, custom, and sometimes law, nominees had to be a resident of the circuit for which he was selected.<sup>43</sup> When new states entered the

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<sup>38</sup> See JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 38–40, 51–52, 77–78, 85–86, 92–93, 97–100, 122–23 (2012); FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 32 (1927).

<sup>39</sup> See Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 *DUKE L.J.* 1421, 1477–1516.

<sup>40</sup> See CROWE, *supra* note 38, at 64, 71–72.

<sup>41</sup> *Id.* at 40–42.

<sup>42</sup> In accordance with the 1789 Judiciary Act, at first circuit courts were staffed by one district court judge and two Supreme Court Justices. Holt, *supra* note 39, at 1486. In response to the Justices' numerous complaints about and in order to ameliorate the burdens imposed by circuit-riding, the Judiciary Act of 1793 decreased the number of Supreme Court Justices per circuit from two to one. For the rest of the practice's history, each circuit court was composed of one district court judge and one Supreme Court Justice. See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY: 1789–1835*, at 89 (rev. ed. 1935).

<sup>43</sup> See Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 *CARDOZO L. REV.* 1753, 1785 (2003) (“[C]ircuit riding was defended on the ground that the

union, nothing automatically provided them with a circuit court. Instead, their systems of justice would linger on, plagued by clogged dockets, until Congress passed new legislation fixing the problem by creating a new circuit. However, so long as circuit-riding continued, a new circuit would require a new Supreme Court Justice to staff it. Hence, for every new circuit, there would be a new Supreme Court seat.<sup>44</sup> In other words, the staffing system of circuit courts was one of the main drivers for the expansion of the Supreme Court.

The partisan stakes were clear, however. Everyone knew that the solution to the performance problem would also give the President an additional appointment to the Supreme Court. Hence, often the President and his party would be especially eager to pass circuit court reform in order to appoint Supreme Court Justices to the new seats. The minority party would oppose and obstruct it. Command of all three branches of government was often necessary to win through the reform. But despite these partisan machinations, the game had implicit rules and limits. No one thought you could increase the Supreme Court seats solely because you disagreed with its decisions. Nor did the parties seriously consider retaliating against the other party's increase. Once a new circuit was created, the issue of expanding the Court was not broached on the floors of Congress until the problem of a considerable number of new states lacking circuits occurred again. To be sure, it would have been possible to manipulate the system in many ways, but no serious attempt was ever made to do so. In 1891, Congress finally created a new set of circuit courts staffed by its own tier of circuit court judges, ending this game of expansions.<sup>45</sup>

#### *A. 1807: "A Performance Problem with a Consensus Solution"*

In 1807, Congress added a new Supreme Court seat so that the three western states of Kentucky, Tennessee, and Ohio would have a Supreme Court Justice to ride circuit. This matter was a "performance problem with a consensus solution."<sup>46</sup> The problem was that Kentucky, Tennessee, and Ohio were unincorporated into the circuit court system. Because they lacked an assigned Supreme Court Justice, parties unhappy with a district court's decision could not appeal to a circuit court. As Justin Crowe notes, "particularly in the West, where the complicated nature of land deeds and titles—and the battle between absentee landholders and residents over them—was a constant agitation, citi-

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practice acquainted the justices with local law and custom.".) *But see id.* (noting that those opposed to circuit-riding argued that "knowledge of local customs was not required to adjudicate cases").

<sup>44</sup> See CROWE, *supra* note 38, at 73 n.247, 89–92 ("[N]ew states required new circuits . . . new circuits required new justices . . .").

<sup>45</sup> *Id.* at 175, 185–87.

<sup>46</sup> CROWE, *supra* note 38, at 88.

zens needed judges to resolve disputes and maintain a sense of order.”<sup>47</sup> Citizens widely regarded district court judges as incompetent to provide the needed guidance.<sup>48</sup> District court decisions were often final as there were no circuit courts, and many cases were not appealable to the Supreme Court.<sup>49</sup> Moreover, when an appeal was available, it was too expensive and time-consuming for many litigants to complete the necessary travel to Washington, D.C.<sup>50</sup> By 1807, Kentucky and Tennessee had been suffering with this problem for more than a decade. The problem had also become intolerable in Ohio, which had been admitted as a state in 1803. One solution—the creation of a separate tier of circuit courts staffed by permanent circuit judges—haunted almost all efforts at judicial reform in the nineteenth century. Yet, the Jeffersonians, who held the majority in all three branches, were opposed on ideological grounds to such a powerful expansion of the national judiciary, and they had just repealed such a system in 1802.<sup>51</sup>

Congress chose a different path, creating a powerful precedent: it expanded the system of circuit-riding to the newly admitted western states by creating a Seventh Circuit. In so doing, they created one new Supreme Court seat that President Thomas Jefferson and his majority in the Senate would fill.

Despite the partisan benefit, it was a consensus solution. One would be hard pressed to find that partisanship in any way dominated the decision. There was little debate on the topic and no record of individual members’ votes in the Senate, which would be expected for a controversial measure. It overwhelmingly passed in the House eighty-two votes to seven, and six of the seven dissenting voters were members of Jefferson’s party—the party that stood to gain from additional Supreme Court appointments.<sup>52</sup>

Furthermore, a plausible case existed for adding two seats rather than one because features unique to the Seventh Circuit made it difficult for only one Justice to manage. Relative to the already existing circuits, the Seventh Circuit was much larger and further from Washington, D.C. Additionally, the journey to reach D.C. was more onerous because it required parties to traverse the Appalachian Mountains. Indeed, the Supreme Court Justice for the Seventh Cir-

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *id.*; Curtis Nettels, *The Mississippi Valley and the Federal Judiciary, 1807–1837*, 12 *MISS. VALLEY HIST. REV.* 202, 206–207 (1925).

<sup>50</sup> Nettels, *supra* note 49, at 207.

<sup>51</sup> *Id.* at 206–08.

<sup>52</sup> See 16 *ANNALS OF CONG.* 500 (1807) (summarizing voting results). Political scientist Justin Crowe notes that “[o]f the seven nay votes, five (James M. Garnett, David Meriwether, John Randolph, Richard Stanford, and David R. Williams) were Democrat-Republicans from the South, one (Joseph Stanton) was a Democrat-Republican from Rhode Island, and one (Benjamin Tallmadge) was a Federalist from Connecticut.” CROWE, *supra* note 38, at 89 n.12.



cuit found the travel so unmanageable that he stopped riding circuit in Tennessee completely and was widely believed to have died from the exhaustion of riding circuit.<sup>53</sup> The caseload quickly increased, a predictable result considering the types of claims these three new western states faced.<sup>54</sup> Likely for these reasons, almost a decade before the 1807 addition, the Senate had passed a bill adding two circuits for these new western states, but the bill never passed the House.<sup>55</sup> All in all, the creation of a new seat in 1807 raised no significant opposition. There is no doubt that Jefferson relished the additional appointment, but the increase of one Justice was modest in relationship to the performance needs of the three large states.

### *B. 1837: The Partisan Race to Fix a Performance Problem*

The 1807 addition set the precedent that new states would require new Supreme Court seats, and the Union continued adding states at a steady clip. In the antebellum era of intense political competition, the question was which party would reap the benefits of the new addition. After decades of gridlock, the answer was the Jacksonians. On the last full day of his presidency, Andrew Jackson signed the Judiciary Act of 1837, which expanded the size of the Supreme Court from seven to nine seats.<sup>56</sup> Jackson filled the two seats with Justices he believed to be sympathetic to his goals.<sup>57</sup> In an important constitutional history of the Jacksonian era, Gerard Magliocca calls it “the first successful example of [c]ourt-packing in our history.”<sup>58</sup> Undoubtedly, the Judiciary Act was partially motivated by the desire for additional appointments, but to call it “court-packing” obscures the good performance rationale that justified the legislation and helped avert retaliatory re-packing.

As in 1807, in the 1820s and 1830s, everyone agreed that the lack of new circuit courts for newly admitted states was a serious administrative problem. The problem had been growing worse for some time. In 1816, during his eighth annual message to Congress, President James Madison decried “the ac-

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<sup>53</sup> CROWE, *supra* note 38, at 87, 100 n.59.

<sup>54</sup> The claims in western courts were conflicts over titles to land, the larger population of immigrants in the west, credit relations between East and West, admiralty cases “arising from river traffic,” and “cases growing out of offenses committed by whites against [Native Americans] on land to which [Native American] title had not been extinguished.” Nettels, *supra* note 49, at 202–05.

<sup>55</sup> 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 225–26 (Maeva Marcus et al. eds., 1992) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT] (stating that there is “no record of the debate and little other evidence of why it failed”).

<sup>56</sup> Nettels, *supra* note 49, at 225.

<sup>57</sup> See *id.* at 226.

<sup>58</sup> MAGLIOCCA, *supra* note 15, at 68.

cruising business, which necessarily swells the duties of the Federal courts.”<sup>59</sup> Eight years later, President James Monroe echoed Madison’s lament, informing Congress that the circuit riding system was becoming “impracticable in the execution.”<sup>60</sup>

In fact, the problem was worse than it had been before the 1807 fix. That legislation solved the problem of three orphaned states. Between 1807 and 1837, the Union admitted a whopping *nine* new states without incorporating them into the circuit court system.<sup>61</sup> And these states were the very ones most in need of swift and efficient court administration. Because the existence of these states resulted from multiple agreements between foreign governments, the United States, and neighboring states, disputes over titles to land crowded their especially large dockets. Congressman Daniel Cook observed that in these new states, “there was not a foot of land, the original foundation of the title to which, when drawn in question, would not constitute a proper subject for Federal jurisdiction.”<sup>62</sup> The states were also prime sites for other federal cases, including ones between citizens and non-citizen immigrants, diversity cases between eastern creditors and western debtors, and, because of their proximity to the water, admiralty cases.<sup>63</sup> The Seventh Circuit, created in 1807, had a similar docket and found that, even with a Justice riding circuit, the workload was unmanageable almost from the start and became worse over time.

Even without this unusually large case load, the lack of an intermediate appellate court would have been a severe problem. Its absence meant that there was no appeal for criminal cases or for civil cases involving property valued at less than two hundred dollars.<sup>64</sup> Compounding these problems, because of the position’s small salary and lack of prestige, district court judicial appointments did not attract high-quality candidates. As one Senator commented on the floor of Congress, because “[t]he District Judges were not men of the highest honor, nor had they the capacity to make a correct decision in an intricate cause, the consequence was, they did not possess the confidence of the people, and ill-will and confusion reigned amongst them.”<sup>65</sup> Certain categories of cases were

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<sup>59</sup> Letter from James Madison to United States Congress (Dec. 3, 1816), <https://founders.archives.gov/documents/Madison/99-01-02-5598> [<https://perma.cc/B4N7-D3W9>].

<sup>60</sup> James Monroe, President of the U.S., Eighth Annual Message (Dec. 7, 1824) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/december-7-1824-eighth-annual-message> [<https://perma.cc/42PJ-V8EV>]).

<sup>61</sup> CROWE, *supra* note 38, at 92–93. Of the nine states that were admitted to the Union between 1807 and 1837, Maine was the only state to be incorporated into a circuit within that same period. *Id.* at 93 n.20. Maine became a part of the pre-existing First Circuit in 1820. *Id.*

<sup>62</sup> 2 REG. DEB. 988 (1826) (emphasis omitted).

<sup>63</sup> See Nettels, *supra* note 49, at 203–05.

<sup>64</sup> *Id.* at 206.

<sup>65</sup> See 1 REG. DEB. 586 (1825) (statement of Rep. William Kelly).

appealable to the Supreme Court, but the option was unattractive for many because it was time-consuming and costly for litigants to travel from the far west to the Supreme Court in Washington, D.C.

Unfortunately, there is no record of a congressional debate for the 1837 Judiciary Act, and the letters of the key actors make no mention of it. But there is an extensive record of the most serious attempt at circuit reform between the 1807 and 1837 bills, and it sheds ample light on the partisan and performance concerns regarding Supreme Court expansion in the 1830s. In 1825 and 1826, both houses of Congress debated different versions of a bill that would add three new Supreme Court Justices to ride circuit for the five newly admitted states.<sup>66</sup> At the time, John Quincy Adams was President of the United States after defeating Jackson in the election of 1824. The campaign was polarizing, and the Jacksonians believed that Adams had unfairly stolen the Presidency through a “corrupt bargain.”<sup>67</sup> As a result, the tension was high between the two nascent parties which would go on to become the Democrats, led by Andrew Jackson, and the Whigs, led by President John Quincy Adams and Congressmen Daniel Webster. The Jacksonians had a majority in the Senate and the proto-Whigs had a slim majority in the House.<sup>68</sup>

The 1825 and 1826 debate turned on whether the proposed legislation best solved the performance problem. Nearly all of the congressmen accepted that the problems afflicting the western states were serious and that it was necessary to “remove this eye-sore, this rot in the Western extreme of the Union, and to allay the feelings of discontent which begin to unfold themselves in that quarter.”<sup>69</sup> The disagreement was about the remedy—about the desirability of circuit-riding. Western representatives and the Jacksonians favored the proposed legislation, which would expand circuit-riding into the western states by adding three seats to the Supreme Court.<sup>70</sup> The opposition, led by proto-Whigs in the Northeast, sought to prevent the expansion of the Court by abolishing circuit-riding and replacing it with a new tier of separate circuit court judges.<sup>71</sup>

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<sup>66</sup> See CROWE, *supra* note 38, at 102–04.

<sup>67</sup> SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 254–57 (2006).

<sup>68</sup> *Id.* Although they were not yet coherent parties and went by other names, to enhance readability, from now on, I will refer to these two nascent political parties as the Democrats and the proto-Whigs. In the 1820s, the Jacksonians or Democrats were opposed by the National Republicans led by Henry Clay and John Quincy Adams. In 1833, the National Republicans still under Clay’s leadership formed the core of a new Whig party, which now included Anti-Masons and disaffected Southerners, jointed together under the banner of opposition to increased power in the Executive and in Andrew Jackson in particular. See MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 7–30 (1990).

<sup>69</sup> Nettels, *supra* note 49, at 212 (quoting 2 REG. DEB. 557 (1826)).

<sup>70</sup> CROWE, *supra* note 38, at 98–101.

<sup>71</sup> *Id.* at 96–98.

The rhetoric of the debate does not fit the court-packing story. Proponents spent much of their time trying to prove the administrative travails of the western states. This by itself is not necessarily inconsistent with the court-packing narrative: often, performance rationales are pretexts for partisan maneuvers. What is surprising is the opposition's response. They did not lambast supporters for trying to pack the courts with their allies. Rather, they accepted the debate's technocratic premise and asserted that, rather than expanding circuit-riding, a new tier of Justices would best address the West's concerns. Opponents did express concerns that continual expansion of circuit-riding would lead to an unmanageably large court, but this was a performance, not a partisan concern.<sup>72</sup>

The possibility of partisan abuse was raised two times by opponents of the bill. Nonetheless, they were isolated accusations that gained little traction because supporters of the bill were opposed to the President, who would make nominations to the new seats of the Court. The charge was made by Senator Willie P. Mangum of North Carolina who reminded the audience that, in 1801, President John Adams and the Federalists had attempted to create and then pack the lower circuit courts to "cover their retreat and shelter their retirement."<sup>73</sup> He accused the West of repeating this "history," but this time with the Supreme Court rather than the lower courts.<sup>74</sup> He argued, "So it may become history, that another Administration raised up a new set of Judges . . . but that patronage might sprinkle its delicious manna in the West, ay, even in the wilderness, to cheer, to gladden, and secure, what otherwise might have been more than doubtful."<sup>75</sup> While many were offended by the remark, the most effective response came from Congressman Bob Livingston of Louisiana. As the representative from a state that would receive a circuit-riding justice, he was anxious to pass the bill for reasons of good government. But as a Jacksonian, the partisan benefit was lacking as, after all, President John Quincy Adams would be making the nomination. Livingston subtly pointed out the partisan disconnect: "[C]ircumstanced as I am, I cannot be supposed to be the advocate of any measure that would [provide appointments to Adams]."<sup>76</sup> Indeed, Jacksonians from the West almost universally supported the bill. Opposition to the bill came from some representatives of the northeastern states who were allies of Adams.

