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Constrained Supreme Court Expansion: A Plan for Remediating the Effects of Mitch McConnell's Norm-busting "Advice and Consent" Procedures

CHARLES M. LEEDOM, JR.*

ABSTRACT

This article proposes a Plan to de-politicize the Supreme Court Justice nomination process consistent with historic precedents and constitutional powers granted to the President and Congress. The proposed Plan involves legislation (the Merrick Garland and Ruth Bader Ginsberg Supreme Court De-Politicization Act) that would immediately add two Supreme Court Justices, as permitted by the Constitution, but only for a limited time. To prevent future tit for tat expansion, a Constitutional Amendment is proposed to freeze the Court size, initially, at eleven and, eventually, at nine upon the departures of Justices Gorsuch and Barrett who received their respective appointments through the norm-busting maneuverings of Majority Leader Mitch McConnell. The legislation seeks to encourage bi-partisan support for the Amendment by threatening the appointment of two additional Justices (enlarging the Court to thirteen Justices) by the end of President Biden's first term unless the proposed Constitutional Amendment has been adopted. The Plan is timely because Democrats have achieved unified control over Congress and the presidency as a result of the November 3, 2020 election and the Georgia runoff elections of January 5, 2021. The Plan's effect would be to convert the present six to three conservative super-majority of the Court

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to a more balanced six to five tilt in favor of conservatives or, if forced by Republican intransigence, six to seven in favor of Justices appointed by Democratic presidents. Unlike most other proposals for Court reform advanced by progressives, this proposed Plan is moderate and practical. In particular, the legislation would only add the third and fourth seats if the linked Constitutional amendment fails to be adopted during the first two years of the Biden administration. By threatening to add the third and fourth seats, Democrats would be providing Republicans with a powerful incentive to reach agreement with the Democrats on a depoliticized nomination process and revised Court structure and/or jurisdiction. To that end, the proposed Constitutional amendment also includes a second section that requires the Senate to hold a recorded final vote within ninety days of any nomination made ninety days or more before a Presidential Election Day. Should the Senate fail, after ninety days, to provide "Advice and Consent" via a recorded final vote, the nomination would become automatically "confirmed." A third section of the Amendment provides that no nomination may be made by the president during the period starting ninety days before the next Election Day for President and ending on the next occurring Presidential Inauguration Day. Sections two and three would thus ensure that no future Majority Leader would be able to engage in the type of raw-power, partisan maneuvering that characterized Mitch McConnell's stewardship of the Senate's Supreme Court "Advice and Consent" functions. Other Court reforms such as those proposed by Ryan D. Doerfler and Samuel Moyn and/or by Daniel Epps and Ganesh Sitaraman, could be considered to avoid the need to add the second pair of Justices.

In the final section, this article offers answers to a number of likely challenges to the adoption of the proposed Plan.

SUMMARY

Despite his protestations, Mitch McConnell's handling of Supreme Court nominations has been unusually hypocritical even when measured by the forgiving standards of contemporary US politics.[1] Within hours of Ruth Bader Ginsburg's death, he promised a swift vote on President Trump's nomination to fill RBG's seat.[2] This announcement constituted a stunning reversal of the position he took in February of 2016, immediately after Antonin Scalia's death (which occurred over 200 days before the next

1. *See* Carl Hulse, *McConnell vows to vote on Supreme Court nominee four years after blocking one.*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/us/politics/mitch-mcconnell-supreme-court-ruth-bader-ginsburg.html.

2. Marianne Levine, *McConnell fends off accusations of hypocrisy over holding Supreme Court vote,* POLITICO (Sept. 21, 2020), https://www.politico.com/news/2020/09/21/mcconnell-pushes-back-hypocrisy-supreme-court-419569.

presidential election), stating: "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President."[3] His 2016 position extended by 100 days the next-closest period during which a Congress (controlled by one party) had refused to act on a nominee submitted by a president from another party.[4]

This article describes a Plan to remediate the effects of McConnell's inconsistent positions on Supreme Court vacancies occurring before presidential elections.[5] The Plan is now timely because the Democrats have gained unified control of the White House and of both houses of Congress as a result of the November 3, 2020 presidential election and the election of two Democratic senators during the Georgia runoff elections of January 5, 2021.[6] In addition, President Biden has appointed a Commission to consider structural reforms of the federal courts.[7] If enacted, the proposed Plan would remediate the effect of McConnell's inconsistent handling of the Senate's "Advice and Consent" function by immediately adding two seats to the Supreme Court pursuant to powers clearly granted in Article III of the Constitution.[8] To avoid engendering overwhelming opposition (like the successful opposition to Franklin Roosevelt's 1937 attempt to "pack the Court"), this Plan's enabling legislation returns the Court to nine seats upon the departures of Justices Gorsuch and Barrett who received their appointments via McConnell's inconsistent Advice and Consent procedures.[9] The Plan promotes further de-politicization of the Justice selection process by encouraging adoption of a Constitutional amendment that:

a. fixes the number of Justices initially at eleven, and ultimately at nine, once the Scalia (Gorsuch) and RBG (Barrett) seats are vacated, and
b. requires Advice and Consent by the Senate on all Supreme Court nominations made more than ninety days before a presidential election and precludes any presidential nomination in the period thereafter up to the next occurring inauguration day (thereby precluding any future application of the "McConnell principle" by