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<sup>72</sup> See 1 REG. DEB. 587 (1825). Then-Senator Martin Van Buren noted that "[t]he appointment of three new judges would, in the opinion of many, make the Supreme Court too numerous." *Id.*

<sup>73</sup> 2 REG. DEB. 943 (1826).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (emphasis omitted).

<sup>76</sup> *Id.* at 1013.

Livingston further pointed out that if appointments were the true issue, then logically he could just as easily favor the alternative measure pushed by the bill's opponents. That measure would have ended circuit-riding by establishing a new separate tier of circuit court judges. New judges, Livingston argued, "would give that patronage to much greater extent. This [bill] proposes the appointment of three Judges; the substitute would require ten; or, in time, fifteen new appointments of Judges for the circuit."<sup>77</sup> Whether, from a partisan perspective, it is more valuable to nominate all the circuit court judges or to nominate three Supreme Court Justices can be debated. But the point still holds that if partisanship was the true concern, opponents should not have repeatedly pushed for a new tier of circuit court judges, and proponents of the bill should have been far more open to it.

In fact, the actors that stood to gain the most partisan benefit from the bill wished to have fewer seats rather than more. Daniel Webster, a proto-Whig representative from Massachusetts and chairman of the Judiciary Committee in the House, led the push for the expansion bill. Webster surely welcomed, and was partially motivated by, the additional appointments for Adams, but he and Adams had pushed against adding to the then seven member court three more seats rather than two, believing that it was undesirable to have an even number of Justices on the Court.<sup>78</sup> The western states objected, arguing that three Justices were necessary for the case load.

The thirst for denying party appointments did play a role. Jackson's ally, Martin Van Buren, was the chairman of the Judiciary Committee in the Senate. Although Van Buren did not openly oppose the bill so as to avoid antagonizing western states, he carefully doomed it through two amendments that would have prevented Webster from getting his first choice for Supreme Court candidate. According to the norms of the era, the President could only nominate Justices who were residents of the circuit in which they would ride. Webster's candidate, John McClean, was from Ohio, a state that was then a part of the Seventh Circuit, along with Kentucky and Tennessee.<sup>79</sup> When Webster introduced his legislation, a Kentuckian held the Seventh Circuit seat, making it impossible for Webster to nominate his Ohioan candidate. Webster's version of the bill in the House carefully reorganized the circuits, divorcing Kentucky and Ohio and placing the latter in one of the new circuits so that McClean could occupy one of the new seats. When the Senate received the bill, Van Buren, through a proxy, struck back by amending the bill so that Ohio and Kentucky would remain in the same circuit, thus blocking the possibility of nominating

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<sup>77</sup> *Id.*

<sup>78</sup> ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 257–58 (1997).

<sup>79</sup> *Id.*

McLean.<sup>80</sup> The Senate also took the extra step of formalizing the residency requirement by amending the bill to require that each Justice be a resident of the circuit in which they rode. When Webster sought to hold a conference between the two chambers in order to rectify these changes, Van Buren refused, and the bill died a quiet death.<sup>81</sup>

If the addition was primarily partisan, Van Buren would have openly accused Adams and Webster of packing the court for their political gain. Instead, Van Buren hid his motive by using a proxy to add misleadingly minor amendments to the bill that effectively killed it. Nor, if partisan gain was the primary motivation, would the bill have passed by a large majority in the House, where Jacksonians had about half the seats, or the Senate, where Jacksonians had a majority.

Where the proto-Whigs in 1825 failed, the Jacksonians in 1837 succeeded. With possession of both the Presidency and Congress, the Jacksonians expanded the size of the Supreme Court by two seats, a reasonable number given that it was one seat less than the proto-Whigs had proposed more than ten years earlier. The Whigs, now an official political party, had a muted reaction to the passage of the 1837 bill.<sup>82</sup> Some contemporary proponents of court-packing argue that the success of the practice turns on whether the political party that packed the Court continues to dominate elections and thus deprives the opposition of an opportunity to pack in kind.<sup>83</sup> The packing party must become hegemonic over the political system, so the argument goes.

But this thesis does not hold up for the “Age of Jackson,” the antebellum era in which Democrats dominated elections. Less than three years after the addition of two seats to the Supreme Court under President Jackson, the Whigs regained control of the Presidency and achieved large majorities in both houses of Congress in the election of 1840. They faced off against a Court where a solid majority of the Justices were appointed by either President Jackson or his close ally and successor, President Van Buren. And key appointments were divisive: for more than a year in 1835 and 1836, Whigs had fiercely fought against Jackson’s multiple nominations of Roger Taney to the Supreme Court because of his role in destroying the National Bank. The Whigs were also displeased that after the Jacksonians lost the Presidential and Senate elections of 1840, in a lame-duck session, President Van Buren nominated and Congress

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<sup>80</sup> CROWE, *supra* note 38, at 105–07.

<sup>81</sup> *See id.* at 104–07.

<sup>82</sup> *See id.* at 121–23.

<sup>83</sup> *See* Mark Tushnet, *Why Critics of Court-Packing Proposals Aren't Watching the Whole Board of Politics*, BALKINIZATION (Apr. 23, 2019), <https://balkin.blogspot.com/2019/04/why-critics-of-court-packing-proposals.html> [<https://perma.cc/6XTZ-LG26>] (stating that Republicans can only retaliate once they've obtained control of Congress and the presidency).

confirmed a Justice to the Supreme Court.<sup>84</sup> Yet the Whigs did not signal any desire to again increase the size of the Court.

The most likely explanation for the Whigs' non-retaliation is that there was no legitimate performance rationale. Since the 1837 expansion of the Court, no new states had been admitted to the Union, and thus there was no need for new circuits. Expansion was unjustifiable. Thus, in the Whigs' view, the 1837 expansion of two seats was not an act of court-packing, but a way to accommodate circuit-riding.

### C. 1863: A Sectional and Bipartisan Appointment

In 1863, the Court expanded again. This expansion, from nine to ten seats, is the last example of the circuit-riding system at work. In the midst of the Civil War, President Lincoln faced off against a pro-southern Court that Republicans feared would act as a fifth column and sabotage the Union from within. Given Lincoln's strong incentives to change the ideological composition of the Court, some have argued that Lincoln's one seat expansion was "packing the Court."<sup>85</sup> Timothy Huebner calls the expansion a "mostly partisan attempt to shape the structure and personnel of the Supreme Court: the first Court-packing plan."<sup>86</sup> Today's proponents of court-packing also cite Lincoln's expansion as precedent, arguing that his "explicit goal" was to "protect[] both the Union and [his] agenda against slavery, in the face of reactionary Court decisions like *Dred Scott*."<sup>87</sup> Others, however, have emphasized that expansion was not a partisan issue, but rather a means to create a circuit court to cover California and Oregon.<sup>88</sup> Both are half-right: whereas the change in the court's

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<sup>84</sup> Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 422–23.

<sup>85</sup> See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 134 (2009) ("The size of the Supreme Court was increased to ten members in 1863, in the midst of the Civil War, in an effort to ensure a pro-Union Court."); PAUL KENS, *JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE* 95 (1997) (asserting that Republicans "wanted to pack the Court with judges who would 'help keep the power of the Court right'" (quoting SILVER, *supra* note 14, at 87)); SILVER, *supra* note 14, at 84 (asserting that for Republicans the threat meant that logic "dictated a packed Court").

<sup>86</sup> Timothy Huebner, *The First Court-Packing Plan*, SCOTUSBLOG (July 3, 2013), <https://www.scotusblog.com/2013/07/the-first-court-packing-plan/> [<https://perma.cc/93ZB-CRXU>].

<sup>87</sup> Bee, *supra* note 25; see Burns, *supra* note 32 (explaining that opponents of court-packing should not fear that it would negatively impact the Court's legitimacy because that was not the result of Reconstruction era court-packing).

<sup>88</sup> See CROWE, *supra* note 38, at 143 ("In order to alleviate both the remaining proslavery majority on the Court and judicial performance in the far West, Republicans proposed and passed . . . a bill abolishing the California Circuit, joining California and Oregon in a newly created Tenth Circuit . . ."); STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 18 (1968) (noting the position of Representative John A. Bingham of Ohio that "[t]he reorganization . . . 'merely consol-

size was political, its extent was strictly limited by policy concerns. Lincoln and the moderate Republicans rejected court-packing. Indeed, they added the bare minimum number of Justices required by needs of the circuit-riding system. Nonetheless, they were partly driven to do so by prospect of gaining one additional appointment to the Supreme Court.

The Republicans certainly had sufficient motive to pack the Court. In Civil War America, the Republican Party's most prominent statesmen repeatedly alleged that the Supreme Court was part of, as Lincoln put it, "a conspiracy to perpetuate and nationalize slavery."<sup>89</sup> Salmon Chase, a founding member of the Republican party and whom Lincoln would choose as his first Secretary of Treasury and then as Chief Justice of the Supreme Court, argued that the "slave power" had "filled every department of the executive and judicial administration with its friends and satellites."<sup>90</sup> The result, several historians contend, was that time and again, politically controversial Supreme Court decisions, such as *Prigg v. Pennsylvania* and *Dred Scott*, had stood in the way of freedom and further entrenched slavery.

The Court decided *Prigg* and *Dred Scott* before Lincoln's election and the South's secession. Now Republicans feared that the Court would undermine the North's measures to win the Civil War. Just shy of three months into Lincoln's presidency, the Chief Justice and author of *Dred Scott*, Roger B. Taney, struck down Lincoln's suspension of habeas corpus.<sup>91</sup> Furthermore, with no case before him and in violation of judicial norms, Taney would go on to privately draft several opinions striking down other key Lincoln initiatives such as conscription, printing paper money to finance the war, and the Emancipation Proclamation.<sup>92</sup> Two months into his presidency, due to deaths and resignations, Lincoln had enough vacant seats to weaken southern dominance of the Court, but not enough to overturn it. His potential appointments would weaken the proslavery majority of the Court from 8–1 to 6–3.<sup>93</sup> It was this 6–3 Court that was set to hear a case to decide the constitutionality of Lincoln's executive order to blockade the southern ports, a key part of the war strategy.<sup>94</sup>

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idates the southern circuits and makes an additional circuit in the Northwest, where an additional circuit is needed, by reason of the great increase of population" (quoting CONG. GLOBE, 37th Cong., 2d Sess. 173 (1862) (statement of John A. Bingham)).

<sup>89</sup> Abraham Lincoln, Speech at Springfield, Illinois (July 17, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 504, 521 (Roy P. Basler et al. eds., 1953).

<sup>90</sup> Salmon Chase, The Address of the Southern and Western Liberty Convention, Held at Cincinnati, June 11 and 12, 1845, with Notes by a Citizen of Pennsylvania, in SALMON PORTLAND CHASE & CHARLES DEXTER CLEVELAND, ANTI-SLAVERY ADDRESSES OF 1844 AND 1845, at 75, 98 (1867).

<sup>91</sup> *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

<sup>92</sup> BRIAN MCGINTY, LINCOLN AND THE COURT 194–96, 203–05 (2008).

<sup>93</sup> *See id.* at 92–95.

<sup>94</sup> *See* The Prize Cases, 67 U.S. (2 Black) 635 (1862) (finding that it was proper for President Lincoln to institute a naval blockade of the Southern states after commencement of the Civil War).



Not only did Lincoln have sufficient motive to pack the Court, he also had the opportunity. By 1863, there were eight new states in the Union lacking a Justice riding circuit, and therefore, were without any circuit court adjudications, a problem which Lincoln addressed in his first annual message to Congress.<sup>95</sup> That exact same number of circuit-less states had justified the addition of two seats in 1837. Why could it not justify the addition of two seats again or perhaps even more seats given the wider expanse of the country and the growing population?

A few actors pushed for court-packing. In June of 1861, the *New York Tribune*, long a hostile critic of the Court, proposed a detailed plan that would reorganize the circuits in such a way that there would be four additional seats, which would allow Lincoln to establish a one seat majority on the Court.<sup>96</sup> As Congress began debating reorganizing the circuits in December of 1861, the *Tribune* returned to the topic of packing and lowered its suggested number for new seats. Claiming both that “[t]he present rebellion, which fills every corner of the land with bloody strife, and makes even the solid tremble, is due quite as much to an unsound and unwise decision of the Supreme Court as to any other single cause,” and that the “number of Supreme Judges in the Northern States [was not] more than half enough to transact the business of the circuits,” the *Tribune* suggested an additional two seats, a compromise from the paper’s originally suggested number of four.<sup>97</sup> One of Lincoln’s regular correspondents wrote to him that the Court’s size should be increased to twelve as it “may aid in bringing treason to terms, as well as provide judicial machinery for punishing traitors.”<sup>98</sup> The most extreme proposal was from Senator Robert P. Hale of New Hampshire, who proposed a resolution asking the Senate to consider “abolishing the present Supreme Court of the United States, and establishing instead thereof another Supreme Court.”<sup>99</sup>

Ultimately, “Hale and the Radicals and the radical press lost.”<sup>100</sup> Moderates worried that packing would permanently damage the Supreme Court’s legitimacy and initiate a never-ending cycle of retaliatory packing. A moderate Republican Senator fretted that if Senator Hale’s plan succeeded the judgments of the Supreme Court “will be very likely to be disobeyed” and “will be resisted by the people because they come from a tribunal which is wholly unworthy

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<sup>95</sup> See Abraham Lincoln, President of the U.S., First Annual Message (Dec. 3, 1861) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/december-3-1861-first-annual-message> [<https://perma.cc/3PJ2-2LS3>]).

<sup>96</sup> SILVER, *supra* note 14, at 42–43.

<sup>97</sup> *Id.* at 42–48; Editorial, *The Supreme Court*, N.Y. DAILY TRIB., Dec. 12, 1861, at 4.

<sup>98</sup> SILVER, *supra* note 14, at 43 (quoting Letter from Samuel A. Foot to Abraham Lincoln (June 4, 1861)).

<sup>99</sup> CONG. GLOBE, 37th Cong., 2d Sess. 8 (1861).

<sup>100</sup> SILVER, *supra* note 14, at 47.

of public confidence.”<sup>101</sup> Retaliation was also a concern: another Republican predicted that Senator Hale’s legislation would begin a pattern in which the Court “will be abolished as often as the political complexion of Congress changes.”<sup>102</sup>

Lincoln and the moderates chose a modest path of adding only one Justice to address the problem of the eight new states that lacked circuit courts.<sup>103</sup> First, in 1862, the Republican Congress passed legislation incorporating six of the eight unincorporated states into the pre-existing circuit system by cutting down the number of circuits for the South and redistributing them to the North. They were able to avoid adding new circuits because the South already had more judges proportional to their population and, in any case, when the Civil War broke out the South had shut down many of the federal courts, often chasing the judges out of the state. In his speech introducing the legislation to the House, Congressman John Bingham emphasized that “the bill does not change the number of judges in the Supreme Court,” a point later emphasized by other representatives.<sup>104</sup>

Wait Talcott, a former state Senator from Illinois, thought the legislation wasted a crucial opportunity to pack the Court and expressed his frustration in a letter to Senator Lyman Trumbull. Trumbull was also from Illinois, was the chairman of the Judiciary Committee, and wrote the expansion legislation. Talcott wrote to Senator Trumbull that he had “more fear of this Court than anything else” and asked whether, by adding more states, Congress could “make it necessary for another Judge, and put in one that will be tried and true and help keep the power of the Court right.”<sup>105</sup> Note here the implicit acknowledgement of the norm that new seats to the Court could not be added without the addition of new states.

Because the 1862 Judiciary Act did not incorporate California or Oregon into the pre-existing circuit system, there was another opportunity to add a Justice to the Court in 1863. Part of the reason was geography: these two states were the furthest west and it would have been difficult to combine them with the pre-existing circuits. In addition, representatives pushed hard for their states to be grouped with those that shared similar interests, and California and Oregon did not quite fit with any other states. Furthermore, in 1855, to aid in

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<sup>101</sup> CONG. GLOBE, 37th Cong., 2d Sess. 27 (1861) (statement of Rep. Lafayette S. Foster).

<sup>102</sup> *Id.* at 28 (statement of Rep. Orville H. Browning).

<sup>103</sup> These eight states are California, Oregon, Florida, Texas, Iowa, Wisconsin, Minnesota, and Kansas. *Supra* Table 1.

<sup>104</sup> CONG. GLOBE, 37th Cong., 2d Sess. 173 (1861) (“[The bill] leaves the court constituted as it now is. It neither adds to nor takes from the number of judges now provided by law for that tribunal.”).

<sup>105</sup> Letter from Wait Talcott to Lyman Trumbull (Feb. 1, 1863), *microformed on reel 8, box 32, shelf no. 14,122, in Lyman Trumbull Correspondence, 1843–1894, Library of Congress.*

the resolution of California's large size, growing population, and complicated caseload, Congress had granted the state its own separate circuit judge, the only kind in the system. Thus, California could not be immediately incorporated into the system because that would involve abolishing the circuit judge's seat, violating his constitutionally guaranteed life tenure. However, in April of 1862, the Californian circuit judge took a six-month leave because of illness, and it became clear that he would shortly retire.<sup>106</sup> This gave Lincoln the opportunity to rectify the anomalous role of California by abolishing the lone circuit court judge and replacing him with a circuit-riding Supreme Court Justice.

Certainly, Republicans were eager for an additional appointment to the Court. The *New York Times* reported that the new Justice "adds one to the number which will speedily remove the control of the Supreme Court from the Taney school."<sup>107</sup> But because the nominee was one of their own, Union Democrats were hardly upset by Lincoln's appointment. The tenth Justice, Stephen J. Field, is the only clear case during the first one hundred years of the Supreme Court's existence in which a President appointed a member of the opposite party to the bench. Perhaps unsurprisingly then, he would go on to vote consistently to strike down important Republican Reconstruction legislation after the end of the Civil War.<sup>108</sup> Nonetheless, with the unified support of the California delegation, the Senate confirmed Justice Field unanimously to the seat.

Field was a pro-Union Democrat who stood against secession.<sup>109</sup> His appointment may not have been to the taste of Democrats from the Deep South, but at this point they had seceded from the Union and had no representatives in Congress. As a matter of internal Union politics, southern opinion was largely irrelevant and Field was an acceptable choice for northern Democrats, muting accusations that the creation of the tenth seat was political.<sup>110</sup>

The expansion of the court from nine to ten was tied to the maintenance of the system of circuit-riding. Lincoln and the Republican Congress were hostile to the Supreme Court. Yet, by adding the bare minimum necessary to sustain the circuit-riding system, they staved off the radicals' push to use the extensive addition of new states as a pretext to add many new seats to the Court.

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<sup>106</sup> SILVER, *supra* note 14, at 91.

<sup>107</sup> *Important from Washington.: Our Special Washington Dispatches.: Another Supreme Court Judge.*, N.Y. TIMES, Mar. 4, 1863, at 1.

<sup>108</sup> See Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17, 22 (2000).

<sup>109</sup> MCGINTY, *supra* note 92, at 178.

<sup>110</sup> Lincoln was a Republican. His appointment of a Democrat to the Supreme Court was consistent with his larger strategy to peel off pro-war Democrats and citizens of the border states from the Democratic party. Graber, *supra* note 108, at 32–33.

Further, the extraordinary choice of a Democrat to fill the new tenth seat protected the appointment from charges of partisanship.

### III. COURT-PACKING ATTEMPTS

Four changes to the Court's size were part of attempts to pack the Court. Concerns about efficiency and good administration, so prominent in the changes related to circuit-riding, were largely irrelevant. What was at stake was the ideological composition of the Court. The four changes come in pairs, one in the early 1800s and the other during Reconstruction. Both pairs begin with an attempt to prevent a President from filling a vacant seat by abolishing it and in so doing reducing the court's size.

Subsequently, the elected branches fully or partially restored the Court's size. The significance of these two restorations are different. In the first case, the 1802 restoration signals the failure of the previous year's court-packing attempt. The 1802 restoration essentially reversed and repealed the previous administration's attempt to deny the incoming President a chance to fill the next vacant seat on the Supreme Court. This defeat is no more a precedent in favor of court-packing than is Roosevelt's infamous failure in 1937. The second case, the restoration of 1869, comes closest to court-packing because it ostensibly allowed Reconstruction Republicans to steal a Supreme Court seat. Still, its precedential status is questionable. Given that both political parties had deserted President Johnson, the stolen seat was unlikely to lead to a cycle of the tit-for-tat retaliation that would probably result today.

#### *A. The Failure of 1801/1802*

The 1801–1802 episode is no precedent for court-packing because it failed. President John Adams and the Federalists failed to deny the incoming President, Thomas Jefferson, his chance to fill the next vacancy on the Court. During the lame-duck period of 1801, Adams and the Federalists passed legislation reducing the size of the Supreme Court from six seats to five, pending the next vacancy on the Court. When the next Justice retired, the seat would have vanished, robbing Jefferson of his appointment. In line with the overall moderation of the Jefferson administration, rather than either destroy or pack the Supreme Court, both live options, Jefferson and his lieutenants in Congress chose to restore the Court to its previous size.

The fluctuation of the Court's size was tangled up in the election of 1800, which marked the first transition of power between parties in U.S. history, specifically from the Federalist party, led by John Adams, to the Republican party,

led by Thomas Jefferson.<sup>111</sup> The campaign for the presidency in 1800 was brutal and polarizing; many feared it would escalate into violence. By December of that year, Jefferson had received the most votes for the Presidency, and his political party, the Republicans, effectively had received majorities in both houses of Congress.<sup>112</sup> But before they would take power, they faced an extended lame-duck period of more than three months in which John Adams and the Federalists in Congress would continue to hold office. This odd and lengthy period was not by design, but rather was a contingent fluke that would eventually be addressed by a constitutional amendment.<sup>113</sup> In the meantime though, the lame-duck period left ample opportunity for partisan abuse.

The Federalists took advantage of the lame-duck period to entrench themselves in the judiciary. Adams and the Federalists were convinced that the Jeffersonians were enemies of the Constitution who would bring the French Revolution's Reign of Terror to American shores. To save the Republic, the Federalists, in Jefferson's words, "retired into the judiciary as a stronghold."<sup>114</sup> Most famously, in what is known as the "appointment of the midnight judges," the Federalist Congress created the first circuit courts and filled them with ideological allies, some with questionable qualifications.<sup>115</sup> More central to this Article's focus, however, are two hardball tactics, layered on top of each other, concerning the Supreme Court.

First, during the lame-duck period, the Federalists filled a newly vacant Supreme Court seat. In December of 1800, due to sickness and during the lame-duck, Chief Justice Oliver Ellsworth resigned from the Supreme Court, leaving Adams with a decision: leave the seat vacant for the incoming Republican President to fill or take advantage of the interim period to seek confirma-

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<sup>111</sup> For a dramatic blow-by-blow account of the struggle between Thomas Jefferson and the Federal Courts, see BRUCE A. ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 111–269 (2005).

<sup>112</sup> At first, the Federalists retained their majority in the Senate with their seventeen members outnumbering the fifteen Republican ones. But in a colossal blunder, President Adams nominated two Federalist Senators with time still left in their six-year terms to district court judgeships. These two Federalists resigned from the Senate, and their respective states replaced them with Republicans, swinging control of the Senate to the Republicans. *Id.* at 136–38. Another technicality is that Thomas Jefferson and Aaron Burr tied for the most electoral college votes, even though it was widely understood that Burr was running to be Vice President. This technicality of the electoral system was fixed by the adoption of the Twelfth Amendment. *Id.* at 31–33, 203–06.

<sup>113</sup> ACKERMAN, *supra* note 111, at 118–19.

<sup>114</sup> Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 301, 302 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

<sup>115</sup> Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 494, 505–06, 521–22 (1960).

tion of his own nominee.<sup>116</sup> He chose the latter course and began a rushed campaign to find a nominee and have the Senate confirm him.

This goal of filling the vacant Supreme Court seat was just the beginning. The Federalists and Adams continued to press for partisan advantages during the lame-duck period. The Federalists' second hardball tactic was legislation that reduced the Court's size. The Federalist majority in Congress began debating the Judiciary Act of 1801. Alongside creating the "midnight judges," the Judiciary Act would also shrink the Supreme Court from six to five Justices, but the timing of the reduction, as specified by the statute, was key. If the sixth seat were vacant, then the legislation would immediately reduce the number of seats on the Court to five. However, if all the seats were filled, the shrinking would be delayed until "after the next vacancy."<sup>117</sup>

If the Senate failed to confirm Adams's nominee for the Supreme Court vacancy, the sixth seat would disappear upon passage of the legislation, thereby denying the incoming President, Thomas Jefferson, one otherwise guaranteed appointment.<sup>118</sup> This would be a significant victory for Federalist Adams, but the partisan gains could be even larger. If the Federalists were particularly efficient, Adams could fill the vacant seat before the legislation was passed.<sup>119</sup> The confirmation of a Federalist Supreme Court nominee and shrinkage of the Court's size pending the next vacancy offered a double-partisan win. Not only could Adams deprive President-elect Jefferson of a future appointment, but Adams could also place a new Federalist Justice on the Court. Naturally, the Federalists sought to achieve the double-partisan win.

The appointment of the new Supreme Court Justice turned into a "race against the clock."<sup>120</sup> Acting as a messenger for the Federalist Congress, the Secretary of the Navy, Benjamin Stoddert, warned Adams:

As the bill proposes a reduction of the Judges to five—and as there are already five Judges in commission, it is suggested that there might be more difficulty in appointing a chief Justice without taking

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<sup>116</sup> See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 63 (5th new rev. ed. 2008) (detailing Chief Justice Ellsworth's retirement from the Court).

<sup>117</sup> See Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89 ("That from and after the next vacancy that shall happen in the said court, it shall consist of five justices only; that is to say, of one chief justice, and four associate justices."), *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

<sup>118</sup> Kathryn Turner, *The Appointment of Chief Justice Marshall*, 17 WM. & MARY Q. 143, 150 (1960) [hereinafter Turner, *The Appointment of Chief Justice Marshall*].

<sup>119</sup> *Id.*

<sup>120</sup> The term "race against the clock" comes from Professor Bruce Ackerman's account of this episode. ACKERMAN, *supra* note 111, at 130.

the present judges, after the passage of this bill even by one branch of the Legislature, than before.<sup>121</sup>

Adams's first choice for the seat, John Jay, refused the nomination on January 19, 1801.<sup>122</sup> Two days later, the House passed the Judiciary Act on to the Senate. The window for the double-partisan gain was closing quickly, as Jefferson would take power at the beginning of March—and in the 1800s, it took a great deal of time for messages to be exchanged by mail. Out of expediency, Adams dropped his second and third choice nominees for the Supreme Court seat as they lived outside the capital and letters could not be delivered in time. Instead, he chose his Secretary of State John Marshall, whom he could confer with in person. Marshall, perhaps the greatest Supreme Court Justice, was chosen as much for his physical proximity as for his talented legal mind.<sup>123</sup> The Senate confirmed Marshall as Chief Justice on January 27, and Adams signed the Judiciary Act of 1801 on February 13. With less than a month remaining, the Federalists filled as many of the new circuit court seats as quickly as possible, some with unseemly or unqualified candidates.<sup>124</sup>

Jefferson fumed in his private letters that the Federalists had

retired into the judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased. By a fraudulent use of the Constitution, which has made judges irremovable, they have multiplied useless judges merely to strengthen their phalanx.<sup>125</sup>

On the floors of Congress, on the last day of the lame-duck session, Republican William Giles warned the Federalists that “the Revolution [of 1800] is incomplete, as long as that strong fortress is in possession of the enemy.”<sup>126</sup> Similarly, a Republican Senator from New York wrote that because the Feder-

<sup>121</sup> Letter from Benjamin Stoddert to John Adams (Jan. 19, 1801), in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 55, at 686.

<sup>122</sup> ACKERMAN, *supra* note 111, at 124–25.

<sup>123</sup> Turner, *The Appointment of Chief Justice Marshall*, *supra* note 118, at 155.

<sup>124</sup> See ACKERMAN, *supra* note 111, at 131–35 (discussing the example of Oliver Wolcott, “who had never practiced law” and “who had recently been forced to resign as secretary of the treasury amid charges of fraud after a suspicious fire in the treasury building” and various examples of nepotism, including “John Marshall, who managed to secure judgeships for *two* of his brothers-in-law”).

<sup>125</sup> Letter from Thomas Jefferson to John Dickinson, *supra* note 114.

<sup>126</sup> RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 20–21 (1971) (quoting Letter from William Branch Giles to Thomas Jefferson (June 1, 1801), *microformed on ser. 1, reel 1, at 4*, in Thomas Jefferson Papers, Library of Congress, <https://www.loc.gov/item/mtjbib010111/> [<https://perma.cc/A8BC-XY6>]).

alists were “about to experience a heavy gale of adverse wind,” they had “cast[] many anchors to hold their ship through the storm.”<sup>127</sup>

In 1802, the Republican Congress restored the Court’s size back to six seats by repealing the Federalists’ 1801 Judiciary Act. In so doing, they rejected more far-reaching forms of retaliation pushed by some members of the radical wing of the Republican party including constitutional amendments, a razing of the federal judiciary as a whole, and packing the court.<sup>128</sup> None of these ideas were ever seriously pushed for on the national level, but packing did become the subject of serious discussion on the floors of Congress. Both the Republicans and their opponents understood and distinguished between restoring the court to its original size of six and going beyond the status quo ante by increasing it to seven—or more. It was a difference not only in quantity, but in kind. While restoring the Court’s size was uncontroversial, both parties condemned packing because it more gravely threatened the independence of the Supreme Court.

On the floor of Congress, Republican House Speaker Nathaniel Macon, expressed his wish to amend the repeal act to “add two or three more judges to the Supreme Court.”<sup>129</sup> Macon was opening up the possibility of packing the Court. The Federalists vigorously responded, with one congressman asserting that “[t]his proposition has been repelled whenever it has been urged” because it would make the Supreme Court “that tribunal in which the justice of the country is to reside, to resemble a popular assembly.”<sup>130</sup> Another Federalist accused the Republicans of using the repeal of 1801 to lay the groundwork for “add[ing] a few of their friends to the Supreme Court.”<sup>131</sup>

The Federalist condemnation of their political enemies’ flirtation with stacking the Court is unsurprising. More remarkable, however, is that the Republicans agreed with the Federalist assessment. No Republican defended Macon and his packing suggestion against Federalist attacks. The silence speaks volumes: Republicans apparently wanted nothing to do with the radical idea.

In fact, in a separate, but related, section of the congressional debate, Republicans repeatedly condemned the idea of court-packing. The charge of packing was a Republican line of attack against the Federalists’ creation of the

<sup>127</sup> *Id.* at 15 (quoting Letter from Gouverneur Morris to Robert R. Livingston (Feb. 20, 1801), in 3 THE LIFE OF GOUVERNEUR MORRIS 153–54 (Jared Sparks ed., 1832)).

<sup>128</sup> *See id.* at 20 (“[T]he measures which the Old Republicans advocated in the first decade of the nineteenth century were truly radical.”).

<sup>129</sup> 11 ANNALS OF CONG. 564 (1802).

<sup>130</sup> *Id.* at 771–72 (statement of Rep. Roger Griswold).

<sup>131</sup> *Id.* at 843. That same congressman, Representative John Dennis, explained, “[T]here are but two alternatives if we abolish this system. You must either increase the number of the judges of the Supreme Court, in which case no money will be saved, or devolve on State authority the execution of your laws.” *Id.* at 844.



circuit courts and a justification for their abolishment. Republicans criticized the partisan creation of circuit courts as a violation of the independence of the judiciary. This argument had a next logical step: If the partisan creation of courts undermines judicial independence, so too does the partisan addition of seats to a pre-existing court. On the floor, Republican Congressmen David Stone worried that if Federalist arguments were true, then

[c]an anything be more easy than for the Legislature . . . in order to free themselves from the opposition of the present Supreme Court, to declare, that court shall hereafter be held by thirteen judges[?] An understanding between the President and the Senate would make it practicable to fill the new offices with men of different views and opinions from those now in office. And what, in either case, would become of this boasted protection of the people against themselves?<sup>132</sup>

Similarly, Republican Congressman John Randolph of Roanoke warned that, “by increasing the number of judges, any tone whatever may be given to the bench.”<sup>133</sup> He asserted that the “doctrine of our opponents prove that, at every change of administration, the number of your judges are probably to be doubled.”<sup>134</sup> The Judiciary Bill of 1801, according to Republicans, was a slippery slope that would descend into repeated rounds of court-packing. This bipartisan condemnation of packing calls into question the dominant account of the history of court-packing in which pre-FDR, packing “was an appropriate and even desirable method of dealing with a recalcitrant Supreme Court.”<sup>135</sup>

It is not just the Republicans’ words that belie the myth of recurrent packing; it is their actions too. The Republicans limited themselves to solely reverting the Court to its old size so that the status quo was restored.

Although Republicans’ condemnation of packing was sincere, surely it was partly motivated by the fact that the reversibility of a reduction left open the possibility of alternative options for retaliation. If the Federalists had packed the Supreme Court by expanding it, the life tenure of Justices would have made the measure irreversible. The only commensurate form of retaliation would have been to pack back. But here, faced with a reduction, all the Republicans had to do, and all they did, was repeal the old act.<sup>136</sup>

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<sup>132</sup> *Id.* at 73.

<sup>133</sup> *Id.* at 660.

<sup>134</sup> *Id.* at 659.

<sup>135</sup> Grove, *supra* note 9, at 468.

<sup>136</sup> Despite reservations, I ultimately chose to include the 1801 reduction as a court-packing attempt. The doubts were rooted in the fact that since reductions are reversible, they are less likely to induce tit-for-tat escalations than expansions that create new seats for Justices with life tenure. Because reductions lack court-packing’s hallmark danger, court-packing might then be defined as only entailing expansions in the Supreme Court’s size.

While court-packing would have left Republicans open to charges of radicalism, the Republican repeal of the Judiciary Act of 1801, especially the increase back to six seats, could be and was defended as a mere restoration of the status quo. President Jefferson wrote that the repeal sought to “restore[] our judiciary to what it was while justice [and] not federalism was its object.”<sup>137</sup> Federalist Alexander Hamilton thought this point about restoration so central to the Republicans’ argument that he attempted to rebut it at length in one of his anonymous editorials arguing that a repeal of the Judiciary Act of 1801 was unconstitutional.<sup>138</sup> The congressional debates also repeatedly returned to the theme that the increase in Supreme Court seats was simply a restoration. Congressman Philip Thompson argued,

[T]he intention of the bill, as I understand it, [is not] to interfere with the offices of the judges of the Supreme Court, further than to restore them to that firm, that rightful, that Constitutional ground, on which they stood previously to the passage of the law of the last session, and to all the duties and immunities of which I most sincerely wish to see them restored.<sup>139</sup>

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Nonetheless, I’ve included this 1801 reduction under the attempted court-packing section for three reasons. First, I did not want to “rig the game” by defining court-packing so narrowly as to artificially exclude examples, like the 1801 reduction, that most would likely consider court-packing. The better course is to show that, even under a broader definition, court-packing is not a recurrent feature of American politics. Second, even if the reader disagrees that a reduction is a form of court-packing, the 1801 reduction still fails as precedent because it was repealed. Lastly, as is evident in the 1866/1869 example, a reduction combined with a restoration can, at times, be irreversible. After all, pro-Johnson forces could not undo Ulysses S. Grant’s appointment of a life-tenured Supreme Court Justice, and thus had a strong incentive to retaliate by packing in turn. Thus, under any definition, this 1866 reduction is part of a court-packing attempt.

Note also that the political situation in which Congress would have the motivation and ability to reduce the Court’s size is rare. Congress would most likely want to deny a President an appointment when these two branches are controlled by different parties. In that situation of divided government, Congress would only be able to pull off the reduction if it had a supermajority to override the President’s veto.

<sup>137</sup> Letter from Thomas Jefferson to Constantin François de Chassebœuf, Comte de Volney (Apr. 20, 1802), <https://founders.archives.gov/documents/Jefferson/01-37-02-0231> [<https://perma.cc/VW82-SA49>]; see also 11 ANNALS OF CONG. 70 (1802) (“The true question is, not whether we shall deprive the people of the United States of all their courts of justice, but whether we shall restore to them their former courts.” (statement of Sen. David Stone)).

<sup>138</sup> Hamilton, under the pseudonym Lucius Crassus, characterizes President Jefferson’s inaugural message as intending to signal that the President “meant nothing more than to condemn the recent multiplication of Federal Courts, and to bring them back to their original organization: considering it as adequate to all the purposes of the Constitution; to all the ends of justice and policy.” Lucius Crassus, *The Examination Number VI*, N.Y. EVENING POST, Jan. 2, 1802, at 2 [<https://perma.cc/KET5-6GZK>] (emphasis omitted).

<sup>139</sup> 11 ANNALS OF CONG. 550 (1802).

Indeed, since all understood that the Federalists' reduction of the Supreme Court's size was reversible, its reversal was relatively uncontroversial. The key issue haunting the Jeffersonians was a different matter; it was the appointment of the life-tenured circuit court judges, whose reversibility was a matter of great debate. During the lame-duck period, President-elect Jefferson wrote that he "dread[ed] [the circuit court appointments] above all the measures meditated [by the Federalist Congress], because appointments in the nature of freehold render it difficult to undo what is done."<sup>140</sup> Surprisingly and despite his lame-duck appointment, congressional debate and the newspapers never carped on Marshall's appointment as Chief Justice, although they did discuss the reduction in the number of seats.<sup>141</sup> Again, the central controversy centered on the creation and filling of the seats of the new circuit courts and whether this was reversible. Would abolishing the circuit courts violate the Constitution's guarantee of life tenure to Article III judges? Did the legislature have the right to repeal its own decisions or did some decisions create irrevocable rights and entitlements, specifically the judge's right to hold his seat for life?

This problem of irreversibility of circuit court appointments was irrelevant to the reduction in the size of the Supreme Court. With the Republicans possessing a majority in both Houses, Congress could easily restore the Court's size back to six. For that reason, the circuit courts, not the Supreme Court, were the main focus of the debate.

Jefferson and Congress's solution to the problem of the judiciary was of a piece with their moderate approach to governing. Federalists feared the worst: they imagined that, upon taking office, President Jefferson would inaugurate a new French Revolution in which heads would roll, the powers of the national government would be radically reduced, and the Constitution would be shredded.<sup>142</sup> Jefferson took a different path. He sought and eventually created a coalition that would achieve a middle ground by cleaving off radicals from both the Federalist Party and his own. He would, as one Republican phrased it, "form a party of Constitutionals composed of true patriots who will avoid extremes."<sup>143</sup> Jefferson intended to, as one Republican put it, "adopt [a] system of accommodation, and to endeavor . . . to draw over those who have been

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<sup>140</sup> Letter from Thomas Jefferson to James Madison (Dec. 26, 1800), in 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 125, at 186, 187.

<sup>141</sup> Neither of the two main Jeffersonian newspapers, the moderate *National Intelligencer* nor the more radical *Aurora*, argued that Chief Justice Marshall's appointment was illegitimate because it was done during a lame-duck period. Professor Kathryn Turner agrees, noting that "[m]ost newspapers simply stated the fact of his appointment." Turner, *The Appointment of Chief Justice Marshall*, *supra* note 118, at 162.

<sup>142</sup> See STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 750 (1993).

<sup>143</sup> ELLIS, *supra* note 126, at 52 (quoting Letter from T. Law to William Eustis (Aug. 4, 1802)).

heretofore his opponents.”<sup>144</sup> Jefferson signaled this intention from the beginning with a reconciliatory inaugural address that proclaimed, “We are all Republicans, we are all Federalists.”<sup>145</sup>

From 1801 to 1802, the size of the Court changed twice. First, the Federalists manipulated the Court’s size for their partisan advantage by reducing the size of the Court from six seats to five. Because the size change was a reduction and not an expansion, the Republicans did not have to pack the Court to retaliate. Instead, they condemned packing as a threat to the judiciary and merely restored the Court’s size back to six seats. Adams’s packing attempt is not a precedent because it was repealed and repudiated.

### B. *The Success of 1866/1869*

The changes to the Court’s size during Reconstruction are the closest precedent in U.S. history for court-packing. While the 1801 Federalist effort to block the President from making an appointment failed, the 1866/1869 Republican gambit worked, and worked in spades. In 1866, to block President Andrew Johnson from appointing a new Supreme Court Justice, Congress passed a law reducing the size of the Supreme Court from ten seats to seven. In 1869, after Republicans wrestled back the Presidency with the election of Ulysses S. Grant, Congress increased the Court’s size and appointed a Justice to the newly created seat. In so doing, Congress effectively robbed President Johnson of two appointments and transferred one to President Grant. Nonetheless, the danger to the Court of a tit-for-tat downward spiral was tamped down because both political parties had deserted Johnson.

The story begins on April 15, 1865, when John Wilkes Booth assassinated President Lincoln, leaving then-Vice President Johnson to take his place.<sup>146</sup> A month and a half later, Justice John Catron passed away, leaving one of the ten seats on the Supreme Court vacant. The choice of who to nominate to this seat fell to the new and accidental President Johnson.<sup>147</sup> Although elected as Vice President on the same ticket as Republican Abraham Lincoln, Johnson was a War-Democrat. Despite being a firm believer in states’ rights, he was loyal to the Union and against secession. As President, he would push for a lenient Reconstruction that, while abolishing slavery, would still leave white supremacy

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<sup>144</sup> *Id.* at 27 (quoting Letter from John Dawson to James Monroe (Feb. 23, 1801), *microformed on ser. 1, reel 2, at 3, in James Monroe Papers*, Library of Congress).

<sup>145</sup> Thomas Jefferson, The First Inaugural Address (Mar. 4, 1801), in *LIBERTY AND ORDER: THE FIRST AMERICAN PARTY STRUGGLE* 263, 263 (Lance Banning ed., 2004).

<sup>146</sup> See *Abraham Lincoln’s Assassination*, HISTORY, <https://www.history.com/topics/american-civil-war/abraham-lincoln-assassination> [<https://perma.cc/9SZF-RL6W>] (last updated Apr. 13, 2020).

<sup>147</sup> See 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY: 1856–1918*, at 144 (1922).

and the power of the large plantation class intact.<sup>148</sup> This put him in immediate conflict with the Republican Party, most of whom wanted a more thorough remaking of southern society.<sup>149</sup>

On April 16, 1866, Johnson nominated Henry Stanbery to the Supreme Court. The nomination landed at the moment when simmering tensions between Johnson and the Republican Congress boiled over. Between February and May of 1866, Congress twice passed, and Johnson twice vetoed, the extension of the Freedmen's Bureau, legislation intended to aid former slaves with education, employment, and other resources necessary to smooth the transition to freedom. Congress ultimately mustered enough votes to override Johnson's veto. In March of 1866, Congress also overrode Johnson's veto of the Civil Rights Bill, a precursor to the Fourteenth Amendment.<sup>150</sup> Lastly, Congress felt under siege by a Supreme Court that was threatening to strike down as unconstitutional the use of the military to occupy and reconstruct the South.<sup>151</sup>

Republicans believed that, if confirmed, Stanbery would have strengthened Johnson's hand against the Republican Congress. While highly respected as a jurist, Stanbery stood as a potent symbol of Johnson's pro-southern Reconstruction policies because he had drafted Johnson's veto message for the Civil Rights Bill. Both the *Springfield Republican* and the non-party aligned *The Nation* magazine condemned the nominee, with the former writing that

[Stanbery] is a Republican of the milk-and-water sort, one that votes the ticket but steadily advocates the principles of the other side. He was always loyal, but on all questions carried in Congress he has been against the earnest republicans. I believe he . . . didn't see any good in the emancipation proclamation after it was issued. In short, he is very moderate in his views.<sup>152</sup>

In response, the Republican Congress successfully passed a statute into law reducing the size of the Court from ten to seven seats. In effect, this was a blanket refusal to confirm any nominee to the vacant tenth seat. What's more, by reducing the size of the Court by three seats, the Senate also sent the message that it would not entertain any nominees, not only for this newly opened

<sup>148</sup> See ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 68–70 (1960).

<sup>149</sup> See MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869*, at 155–244 (1974).

<sup>150</sup> ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 240–49 (1988).

<sup>151</sup> See WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 58–110 (1989).

<sup>152</sup> Editorial, *The New Judge Stansbury*, *SPRINGFIELD WEEKLY REPUBLICAN*, Apr. 21, 1866, at 4; see Editorial, *The Week*, *THE NATION*, Apr. 26, 1866, at 514 (“Mr. Stanberry’s mind . . . is not that of a statesman, and a judge of the Supreme Court ought to be statesman.”).

seat, but also for the next two vacancies as well. The preemptive strike was prescient: Justice James Moore Wayne passed in July of 1867.<sup>153</sup> The reduction thus blocked not one, but two, of Johnson's expected appointments to the Supreme Court.

Republicans won back the Presidency in 1868, and on his first day in office, March 4, 1869, the new President, Ulysses S. Grant, signed the Judiciary Act of 1869, expanding the Supreme Court's size to nine seats. At the time, eight Justices sat on the Court. By subsequently increasing the Court's size, Republicans effectively transferred one of those blocked appointments from Johnson to his successor. The increase therefore gave Grant an additional appointment, an appointment that had once belonged to Johnson. However, Johnson's other blocked appointment was not transferred, as the Republicans only increased the Court's size to nine, one short of its previous ten seat size.

The importance of the seat that Republicans had wrestled from Johnson was dramatized in the Court's reversal on the constitutionality of paper money, one of the era's central political issues. In December of 1869, the Supreme Court, then composed of just eight Justices because President Grant had still not filled the vacant seat, addressed the paper money question in *Hepburn v. Griswold*. By a 5–3 vote, the Court declared paper money to be unconstitutional for payments of pre-existing debts and called into question paper money's constitutionality in general.<sup>154</sup> Shortly after the Court issued the opinion, one of the Justices in the majority retired, creating a second vacancy, and Grant had still not filled the extra vacancy that was transferred from Johnson. Hence, there were two vacancies. Although it remains heavily contested, it seems likely that President Grant chose his two nominees based on the belief that they would overrule *Hepburn*.<sup>155</sup> On March 25, a few days after the Senate confirmed the second Justice, the Attorney General motioned for a rehearing of the case, and on May 1 the Court reversed its previous decision by a 5–4 vote.<sup>156</sup> The partisan press heavily criticized the flip-flop, and the reversal underscored the importance and political nature of the appointments.

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<sup>153</sup> ABRAHAM, *supra* note 116, at 99.

<sup>154</sup> *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 626 (1869).

<sup>155</sup> See Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and The Legal Tender Cases*, 54 HARV. L. REV. 1128, 1132–33 (1941) (discussing an entry in Secretary of State Hamilton Fish's diary in which Grant tells Fish that he could choose his nominees based on the belief they would reverse the *Hepburn* decision and thus would not dispute that fact with a public statement); Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343, 348 (1935) ("It was then that the rumor spread that Grant had packed the Court to secure the decision on greenbacks that he wanted.").

<sup>156</sup> *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553 (1871); Fairman, *supra* note 155, at 979–80.

Not all agree with this political interpretation of the events. Stanley Kutler and Justin Crowe argue that “partisan political calculations . . . had little to do with” the reduction in the Court’s size.<sup>157</sup> In their telling, the reduction’s goal was to create an odd number of Justices to prevent tie votes. The Democratic press certainly did not understand it that way. Whereas in 1862 Democratic newspapers refrained from any criticism of Lincoln’s resizing of the Court, in 1866 they roundly condemned the reduction. The *Daily National Intelligencer* explained that the “unscrupulous movement to reduce the number of justices” was based on “the injurious supposition that under a reduced organization the acts of revolutionary and usurping politicians may be more secure of immunity.”<sup>158</sup> Three years later, the newspaper had not changed its opinion, calling the reduction “legislation passed in disregard of the public interests, and simply as measures of hostility to President Johnson.”<sup>159</sup> The pro-Republican *New York Times* agreed with its Democratic counterparts, writing that the reduction’s “result is in accordance with what I long since stated in my dispatches would be done by Congress by way of defeating the nomination of Judges by Mr. Johnson.”<sup>160</sup>

Republican congressmen did not openly admit their partisan intentions because it would have aroused more opposition. Perhaps for that reason, the legislative debate was a short one. But the true motivation appears to have been an open secret in the halls of Congress. Speaking three years after the reduction, as Congress debated restoring the Court’s size, a Republican Congressman acknowledged the legislation’s true motive: “The reduction was made under peculiar circumstances, and with some reference to political considerations two or three years since. Now that those have passed away, I see no objection to increasing the number of the judges of that court by one or two.”<sup>161</sup>

The performance explanation espoused by both Kutler and Crowe also conflicts with our most basic intuitions about politicians. Generally, politicians try their best to carefully calculate an action’s political payoffs. Hence, we would expect any Congress facing off against a President of the opposing party to consider the partisan implications of reducing the Court’s size during a vacancy. Such calculations are even more likely at a time when inter-branch con-

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<sup>157</sup> CROWE, *supra* note 38, at 159; see KUTLER, *supra* note 88, at 48–62.

<sup>158</sup> *The Judicial Mind of the Country upon the Policy of Restoration.*, DAILY NAT’L INTELLIGENCER, Apr. 23, 1866, at 6.

<sup>159</sup> *The New Judiciary Bill.*, DAILY NAT’L INTELLIGENCER, Feb. 26, 1869, at 3.

<sup>160</sup> *Washington News.: Special Dispatches to the New-York Times.: Reorganization of the Judiciary.* N.Y. TIMES, July 11, 1866, at 1.

<sup>161</sup> CONG. GLOBE, 40th Cong., 3d Sess. 1487 (1869) (statement of Rep. Charles R. Buckalew).

flict is escalating, the stakes are high, and the Court is increasingly wary about the constitutionality of landmark legislation.

Lastly, in foreseeable ways the reduction did not promote, but rather undermined, the performance of the courts, specifically the system of circuit-riding. Reducing the number of Supreme Court Justices meant that the circuit courts would not be adequately staffed. Before, ten Justices had not been a sufficient number to ride circuit, but now there would be only seven. Congress paid so little attention to this most basic of concerns that the legislation did not even address how Justices should reshuffle themselves into the newly designed circuit courts, leaving the Justices in utter confusion about whether they had the legal authority and jurisdiction to even ride circuit and hear cases.<sup>162</sup> At best, the change to the Court's size could only be temporary, as it was unsustainable. It is unlikely that the goal of resizing was related to performance given the shoddy legislative draftsmanship and the predictable ways it would undermine and throw into chaos the circuit courts.

The corresponding reduction of 1866 and then restoration of 1869 is a form of packing because it irreversibly manipulated the Court's size in order to alter its ideological composition. If pro-Johnson forces were aggrieved, they could not reverse Grant's new appointment. The most fitting remedy for allies of Johnson would be to retaliate by packing the next time they controlled Congress and the Presidency.

But this reconstruction-era incident should not serve as precedent for current or future court-packing proposals because of its context. Critics of court-packing fear that it will lead to a self-destructive pattern in which each party would be incentivized to pack whenever it controls all the elected branches. The question, then, is whether the Republican Reduction and Restoration is equally dangerous to the legitimacy of the Court. I argue that it was not, that it is distinguishable. It is court-packing, but it occurred in an unusual and less risky context than the present one.

Democrats were not enraged by the restoration of the Court's seats and the corresponding transfer of a seat from Johnson to Grant. Yes, the Democrats condemned the reduction of the Court and lambasted the Court for its reversal in the *Legal Tender Cases* in 1871. But there is little indication that they thought of retaliating by expanding the Court if they ever regained power, as was pondered during the Jefferson administration, the Lincoln administration,

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<sup>162</sup> CHARLES FAIRMAN, 6 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88*, pt. 1, at 131–36, 172–75 (1971).



and today.<sup>163</sup> Indeed, a majority Democratic Senate declined to obstruct a Republican President's Supreme Court appointments in the early 1880s. Nor did Democrats try expanding the Court when they controlled both the legislative and executive branches after their sweeping victory in the election of 1892.<sup>164</sup> Why did the dog not bark?

The evidence is inconclusive. But a likely possibility is that Democrats did not consider it a stolen seat because it never belonged to their party in the first place.<sup>165</sup> The anti-packing norm was irrelevant because Johnson was a president without a party.

Constitutional norms regulate contestation between the two political parties, putting outer boundaries on the conflict so that it does not spiral out of control. Escalation between parties is a danger because the political parties have long collective memories, and the party outlasts any particular office holder. Representatives come and go, but the party remains. When new representatives replace old ones, they inherit their party's long-standing grudges and gripes. Norms tamp down this conflict. For example, some argue that to ensure the government is staffed, norms require that during divided government, the Senate should confirm the President's nominees as long as those nominees are moderates. The taboo against court-packing is another norm which regulates political competition by preventing a tit for tat spiral of packing.

But the anti-packing norm is less relevant when the dispute is not between the political parties. For example, a bipartisan decision to pack the court poses little danger of degenerating into tit-for-tat packing because the parties are not attacking each other. A similar dampening of escalation occurs when the packing targets a President who lacks the support of either political party. In this extraordinary context, no political party has any need to retaliate. The attack targets not a party, but an outsider to the system.

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<sup>163</sup> I searched extensively through the main Democratic newspapers, namely the *Baltimore Sun*, *Chicago Times*, *Cleveland Plain Dealer*, *Detroit Free Press*, *New York World*, *New York Herald*, *Richmond Enquirer*, *Washington Daily News*, and *National Intelligencer* from 1870–1872.

<sup>164</sup> See ABRAHAM, *supra* note 116, at 111–17 (summarizing all of President Cleveland's Court appointments, which were only executed to fill new vacancies). On December 15, 1880, the Democratic Senate easily confirmed the Republican President's Supreme Court nominee, William Burnham Woods, despite incredible controversy concerning whether President Rutherford B. Hayes had actually won the 1876 election. True, the Senate rejected the next nominee, Stanley Matthews, but he was a particularly controversial candidate and his nomination occurred during a lame-duck session.

<sup>165</sup> There is an alternative explanation for the lack of retaliation. Some have speculated that President Johnson and the Senate cut a deal: Johnson accepted that he would be unable to fill the vacant seat, but in return the Senate found a place for his Supreme Court nominee by confirming him as Attorney General. See Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 22 n.17 (1983). But there is no direct evidence of a deal, and an equally likely explanation is that the Senate is often more deferential concerning nominations for the cabinet than the Supreme Court.

By 1866, when Johnson nominated Stanbery to the Supreme Court, he lacked the support of either political party. Lincoln was a staunch Republican, but in hopes of attracting Democratic votes, the Republican Convention put Johnson on the ticket as the Vice President, and they ran against the Democratic party in the 1860 election. Johnson had been a life-long Democrat. Yet, he had long cultivated a reputation as a maverick and lone wolf. Still, it was a surprise when he bucked the southern wing of the Democratic party by becoming the only Senator from a seceding state to denounce secession and refuse to resign his seat.<sup>166</sup> Nonetheless, he was a bad fit for the Republican Party, which would have never chosen him for the Presidency.

Polarized by Johnson's vetoes of the Civil Rights Act of 1866 and the Freedmen's Bureau Bill as well as his bellicose verbal attacks against the Republican Party, almost all Republicans, even the moderate ones, deserted the President.<sup>167</sup> But Democrats did not embrace him either. After all, President Johnson had become Vice President by deserting the Democratic Party to run with Abraham Lincoln in 1860, a betrayal that many Democratic officials were not willing to forgive.<sup>168</sup> And even as Johnson's relationship with the Republican party frayed, and despite his pandering to the Democratic party, Johnson still refused to meet the Democrats' demand of appointing Democrats to his cabinet and turning over lower-level patronage to the party.<sup>169</sup> Instead, Johnson tried and failed to form a third party of disaffected Republicans and Democrats, an effort that further alienated him from both parties.<sup>170</sup> For these reasons, Democrats viewed President Johnson's entreaties as too little, too late and declined to choose him as the party's nominee for the 1868 presidential contest.<sup>171</sup> Despite being President, Johnson had to sit out the election. As one contemporary journalist wrote, "Mr. Johnson . . . stands absolutely alone. He is his own sole remaining friend. Unhappily, he does not suffice."<sup>172</sup>

Johnson was not the first example of a party-less President failing to fill a Supreme Court seat. In the nineteenth century, the Senate almost never refused to confirm any of the president's nominees to a vacant seat so as to try and transfer that appointment to a subsequent president.<sup>173</sup> However, about thirty

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<sup>166</sup> See BRENDA WINEAPPLE, *THE IMPEACHERS: THE TRIAL OF ANDREW JOHNSON AND THE DREAM OF A JUST NATION* 41–46 (2019).

<sup>167</sup> See MCKITRICK, *supra* note 148, at 274–326.

<sup>168</sup> HANS L. TREFOUSSE, *ANDREW JOHNSON: A BIOGRAPHY* 338 (1997).

<sup>169</sup> *Id.* at 256–57, 268–70.

<sup>170</sup> See MCKITRICK, *supra* note 148, at 394–421.

<sup>171</sup> *See id.*

<sup>172</sup> WINEAPPLE, *supra* note 166, at 403 (quoting GEORGES CLEMENCEAU, *AMERICAN RECONSTRUCTION, 1865–1870*, at 169 (Fernand Baldensperger ed., Margaret Mac Veagh trans., 1928)).

<sup>173</sup> The other examples of blanket refusals, which this Article does not discuss, are in response to nominations made during lame-duck periods. *See* Whittington, *supra* note 84, at 414–17.

years before the Senate and Johnson came to blows, the Senate had rejected six of President John Tyler's nominees to the Supreme Court to fill two vacant seats, sending a strong signal that no nominee would be seriously considered.<sup>174</sup> On April 4, 1841, President William Henry Harrison died thirty-one days into his term, and then-Vice President John Tyler became President. The elected President, Harrison, was a Whig; his successor, Tyler, was only nominally one. Tyler had resigned from the Democratic party over objections to Jackson's aggrandizement of executive power, but he was still faithful to the states' rights-centric view that the Whigs rejected.<sup>175</sup> He was put on the ticket to attract southerners and, in the 1840 election, the Whigs won control of all three branches of government. When Harrison died, the nationalist Whigs who dominated Congress and those in the Cabinet were immediately at odds with Tyler. In fact, in one fell swoop, the majority of his cabinet resigned, and the Whigs eventually expelled Tyler from the party.<sup>176</sup> In this rare context of a party-less President, the Whig Senate did not need to fear future reprisals from Democrats because the Whigs were attacking their own former leader. To put the implication plainly: what right did Democrats have to retaliate when the Whig Congress denied their own apostate President a Supreme Court seat?

In both Tyler and Johnson's cases, the implicit understanding seems to have been that the Senate did not "steal" a seat from the Democrats because the President was not elected as a Democrat and had not subsequently become affiliated with that party. This background understanding lessened the threat of retaliation and legitimacy loss, making the quasi-packing of Reconstruction relatively safe. The changes in the Court's size in 1866 and 1869 are a successful example of court-packing, but it offers little guidance for how, in a very different partisan environment, packing would play out today.

#### IV. THE VARIETIES OF RETALIATION

There is more than one way to retaliate against the Supreme Court. The question is what are the trade-offs between different methods. What are the distinctive benefits and costs of court-packing? How effective are different Court retaliatory measures, and what threats do they pose to the stability of the

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<sup>174</sup> Tyler did manage to fill one of two vacant Supreme Court seats in a lame-duck Congress. The Whig party preferred to give the President one appointment rather than leave it to the incoming Democratic President and Senate. See Whittington, *supra* note 84, at 420 ("Rather than facing political reality and accepting that the late-term vacancy would be filled by the next president . . . Tyler . . . persisted in trying to find a nominee that the Senate would accept despite the political season. Tyler's persistence was in fact partly rewarded when the senate finally confirmed . . . Samuel Nelson . . ." (footnote omitted)).

<sup>175</sup> JARED COHEN, ACCIDENTAL PRESIDENTS: EIGHT MEN WHO CHANGED AMERICA 5–8 (2019).

<sup>176</sup> *Id.* at 22–24.

constitutional system? Constitutional theory offers few resources to answer these questions.<sup>177</sup> The relevant literatures that might prompt these questions are the constitutional hardball and anti-judicial supremacy literatures. In both, participants are so focused on either encouraging or discouraging retaliation that little weighing is done of the consequences between different tactics.

I raise the possibility that court-packing is the most dangerous form of retaliation. While court-packing is unprecedented, court-curbing measures have a long and storied history. Court-curbing, not court-packing, is the “hallowed American political tradition.”<sup>178</sup> Because curbing measures are reversible, targeted, and do not colonize the Court, they may very well be less likely than packing to destroy the court’s legitimacy. For the most ambitious political actors—the actors most likely to clash with the Court—destroying the Court’s legitimacy would likely be self-defeating in the long run. Such legitimacy is needed by the elected branches when they wish to enact ambitious constitutional and political changes.

Section A of this Part discusses court-packing as an example of “constitutional hardball,” the willingness to breach constitutional norms for partisan gains.<sup>179</sup> Section B explains how the two main schools of thought that reject judicial supremacy, departmentalism, and popular constitutionalism, have no theoretical tools to grapple with the normative implications of different methods of attacking the court.<sup>180</sup> Section C explores the history of court-curbing measures as an effective and less treacherous alternative to packing.<sup>181</sup> Finally, in light of that history, Section D considers President Franklin Roosevelt’s 1937 conflict with the Court, arguing that the threat of court-curbing rather than court-packing ultimately forced the Court to retreat.<sup>182</sup>

### A. Constitutional Hardball

Constitutional norms are the informal, unwritten, and habitual rules of political contestation that ensure stability and fair play.<sup>183</sup> They protect values like limited government, judicial independence, and the separation of powers.

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<sup>177</sup> *But see* Pozen, *supra* note 18, at 62–67 (arguing that an ethics of proportionality can set limits to retaliation against constitutional hardball).

<sup>178</sup> *But see* Smith, *supra* note 23 (arguing that court-packing is the “hallowed American political tradition”).

<sup>179</sup> *See infra* notes 183–191 and accompanying text.

<sup>180</sup> *See infra* notes 192–196 and accompanying text.

<sup>181</sup> *See infra* notes 197–242 and accompanying text.

<sup>182</sup> *See infra* notes 243–276 and accompanying text.

<sup>183</sup> *See* STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 101 (2018); Daphna Renan, *Presidential Norms and Article II*, 131 *HARV. L. REV.* 2187, 2196–98 (2017); *see also* AMAR, *supra* note 20, at xi (arguing that “America’s unwritten Constitution supports and supplements the written Constitution without supplanting it”).

One classic example was the long-standing norm, set by George Washington, against a President serving more than two terms.<sup>184</sup> After Franklin Roosevelt violated this norm by serving as President for four terms, Congress passed, and the state legislatures ratified, the Twenty-Second Amendment, constitutionalizing the norm that “[n]o person shall be elected to the office of the President more than twice.”<sup>185</sup> Breaking a constitutional norm may technically be legal, but the common understanding is that such a breach violates the spirit of the Constitution. The violation is not “unconstitutional,” but because the norm undergirds the foundational principles of our constitutional system, it is nonetheless “anticonstitutional.”<sup>186</sup>

The willingness to break norms is called “constitutional hardball.”<sup>187</sup> Today, most would argue that both political parties, perhaps to greater or lesser degrees, are breaking multiple norms, especially in the area of judicial appointments.<sup>188</sup> Court-packing would be one type of constitutional hardball because it would violate the long-standing norm that the Court’s size should not be changed for political reasons.

Progressive scholars are torn about whether to violate norms. The debate has a common underlying narrative: conservatives are winning political battles because they are ruthlessly breaking norms, and progressives will continually lose until they are willing to respond in kind. It is time, hard-nosed progressives argue, to “play dirty” and stop bringing knives to gun fights.<sup>189</sup> Refusing to break norms is a form of unilateral disarmament. Progressives too should play

<sup>184</sup> MICHAEL J. KORZI, PRESIDENTIAL TERM LIMITS IN AMERICAN HISTORY: POWER, PRINCIPLES & POLITICS 41 (2011).

<sup>185</sup> U.S. CONST. amend. XXII, § 1.

<sup>186</sup> Bradley & Siegel, *supra* note 9, at 298, 301; Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 182 (2018).

<sup>187</sup> The foundational article coining the term and addressing this topic is Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004). For a refinement of the theory, see Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920–26 (2018). For an analysis of constitutional hardball at the state level, see Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217 (2019).

<sup>188</sup> See David E. Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 COLUM. L. REV. ONLINE 207, 212–22 (2018), [https://columbialawreview.org/wp-content/uploads/2018/12/Bernstein-CONSTITUTIONAL\\_HARDBALL\\_YES\\_ASYMMETRIC\\_NOT\\_SO\\_MUCH.pdf](https://columbialawreview.org/wp-content/uploads/2018/12/Bernstein-CONSTITUTIONAL_HARDBALL_YES_ASYMMETRIC_NOT_SO_MUCH.pdf) [<https://perma.cc/P7CH-JJY7>] (challenging Fishkin and Pozen’s thesis that Republicans are almost unilaterally engaging in constitutional hardball by highlighting examples of contentious Democratic behavior); Fishkin & Pozen, *supra* note 187, at 943 (observing that “Republicans play harder hardball”); Jed Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 COLUM. L. REV. ONLINE 85, 87, 101 (2019), [https://columbialawreview.org/wp-content/uploads/2019/04/Shugerman-HARDBALL\\_VS\\_BEANBALL\\_IDENTIFYING\\_FUNDAMENTALLY\\_ANTIDEMOCRATIC\\_TACTICS.pdf](https://columbialawreview.org/wp-content/uploads/2019/04/Shugerman-HARDBALL_VS_BEANBALL_IDENTIFYING_FUNDAMENTALLY_ANTIDEMOCRATIC_TACTICS.pdf) [<https://perma.cc/CB84-77XE>] (“Bernstein is right that Democrats engaged in hardball tactics by . . . making recess appointments . . . . On this question there may be rough symmetry . . .”).

<sup>189</sup> See FARIS, *supra* note 3.

constitutional “hardball” or perhaps even “beanball.” Other progressives, alongside many conservatives, retort that playing dirty exacerbates “a destructive race to the normative bottom” that will take down the entire constitutional system.<sup>190</sup>

The debate within progressive circles is of interest to scholarship because it is a recurring one, the latest iteration of a problem that has long plagued constitutional politics. The problem rears its head whenever one party, conservative or progressive, tries to radically shake up the constitutional system.

The constitutional hardball debate has reached a standstill because it is stuck in a dichotomy between waging a total war on the other political party and effectively surrendering by rigidly adhering to the expired norms of a past age. As history bears out again and again, norm-breaking is inevitable during states of heightened change and constitutional conflict, and it will always raise fears of instability and chaos.<sup>191</sup> That possibility is the price of change. Although constitutional theory cannot completely ward off this danger, it can still establish new outer boundaries to contain the state of heightened conflict.

### *B. Departmentalism and Popular Constitutionalism*

Multiple schools of constitutional thought are hostile to judicial supremacy, the philosophy that the Supreme Court has the final and ultimate word over the meaning of the Constitution. These theories, specifically departmentalism and popular constitutionalism, emphasize the inherently political nature of constitutional questions and celebrate the other political branches’ resistance to the Court.<sup>192</sup> Those who reject judicial supremacy usually begin by pointing out that much constitutional interpretation, indeed interpretation over the most foundational constitutional questions, occurs outside the Court and in opposition to, or at least in tension with, Court doctrine. The point is not only descriptive, but normative. Departmentalists believe that judicial supremacy conflicts with the separation of powers as evidenced in the text, structure, and history of the Constitution.<sup>193</sup> A sister school of constitutional theory, popular constitu-

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<sup>190</sup> Neil Siegel, *Some Notes on Court-Packing, Then and Now*, BALKINIZATION (Nov. 26, 2017), <https://balkin.blogspot.com/2017/11/some-notes-on-court-packing-then-and-now.html> [<https://perma.cc/78QF-E3NF>]; see also Feldman, *supra* note 30.

<sup>191</sup> Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 579, 593–96 (2007); Tushnet, *supra* note 187, at 532–33.

<sup>192</sup> For a comparison of popular constitutionalism and departmentalism, see Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

<sup>193</sup> See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 60–63 (2006); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 52 (2007); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 287 (1994).

tionalism, shifts the emphasis from the separation of powers to popular sovereignty.<sup>194</sup> Since the people are the ultimate authors of the Constitution, the thinking goes, they must have the final say over its meaning. There is now a canonical list of examples of resistance to judicial supremacy, mostly by the most renowned Presidents in United States history: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and, on account of his court-packing attempt, Franklin Delano Roosevelt.<sup>195</sup>

The rise of twenty-first century populism casts a different and darker shadow on these moments. Recently, in Europe and South America, presidential resistance to judicial decisions, legitimized in the language of popular sovereignty, has been a prelude for that president to destroy the judiciary and roll back liberal democracy itself.<sup>196</sup> In the name of the people, demagogues weaken citizens' individual and democratic rights. What is the dividing line then between these new demagogues' attacks on their courts and those of the greatest American Presidents? The question matters for the United States because future U.S. Presidents will undoubtedly resist the Supreme Court. Criteria are needed to decide whether such actions are a continuation of a great American tradition or the beginning of a descent into semi-authoritarianism.

### C. Court-Curbing, but Not Packing

The elected branches have successfully won battles against the Supreme Court by curbing the Court, not packing it. Unlike packing, which seeks to take-over the court, curbing measures seek to force the Court to back down or retreat.<sup>197</sup> Curbing includes, among other measures, narrowly interpreting cases, stripping jurisdiction, or threatening these or other forms of retaliation

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<sup>194</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 58 (2004). For other influential normative pushbacks on judicial supremacy that do not neatly fit into either the departmentalism or popular constitutionalism camp, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CALIF. L. REV. 1323, 1324 (2006).

<sup>195</sup> WHITTINGTON, *supra* note 193, at 30.

<sup>196</sup> See ANDREW ARATO, *POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY* 198, 206, 209, 249–51 (2016); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 125–30 (2018); Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L. L. 285, 185, 294–302 (2015); see also Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 571–81 (2018) (describing the new authoritarian playbook).

<sup>197</sup> Here, this Article differs from most political scientists who define curbing more broadly so that it would include court-packing. See, e.g., TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 25 (2011) (defining curbing as “legislative attempts to limit or remove the Supreme Court’s power”).

through the introduction of bills on the floor of Congress.<sup>198</sup> Although political actors were repeatedly tempted to court-pack, they ultimately rejected it. By contrast, there is a long and strong tradition of retaliating against the Court through curbing measures that are reversible and that seek to check the Court rather than colonize it.

Historically, these milder forms of retaliation have been the first step in a two-step strategy. First, the elected branches neutralized the Court by curbing it. Second, over time, they appointed jurists to the Court who would not only rule that the elected branches' policies were constitutional, but also would actively restructure politics in the ascendant political coalition's favor.

Court-packing offers an alluring promise of skipping the first step of neutralization, thus saving time, headaches, and political capital. The packer can skip to having an allied Court that will not only step out of the way, but also actively help it enact its agenda. But the promise may very well be a false one. Because packing poses grave damage to the Supreme Court's legitimacy, the elected branches may lose the potential for a future ally in the Court—an ally essential for parties that seek to radically reshape constitutional law and politics.

Curbing measures may bruise the Court's legitimacy, but they are less likely than packing to leave it broken. Because packing is irreversible, the sole form of available retaliation is more packing, an escalatory pattern that is lethal for the Supreme Court. Even if the Court only expands once, there is a large risk that losers in controversial cases will disobey the Court and enjoy increased support for such resistance on the basis that a packed Court's rulings do not merit respect. Of the three branches, this disobedience is especially perilous for the Supreme Court. Lacking the power of the purse and the sword, the Supreme Court as the "least dangerous branch" must especially rely on its institutional legitimacy to ensure compliance with its rulings. Court-packing robs the Court of its main source of power, leaving it defenseless and likely to wither away over time.

By contrast, curbing measures may bruise the Court's legitimacy, but they are less likely to leave it broken. Reversible measures may avoid the downward spiral. Rather than escalate, the newly elected representatives may restore, at least partially, the status quo ante by undoing what their predecessors had wrought.

To be sure, curbing may change facts on the grounds, possibly affecting future Court rulings. But the legitimacy of the Court is perhaps better protected because its membership is untainted by these political machinations. By contrast, packing colonizes the court by infiltrating it from within. It tars broadly, potentially sully all future decisions and providing a ready-made justifica-

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<sup>198</sup> For additional court-curbing measures, see Pozen, *supra* note 18, at 15.



tion for disobedience. The taint of appointments perceived as illegitimate will likely last at least as long as the newly appointed Justices sit on the Court. Curbing avoids this problem by attacking from the outside in order to check the Court, forcing it to retreat, but not transform. Curbing reflects primarily on the Congress who may be accused of violating judicial independence. The Court is the victim, not the new perpetrator. During this time of heightened hostility, the Court can lie low, wait for the storm to pass, and then, when calmer times return, begin to regain whatever legitimacy it lost.

Let us discuss in more detail some of the alternatives to court-packing. To illustrate, I will focus primarily on how the Republican Party combatted the Supreme Court in the age of the Civil War and Reconstruction. The Republicans aimed to radically alter the constitutional law on race, federalism, and war powers. The Supreme Court stood in their way.

One method the Republicans used to resist the Court was to narrowly interpret its decisions. Under this method, the court-curber vows to adhere to the Court's decision as binding on the parties, but otherwise contests the decision's scope and its effect on third parties. Republicans followed this strategy to resist the *Dred Scott* decision, which held that African Americans were not citizens and that Congress had no power to regulate slavery in the territories. In his First Inaugural Address, Lincoln acknowledged that Supreme Court decisions are "binding in any case upon the parties to a suit." Yet,

[a]t the same time, the candid citizen must confess that if the policy of the Government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.<sup>199</sup>

One way to narrowly interpret a case is to dismiss wide swaths of a decision away as dicta. Lincoln and the Republicans utilized this strategy to combat *Dred Scott*.<sup>200</sup> One of the main lines of attack against the decision was that only the decision's first holding about black citizenship was necessary for resolving the case, and hence the decision on Congress's lack of power to regulate slavery was non-binding dicta. Influential Republican William Pitt Fessenden stated that, because the issue of the territory was "not before [the Supreme Court], I tell [the Supreme Court] those questions are for me as well

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<sup>199</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 89, at 262, 268.

<sup>200</sup> See *The Past and Present*, CHI. DAILY TRIB., Mar. 12, 1857, at 2 ("We scarcely know how to express our detestation of its inhuman dicta, or to fathom the wicked consequences which may flow from it.").

as for them.”<sup>201</sup> Indeed, states passed resolutions asserting the same point as Fessenden’s, and in 1862, Congress passed a law reasserting its power by banning slavery over the territories.<sup>202</sup>

But what about *Dred Scott*’s first holding on black citizenship? This was surely not dicta. Here, Lincoln’s Attorney General, Edward Bates, used another interpretive strategy: he resolved ambiguities in the decision in his own favor. The problem Attorney General Bates faced was that, by statute, a ship captain in the coastal trade must be a citizen, which under *Dred Scott*, meant that stateless African Americans were ineligible to serve. In his legal opinion, Bates “raise[d] no question upon the legal validity of the judgment in [*Dred Scott*]” and agreed that “Scott[] is not a citizen . . . because he is a negro of African descent.”<sup>203</sup> But Bates also noted that Scott was “of pure African blood.”<sup>204</sup> Other African Americans, Bates asserted, who were of mixed descent—whether Moroccan, Arab, or many other possibilities—were still citizens.<sup>205</sup> This interpretation, if implemented, would have effectively allowed a majority of African Americans to regain the citizenship *Dred Scott* had stripped from them.

Another court-curbing option is jurisdiction-stripping. Article III, Section 2 of the Constitution gives Congress the power to make exceptions to the Supreme Court’s appellate jurisdiction.<sup>206</sup> If Congress anticipates a hostile Supreme Court decision, it can “strip” the Court of jurisdiction over the case. The practice has a significant history. Most famously, it was used to protect the reconstruction of the South after the Civil War. In *Ex parte McCardle*, the Court heard a case originating in a habeas corpus statute that put into question the constitutionality of the Reconstruction Acts which authorized northern military rule over the South in order to break down the power of the large plantation owners.<sup>207</sup> Three days after the Court heard oral argument, Congress repealed the statute that authorized the Court to hear the case, and the Court accepted that it no longer had jurisdiction. Other successful instances of jurisdiction-stripping of the Supreme Court include issues of unlawful detention or imprisonment,<sup>208</sup> deportations of undocumented immigrants,<sup>209</sup> strike-breaking in-

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<sup>201</sup> CONG. GLOBE, 35th Cong., 1st Sess. 616–17 (1858).

<sup>202</sup> FRIEDMAN, *supra* note 85, at 119.

<sup>203</sup> *Id.* at 120 (emphasis omitted) (quoting 10 Op. Att’y Gen. 382, 410, 412 (1862)).

<sup>204</sup> *Id.* (quoting 10 Op. Att’y Gen. at 410).

<sup>205</sup> *Id.* (quoting 10 Op. Att’y Gen. at 412).

<sup>206</sup> U.S. CONST. art. III, § 2.

<sup>207</sup> 74 U.S. (7 Wall.) 506, 507 (1868); William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 236 (1973).

<sup>208</sup> Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2254 (2018)), repealed by Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44, restored by Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.

junctions,<sup>210</sup> state prisoners filing successive habeas corpus petitions,<sup>211</sup> property claims by pardoned and noncombatant Southern rebels,<sup>212</sup> and conditions of confinement of a designated enemy combatant.<sup>213</sup> In the 1970s and 1980s, there were high profile, nearly successful efforts to strip jurisdiction on school prayer, abortion, and desegregation of busing.<sup>214</sup> In the early 2000s, the Senate passed bills to strip the Supreme Court of jurisdiction over school prayer and gay marriage.<sup>215</sup> Unlike court-packing, there has never been a strong norm against jurisdiction-stripping. It is a practice that both parties have engaged in and supported.<sup>216</sup>

Jurisdiction-stripping also differs from court-packing because it is reversible. Another Congress can always restore jurisdiction. The status quo is then returned: the Supreme Court can proceed to rule on the cases from which it was once barred. Indeed, that is exactly what occurred in *McCardle*, the above-mentioned jurisdiction-stripping case. Recall that to save Reconstruction, in 1868 Congress stripped the Supreme Court of jurisdiction over appellate review of writs of habeas corpus, and in so doing effectively removed the Court as an impediment to policy over the incorporation of the Southern states. After the battle over Reconstruction ended, Congress quietly and without debate restored the Supreme Court's appellate jurisdiction over habeas corpus cases in 1885.<sup>217</sup>

Perhaps the most underappreciated option is one that requires no actual action at all. Often, the mere threat of court-curbing has cowed the Court. In

<sup>209</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

<sup>210</sup> Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2018)). Traditionally, this act is interpreted solely as lower-federal-court jurisdiction-stripping, which is incorrect. *See, e.g.,* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 987 n.306 (2013) (depicting the statute as a limit on the authority of lower federal courts). However, the statute's language is broad: it states that "[n]o court of the United States shall have jurisdiction." Norris-LaGuardia Act § 7, 28 U.S.C. § 107. Perhaps many consider the Norris-LaGuardia Act to be an example of lower-court jurisdiction-stripping because the Supreme did not issue injunctions against strikes directly, but only reviewed their validity on appeal or had them issued through a remand with instructions. But because the Supreme Court's way of issuing an injunction is to issue a remand to lower courts with instructions and the lower courts now lack jurisdiction, that is effectively stripping jurisdiction from the Supreme Court.

<sup>211</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 34 U.S.C.).

<sup>212</sup> Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

<sup>213</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 and 42 U.S.C.).

<sup>214</sup> Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900–02 (2011).

<sup>215</sup> *Id.* at 910–16.

<sup>216</sup> Grove, *supra* note 9, at 522–25.

<sup>217</sup> Grove, *supra* note 210, at 991.

political science, Tom Clark has presented thorough and persuasive evidence that Congress's introduction of court-curbing legislation, regardless of whether it is actually enacted, causes the Court to retreat.<sup>218</sup> The theory is that hostile legislation signals to the Court that public support for it as an institution is waning. Knowing that its power to force compliance with its decisions rests solely on political legitimacy, and in order to conserve and rebuild that legitimacy, the Court begins to refrain from exercising its power of judicial review.<sup>219</sup> Qualitative studies reach the same conclusion that "the Justices have been 'acutely aware of the attacks against their decisions, and [have been] willing to make concessions when they felt that danger had become too threatening.'"<sup>220</sup>

Some might argue that the court-curbing threat option actually bolsters the case for court-packing legislation. David Pozen, although leery of court-packing, nonetheless writes that "[t]he best argument for initiating a debate about court packing . . . is that such a debate might alter the political bargaining environment."<sup>221</sup> Given, however, the wide variety of tools Congress has to curb the Supreme Court, there is little additional benefit to selecting court-packing in particular. And there are costs. Politics is unpredictable, but ideas can take on a life of their own. The repeated invoking of court-packing makes it more and more palatable. And the current political system often magnifies the most radical and angry voices, forcing moderates to reverse positions when they stray from the radical line. In this environment, cooler heads will not always prevail. The safer course of action, then, is to refrain from opening the Pandora's box of court-packing.

Of course, if the goal is to destroy the legitimacy of the Supreme Court—or if one considers it an acceptable cost to do so—court-packing is an appropriate measure. In recent years, populist presidents in Hungary, Poland, Turkey, and Venezuela have packed their courts because their goal was the destruction of the old judiciary.<sup>222</sup> Indeed, packing was the beginning salvo in the destruction of a constitutional system. Their argument was not primarily about stolen seats or the necessity of retaliation in a game of constitutional hardball. Rather, these presidents intentionally and openly packed the courts to destroy the old, allegedly corrupt, constitutional order.

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<sup>218</sup> See generally CLARK, *supra* note 197.

<sup>219</sup> *Id.* at 7.

<sup>220</sup> Grove, *supra* note 9, at 525 n.350 (quoting WALTER F. MURPHY, CONGRESS AND THE COURT 64 (1962)). This is also the central thesis of FRIEDMAN, *supra* note 85, and LASSER, *supra* note 151.

<sup>221</sup> David Pozen, *Hardball and/as Anti-hardball*, LAWFARE (Oct. 11, 2018), <https://www.lawfareblog.com/hardball-and-as-anti-hardball> [<https://perma.cc/SGG7-F57K>].

<sup>222</sup> See *supra* note 196 and accompanying text.

Indeed, the most renowned legal scholars leading the push for court-packing—Mark Tushnet, Michael Klarman, and Sanford Levinson—have long harbored skepticism or deep hostility towards judicial review, the Supreme Court, and sometimes the Constitution itself. To be clear, I do not question the sincerity of their belief that court-packing is justified by recent circumstances. Nor do their arguments somehow make them dupes or tools of populist authoritarians abroad. My purpose is to underscore that the dangers of court-packing may weigh less heavily for these scholars. In 2000, Mark Tushnet published *Taking the Constitution Away from the Courts*, a book that advocated for abolishing judicial review because it would “enable greater self-government.”<sup>223</sup> In 2006, Sanford Levinson published the first book in what became a trilogy, condemning not only judicial review but the entire U.S. Constitution as “undemocratic.”<sup>224</sup> More than two decades ago, Professor Michael Klarman, in his careful and balanced studies of constitutional theory, concluded that the “Supreme Court . . . imposes culturally elite values in a marginally countermajoritarian fashion” and denied that “in a democratic society . . . one [can] justify entrusting resolution of fundamental questions of social policy to an institution possessed of a culturally elite bias.”<sup>225</sup> To the question of whether the “Constitution deserve[s] our fidelity,” he answers, “[o]f course not.”<sup>226</sup> The alarms about court-packing will likely ring hollow for these scholars because the revolutionary consequences of court-packing are what they have long sought.

Whether progressives should pack the Court is a complicated political question. The contribution here is to enrich the understanding of the calculation by using history to highlight the costs of a semi-permanently tainted Supreme Court for the health of the constitutional system and for political actors.

Political actors also have a long-term partisan interest in preserving the Supreme Court. Long-term constitutional and political change requires the indirect support of the Supreme Court. Proponents of court-packing claim they are playing defense. The tactic is a shield to protect against the oncoming onslaught of Supreme Court rulings that are aimed at progressive policies on campaign finance, gerrymandering, global warming, and redistribution.<sup>227</sup> If this were true, a permanently hobbled Supreme Court might be relatively innocuous or at least not catastrophic for progressives. But court-packing would

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<sup>223</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 163 (1999).

<sup>224</sup> See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 124–27 (2006).

<sup>225</sup> Michael J. Klarman, *What’s So Great About Constitutionalism*, 93 NW. U. L. REV. 145, 146, 193 (1998).

<sup>226</sup> Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 381 (1997).

<sup>227</sup> See Samuel, *supra* note 25 (suggesting that failure to court-pack will result in “decades of misery for labor unions, voting rights,” and other progressive causes).

not just stop the Court from striking down progressive measures, nor would it merely get the Court out of the way because courts do not only obstruct policy; they actively promote it. For that reason, court-packing is not just a defensive shield, but also an offensive sword. A packed court would not “dismantle with weapons inside the citadel” but would eventually “turn those weapons against their enemies.”<sup>228</sup>

Supreme Court rulings that align with the ideology of the dominant political party have been a common phenomenon. Scholars often tie themselves into knots worrying about the Court as an undemocratic institution, and indeed, the Court has stood in the way of the elected branches.<sup>229</sup> Although the Court does sometimes obstruct a rising political movement, just as often, a friendly court acts as a partner to the dominant party of an era, helping it overcome the fragmentation of the American political system. The Supreme Court usually is in line with the presidential wing of the dominant political party.<sup>230</sup> While presidents share judicial selection responsibility with the Senate, the singularity and first-mover advantages give presidents a significant advantage in the selection of the nominee.<sup>231</sup>

This congruence between the presidential wing and the Court is especially important for political and constitutional change because achieving such change is a long and protracted battle in the American system of divided government. Unlike parliamentary systems that give total control to one political party or coalition, the U.S. Constitution creates a great deal of gridlock by dividing powers vertically through federalism and horizontally through checks and balances.<sup>232</sup> Other vetoes have also developed over time, such as the filibuster, the committee structure of Congress, and the Hastert rule, in which the Speaker of the House will not bring a bill to the floor unless it has the support of more than half of the members of the majority party.<sup>233</sup>

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<sup>228</sup> Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 117, 119 (Ronald Kahn & Ken I. Kersch eds., 2006).

<sup>229</sup> For the classic exposition of Supreme Court as an undemocratic institution, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986). For the first of a five-part history of this dilemma, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

<sup>230</sup> There is now a large and rich literature based on this premise. The foundational article is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For a review of the larger literature, see Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005).

<sup>231</sup> See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000).

<sup>232</sup> Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 642–43 (2000).

<sup>233</sup> Holly Fechner, *Managing Political Polarization in Congress: A Case Study on the Use of the Hastert Rule*, 2014 UTAH L. REV. 757, 758–59.

While the Court may contribute to that gridlock, it just as often helps the presidential wing of a national party mitigate or even overcome the impasse by helping the executive overcome federalism, channel potentially divisive policies, and reconstruct the political arena in more favorable ways.<sup>234</sup> Federalism creates an opening for states to undermine national policies. For example, by 1816, the once divisive National Bank was embraced by the national and presidential wings of the Republican Party, including by Presidents Madison and Monroe. But it was susceptible to political attack by the states. In its 1819 decision, *McCulloch v. Maryland*, the Court protected the National Bank, not just by upholding its constitutionality, but by striking down Maryland's attempt to tax it.<sup>235</sup> "[T]he power to tax involves the power to destroy," Chief Justice Marshall wrote in the now canonical opinion.<sup>236</sup> So too in the late nineteenth century, a business-minded Republican Party, dominant in national elections and prompted by the creation of the railroads, forged policies to create a new national market in goods.<sup>237</sup> By applying the Dormant Commerce Clause doctrine with new vigor, the Supreme Court struck down state legislation that acted as a barrier to a national free market.<sup>238</sup> The same logic applies to civil rights, an issue discussed in the following Section.<sup>239</sup>

Lastly, in 1962, the Supreme Court in *Reynolds v. Sims* reconstructed the political system in a way favorable to urban liberal Democrats by establishing the doctrine of "one person, one vote."<sup>240</sup> Many of the most liberal voters lived in cities and malapportionment gave disproportionate power to rural and conservative constituents. A decade after President Roosevelt's initial election, *The Nation* magazine complained that "[t]he present gerrymandering of state districts amounts to supporters of the New Deal being denied equal voice with its opponents."<sup>241</sup> By enshrining the principle of "one person, one vote," the Su-

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<sup>234</sup> For this point and the examples that illustrate it, this Article draws heavily from WHITTINGTON, *supra* note 193, at 105–57.

<sup>235</sup> 17 U.S. (4 Wheat.) 316, 437 (1819); *see also* WHITTINGTON, *supra* note 193, at 111 (discussing the outcome of *McCulloch* and its effect of "enhanc[ing] judicial authority").

<sup>236</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 431.

<sup>237</sup> RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900*, at 321, 348 (2000).

<sup>238</sup> *See* KUTLER, *supra* note 88, at 127–39 (reviewing several bank tax cases decided during and shortly after the Civil War).

<sup>239</sup> *Infra* notes 271–275 and accompanying text.

<sup>240</sup> 377 U.S. 533, 558 (1964); *see also* *Baker v. Carr*, 369 U.S. 186, 199 (1962) (establishing precedent for apportionment upon which the *Reynolds* court relied); WHITTINGTON, *supra* note 193, at 127 ("The Court's willingness to extend constitutional principles to cover legislative apportionment was welcomed by liberals . . .").

<sup>241</sup> WHITTINGTON, *supra* note 193, at 127.

preme Court increased the representation of urban voters, a majority of them liberal.<sup>242</sup>

Court-curbing is a long-standing practice in American political history, but that does not mean that all forms of retaliation are the same. Court-packing may pose unique dangers because it is irreversible and because it colonizes the Court. Perhaps for this reason, the taboo against court-packing has rarely, if ever, been tampered with. Other court-curbing options should be more palatable for those interested in scaling back the excesses of the Court while still shielding it against irreparable harm. While court-packing is nearly unprecedented, other forms of court-curbing are an American tradition.

#### *D. Revisiting Roosevelt's Court-Packing*

Now that the Article has laid out the history and theory of court-packing and curbing, the traditional narrative about President Franklin Roosevelt's court-packing scheme can be put in proper perspective. Most notably, Congress's court-curbing threats, not Roosevelt's court-packing plan, forced the Supreme Court to retreat. During Roosevelt's first term, the Supreme Court repeatedly struck down landmark New Deal laws, such as the National Industrial Recovery Act, the Agricultural Adjustment Act, and various state minimum wage laws.<sup>243</sup> In November of 1936, Roosevelt won reelection by a whopping margin, capturing every state except for the small ones of Maine and Vermont.<sup>244</sup> On February 5, 1937, Roosevelt announced his court-packing plan, which would have added one Justice for each current Justice who was over seventy years old and refused to retire.<sup>245</sup> The effect would have been the addition of six Justices, enough, Roosevelt believed, to guarantee a solid majority of New Dealers on the Court. Less than two months later, however, in *West Coast Hotel v. Parrish*, the Supreme Court shocked the legal and political world by declaring that state minimum wage laws were constitutional, effectively reversing a previous controversial decision made less than a year and a half earlier.<sup>246</sup> But this was just the beginning: the Court continued to issue rulings that seemed to de facto overturn its previous strict interpretation of the Commerce Clause and congressional and presidential power. The Court's 180-degree turn, along with resistance from Congressional Democrats in Congress, took the wind out of the sails of Roosevelt's packing proposal. According to

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<sup>242</sup> *Id.*

<sup>243</sup> LEUCHTENBURG, *supra* note 10, at 26–82.

<sup>244</sup> JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 239 (2010).

<sup>245</sup> Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1, 12–16 (2013).

<sup>246</sup> 300 U.S. 379, 400 (1937).



the traditional narrative, even though Roosevelt lost the court-packing battle, he won the war.<sup>247</sup> The threat of court-packing was responsible for the “switch-in time that saved nine.”<sup>248</sup> And many claim that Roosevelt’s attempt was a legitimate part of a long tradition of court-packing.<sup>249</sup>

This Article’s discussion of the previous history, or lack thereof, of court-packing prompts a shift in emphasis from the traditional narrative. First, what Roosevelt proposed was nearly novel. With the exception of the 1866/1869 example, Roosevelt’s effort was the first serious and nearly successful attempt to increase the size of the Court for purely political reasons. Indeed, unlike today’s opponents of court-packing who accept proponents’ allegations of the practice’s long history, the 1937 opponents repeatedly asserted that the plan “violate[d] all precedents in the history of our Government and would in itself be a dangerous precedent for the future.”<sup>250</sup>

Second, the Roosevelt story is another example of how court-packing is an excessive and unnecessary form of retaliation. As historians repeatedly point out, the timeline does not fit the narrative that the threat of court-packing was responsible for the Court’s reversal. The key swing vote was Justice Owen Roberts, and the key case was *Parrish*. There was no reason to hear the case unless the purpose was to reverse prior precedent, and Justice Roberts shockingly voted to hear the case before Roosevelt’s reelection—and almost five months before the president announced his court-packing plan.<sup>251</sup> Further, Roberts cast his vote to uphold the challenged minimum wage law on December 19, 1936, more than three months before he, or the public, knew of the court-packing threat.<sup>252</sup> Thus, court-packing could not have motivated the “switch-in-time.”

Historians debate Justice Roberts’s true motive. Revisionists argue that Roberts’s vote in *Parrish* was a principled and legal one that naturally flowed from evolving doctrine.<sup>253</sup> But many others respond that, although a previously underappreciated doctrinal path existed, it was far from inevitable that Roberts

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<sup>247</sup> Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 132 (“The conventional wisdom . . . is that FDR lost the battle, but won the war, since the Court . . . acceded to the New Deal’s constitutionality.”).

<sup>248</sup> For a debate about who invented this common quip, see John Q. Barrett, *Attribution Time: Cal Tinney’s 1937 Quip, “A Switch in Time’ll Save Nine,”* 73 OKLA. L. REV. (forthcoming Nov. 2020).

<sup>249</sup> See *supra* notes 20–24, 32–35 and accompanying text.

<sup>250</sup> S. REP. NO. 75–711, at 3 (1937).

<sup>251</sup> MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 412–13 (2002).

<sup>252</sup> BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 18 (1998).

<sup>253</sup> The landmark revisionist text is CUSHMAN, *supra* note 252.

would take it.<sup>254</sup> While the court-packing plan probably did not sway Roberts *per se*, plenty of other court-curbing measures, as well as public pressure, likely influenced his decision. Between January and June of 1935, Congress introduced twelve court-curbing bills, and it introduced eight more in January of 1937.<sup>255</sup> This court-curbing threat and the public opinion it reflected, along with the maelstrom of criticism, likely influenced the Court's reversal. As Jeff Shesol states,

[E]ven though the *Parrish* decision preceded the launch of the Court plan, a credible case can be made that Roberts and Hughes were influenced by the criticism of [striking down minimum wage laws]; or by rising popular exasperation with the Court; or the indignation of the legal journals; or the scale of Roosevelt's reelection, which surprised the justices; or, through 1936, the mounting threat—or certainty—that either FDR or Congress was about to take serious action to curb the Court.<sup>256</sup>

If this increasingly widespread interpretation is right, then the “switch-in time” is a reflection of the power, not of the court-packing plan, but of traditional court-curbing threats. The entire court-packing plan was unnecessary, and the cost was high: the failure sapped almost all political capital from Roosevelt's domestic agenda.<sup>257</sup> The “switch-in-time” is part of an American tradition, but it is not the mythical court-packing one. Instead, the “switch-in-time” is one instantiation of a long history of using the threat of court-curbing to subdue the Court.

Lastly, Roosevelt's court-packing loss was beneficial for civil rights as the Court, unsullied from court-packing and filled with Roosevelt appointments, would go on to issue key rulings prohibiting discrimination on the basis of race. As I argued previously, to overcome the fragmentation of the American political system, an allied Court is essential for the success of a political party's agenda.<sup>258</sup> In the 1930s, conservatives within the Democratic party were taking advantage of that fragmentation to obstruct the New Deal.<sup>259</sup> A large

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<sup>254</sup> See, e.g., Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1076–78 (2005) (discussing doctrinal evolution).

<sup>255</sup> CLARK, *supra* note 197, at 201.

<sup>256</sup> SHESOL, *supra* note 244, at 415.

<sup>257</sup> See Pildes, *supra* note 247, at 132 (“FDR's legislative assault on the Court destroyed his political coalition . . . and ended his ability to enact major domestic policy legislation, despite his huge electoral triumph in 1936.”).

<sup>258</sup> See *supra* notes 228–241 and accompanying text.

<sup>259</sup> See generally IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013).

faction within these conservatives were southerners.<sup>260</sup> New Dealers were nationalists trying to centralize power to better manage new national challenges such as fighting a World War and managing economic depressions. By the 1936 election, African Americans were also beginning to become a substantial part of the New Deal coalition. By contrast, many southern Democrats sought to preserve local institutions that protected segregation and the patronage system of political parties.<sup>261</sup> Court-packing constituted one part of what became a larger war against the South's stronghold in both Congress and the state legislatures.<sup>262</sup> In the Executive Reorganization Act, for example, Roosevelt tried to liberate the structure of the executive from the control of congressional committees dominated by southerners.<sup>263</sup> Roosevelt also supported and achieved the abolition of the requirement that two-thirds support of convention delegates was necessary to be nominated as the Democratic candidate president, a rule that had ensured southern approval of any candidate.<sup>264</sup> And in the 1938 midterm elections, Roosevelt intervened in the Democratic Party primaries, most aggressively in southern states, to campaign on behalf of progressive Democrats against conservative incumbents.<sup>265</sup> While Jefferson and Lincoln had declined to pack the Court to avoid alienating moderates within their coalitions, Roosevelt embraced court-packing as part of a larger plan to overcome conservatives within the Democratic Party.

Roosevelt specifically chose the number of six new Justices because he believed that number necessary to neutralize the Court given the South's role in the Democratic leadership. Moderate southerners in the Senate held key leadership positions, as represented by the "Big Four" of Majority Leader Joseph Robinson, Jimmy Byrnes, Pat Harrison, and Vice President John N. Garner.<sup>266</sup> These moderates were *only* willing to accept the expansion of the Court by two seats.<sup>267</sup> Although limited expansion would neutralize the Court from its most aggressive rulings against the New Deal, it would still not pose a

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<sup>260</sup> James Patterson notes that "southern Democrats composed the chief Democratic opposition to the New Deal in the House. The percentage of southern Democrats who were conservatives was also greater than that of Democrats from other sections." JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 343-44 (1967). In the Senate, the picture is more complicated as "the percentage of Democrats from each section were conservative was remarkably similar." Nonetheless, "most Senate Democratic conservatives came from the South and West." *Id.* at 350.

<sup>261</sup> See SIDNEY M. MILKIS, THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL 52-74 (1993).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 125-49.

<sup>264</sup> *Id.* at 69.

<sup>265</sup> *Id.* at 75-98.

<sup>266</sup> See KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 82-85 (2004).

<sup>267</sup> See *id.*

threat to southern moderates. Roosevelt had promised the next appointment to Robinson, a promise that Robinson had substantial power to enforce as the Senate Majority Leader. Under this scenario, Senator Harrison would become the next Majority Leader, and Vice President Garner would become the next President after Roosevelt served out his term.<sup>268</sup> By contrast, Roosevelt's plan to install not two but six new Justices was designed to ensure that, even while appointing Robinson, overall, he could still appoint a majority of radical New Dealers to the Court.<sup>269</sup> These radicals could then go on to proactively enforce the New Deal and, in ways Roosevelt might not have expected, civil rights against the recalcitrant South.

In the past, successful battles against the Court have begun with first halting its attacks on legislation and then recruiting Justices through appointments. Through court-packing, however, Roosevelt sought to skip the first step and immediately turn the Court into an allied institution. If he had succeeded, he would have very likely undermined the Court's legitimacy and hence its ability to ensure compliance with its rulings. Instead, conservative and moderate southern Democrats won the battle against Roosevelt's court-packing plan, but still lost a larger war.<sup>270</sup> Less than a year after the failed court-packing plan, with the appointment of Stanley Reed to the Supreme Court in January of 1938, the Court had a majority of reliable Justices who would uphold most New Deal legislation, even discounting the swing vote of Justice Roberts. With the confirmation of Justice Robert H. Jackson in July of 1941, Roosevelt had appointed seven of the nine Justices on the Supreme Court.<sup>271</sup>

Roosevelt's record on civil rights is not a strong one.<sup>272</sup> Nonetheless, his appointments were important to the development of progressive case law on the issue of race. While appointing new Justices, Roosevelt created the Civil Rights Division of the Department of Justice, which, on the basis of creative legal theories, initiated suits, filed amicus briefs, and made oral arguments that prodded the Court to take the initial steps against segregation.<sup>273</sup> The Roosevelt Justice Department had mixed success with the Court, but the Truman Justice Department maintained FDR's policy.<sup>274</sup> This mix of Supreme Court appointment and nudging by the Civil Rights Division led to the string of desegrega-

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<sup>268</sup> See *id.* at 83.

<sup>269</sup> See Cushman, *supra* note 245, at 12–13 (discussing the impact each additional appointment would likely have on New Deal legislation).

<sup>270</sup> Although southern moderates and conservatives played a large role, the coalition against court-packing was broader and more diverse. See PATTERSON, *supra* note 260, at 95–122.

<sup>271</sup> Robert Harrison, *The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography*, 2 LAW & HIST. REV. 165, 165, 194 (1984).

<sup>272</sup> See generally KATZNELSON, *supra* note 259.

<sup>273</sup> MCMAHON, *supra* note 266, at 97–177.

<sup>274</sup> *Id.* at 177–203.

tion cases that culminated in *Brown v. Board of Education* in 1954, perhaps the most important and revered civil rights decision in American history.<sup>275</sup> Furthermore, as Keith Whittington observes, “[t]he enforcement of the racial civil rights commitments embraced by national Democratic officials propelled the Court not only in its explicit racial desegregation cases, but also in many of its pioneering civil liberties cases, especially in regards to free speech and criminal justice.”<sup>276</sup> Roosevelt’s most successful tactic against the South was neither a party purge nor court-packing, but the weaponization of the Court. The already tenuous ability of the Court to enforce these controversial decisions would likely have been depleted if court-packing had succeeded.

### CONCLUSION

Recent history fails us. The sensibilities of our constitutional politics have long been shaped by the era of consensus following World War II and stabilized by the Cold War.<sup>277</sup> It was a time of stability and of fundamental agreement between the two political parties. Against this backdrop, today’s rapid polarization and political realignment have been bewildering. Each violation of a political norm is labeled “unprecedented” in modern history.<sup>278</sup> Since modern history provides little insight, it makes sense to look further back for guidance to rowdier and uncivil political eras that were rife with constitutional hardball.

The danger, however, is that the past becomes too easily caricatured as a Wild West. Radicals, eager to overturn the old order, are at risk of fetishizing past partisan warfare as necessary for true change.<sup>279</sup> Polarization was what

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<sup>275</sup> 347 U.S. 483 (1954). Historians increasingly believe that the actual effect of *Brown v. Board of Education* was either limited or has been misunderstood. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–443 (2004) (arguing that the backlash to *Brown* temporarily destroyed southern racial moderation and the brutal actions of a new wave of massive resistance politicians converted indifferent northerners into proponents of civil rights legislation); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (arguing that *Brown* did not successfully desegregate lower education).

<sup>276</sup> WHITTINGTON, *supra* note 193, at 120.

<sup>277</sup> Aziz Rana, *Goodbye, Cold War*, N+1 (Winter 2018), <https://nplusonemag.com/issue-30/politics/goodbye-cold-war/> [<https://perma.cc/9VFU-H9S5>].

<sup>278</sup> Julian E. Zelizer, *What Is Really Unprecedented About Trump?*, THE ATLANTIC (Oct. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/10/what-is-really-unprecedented-about-trump/544179> [<https://perma.cc/NCV4-PQJT>].

<sup>279</sup> See Thea Riofrancos, *Democracy Without the People*, N+1 (Feb. 6, 2017), <https://nplusonemag.com/online-only/online-only/democracy-without-the-people/> [<https://perma.cc/XYU2-ERZ7>] (arguing that scholars’ concern over norms is a way of protecting a corrupt liberal order); Corey Robin, *Democracy Is Norm Erosion*, JACOBIN (Jan. 29, 2018), <https://jacobinmag.com/2018/01/democracy-trump-authoritarianism-levitsky-zillblatt-norms> [<https://perma.cc/UQ39-VUEU>] (arguing that true political change requires the violation of norms as was done by the abolitionists and New Dealers).

eliminated slavery, they claim.<sup>280</sup> Opponents, more attached to the waning era of consensus, are aghast and assert that no-holds-barred politics culminated in the Civil War.<sup>281</sup>

The historical component of the court-packing debate has mapped onto these positions with court-packing's proponents claiming the distant past as a time of recurrent court-packing. Opponents accept the facts of this narrative but draw different conclusions from it. Wanting to protect the middle and late twentieth century's kinder and more rational form of politics, they reject court-packing as a dead tradition that should stay buried. Whether court-packing continues to be a live political option will depend on the vagaries of politics. Unless dispelled, however, the common historical narrative will continue to lie like a half-buried loaded gun, ready to be unearthed whenever the Supreme Court threatens the agenda of a new or realigned political party.

The past is richer and more complicated than this debate suggests. Although the space for contestation was wider, it was not without boundaries. Again and again, cooler heads prevailed and declined to pack the Court. Rather than colonize and infiltrate the Court, Congress curbed it and forced it to retreat through targeted and reversible measures, such as jurisdiction-stripping. That kind of retaliation against the Court is the "hallowed American political tradition," and court-packing is a break with it.<sup>282</sup>

Of course, traditions do not bind. Nothing about past American constitutional history commands that we repeat it. An unprecedented tactic may be a good one. But the change in tactics should be done with eyes wide open to its pitfalls. Court-packing is a leap into the unknown. We are, at best, unsure whether we can make it to the other side. If we fall short, we do not know what waits for us below.

Literatures like constitutional hardball, departmentalism, and popular constitutionalism indiscriminately celebrate a wide variety of attacks on judicial supremacy. Scholars wrote these foundational works in the aftermath of the fall of the Berlin Wall when liberal democracy seemed invincible. If America had anything to teach emerging democracies, it was that the infusion of politics into law democratized the Constitution, keeping it the citizens' highest law.

Today, liberal democracy is on the decline, and court-packing has helped push it there. New times demand reformulations of old theories that encourage

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<sup>280</sup> See, e.g., Robin, *supra* note 279 (arguing that the elimination of slavery requiring the abolitionists and Republican party to "polarize[] society" and that "[t]he [Reconstruction] Republicans were norm-breakers").

<sup>281</sup> See LEVITSKY & ZIBLATT, *supra* note 183, at 122.

<sup>282</sup> *But see* Smith, *supra* note 23 (arguing that court-packing is the "hallowed American political tradition").

resistance against courts. One response is a knee-jerk reaction that goes to the opposite extreme and accepts judicial supremacy. But this hermetic sealing off of politics from law would be just as much a break with American tradition as court-packing. Going forward, the question is not how to shut down the fierce and inevitable conflict between the elected branches and the Supreme Court, but how to manage it. Scholarship should mine the rich normative debates of past constitutional conflicts to construct limiting principles for court-curbing. This mitigation strategy is no guarantee against disaster, but it offers more hope and is more in line with the American constitutional history than the alternatives of either packing the Court or meekly submitting to its dictates.