3. Hulse, *supra* note 1.
4. *See infra* note 59.
5. *See infra* Part III.
6. Deirdre Walsh & Kelsey Snell, *Democrats Take Control Of Senate With Twin Georgia Victories*, NPR, (January 6, 2021), https://www.npr.org/2021/01/06/953712195/democrats-move-closer-to-senate-control-as-counting-continues-in-georgia.
7. Michael D. Shear & Carl Hulse, *Biden Creating Commission to Study Expanding the Supreme Cour*t, N.Y. TIMES (Apr. 9, 2019), https://www.nytimes.com/2021/04/09/us/politics/biden-supreme-court-packing.html.
8. *See infra* Part II, Part III.
9. *See infra* Part III.

> which the nomination of a Democratic president is denied consideration for an extended period, but the nomination of a Republican president may be rushed through).[10]

Timely consideration of the Constitutional amendment is encouraged by accompanying legislation that would create two additional seats (Twelfth and Thirteenth seats) by a certain date (July 1, 2022) should the Constitutional Amendment (or an acceptable bi-partisan substitution) fail to have been adopted.[11] This date was selected to be sufficiently in advance of the midterms (November 2022), so that restoration of Republican control over the Senate, during the midterm election, would not remove President Biden's prerogative to appoint two additional justices that would deliver a seven to six majority of Democrats to Republican appointments to the Court.[12] The Twelfth and Thirteenth Justices could be nominated and confirmed (but not necessarily appointed) until near the end of Biden's first term.[13] By nominating and securing confirmation prior to the midterms, but withholding final appointment, nearly four years would be available in which to secure passage of an acceptable Constitutional amendment.[14] The Republicans would have a powerful incentive to agree to a bi-partisan Constitutional amendment by which creation of the Twelfth and Thirteenth seats could be avoided, and a less partisan nomination process adopted along with possible additional reform designed to improve Supreme Court functioning and legitimacy.[15]

This article discusses a number of likely challenges to adoption of the proposed Plan including the potentially negative consequences that would result in a Supreme Court comprised of an even number of Justices.[16] This could occur under the proposed Plan over a considerable period should the departures of Justices Gorsuch and Barrett occur at widely separated times.[17] To test the consequences of an even number of Justices, a statistical study was undertaken of the historic vote coalitions occurring in all Supreme Court decisions rendered during several different periods, over the last four decades, in which the decisions were considered by courts consisting of either an even number (eight) or an odd number (nine) of Justices.[18] The study was made using the online Supreme Court Database of coded decisions

10. *See generally id*.
11. *Id.*
12. *See generally id.*
13. *Id.*
14. *See infra* Part III.
15. *Id.*
16. *See generally infra* Part IV (b).
17. *Id.*
18. *See generally id.*

maintained by the Washington University Law School.[19] The results of this study demonstrate, strongly, consistently, and counter-intuitively, that a US Supreme Court comprised of an even number of Justices (e.g. ten or twelve) will likely resolve a higher percentage of cases by overwhelming majorities as compared to a US Supreme Court comprised of an odd number of Justices (e.g. nine or eleven).[20]

INTRODUCTION

On the morning of February 13, 2016, the body of Antonin Gregory Scalia was discovered in a guest room of the Cibolo Creek Ranch in Western Texas.[21] According to the official Report[22] from the local sheriff's office, Scalia had arrived the day before for "a weekend out to go hunting and visit the ranch" and had experienced a "Natural Death."[23] News of Scalia's death hit Washington like a thunderbolt.[24]

Among Democrats, Scalia's death was perceived as a game-changing opportunity to restore to the Court a majority of Justices appointed by Democratic presidents,[25] and potentially set the Court in a more progressive direction away from a series of recent Court decisions[26] considered antithetical to the Democrat's progressive agenda.[27] One month after Scalia's

19. *Id.*

20. *See generally id.*

21. Presidio County Sheriff's Office Offense Report (Feb. 13, 2016), https://www.documentcloud.org/documents/2719258-Scaliarepor.

22. *Id.*

23. *Id.*

24. Eva Ruth Moravec, et al., *The Death of Antonin Scalia: Chaos, Confusion and Conflicting Reports*, WASH. POST (Feb. 14, 2016), https://www.washingtonpost.com/politics/texas-tv-station-scalia-died-of-a-heart-attack/2016/02/14/938e2170-d332-11e5-9823-02b905009f99_story.html; Pierre Thomas, *'This Week' Transcript: Ted Cruz, John Kasich, Marco Rubio, Bernie Sanders, and Donald Trump*, ABC NEWS (Feb. 14, 2016), https://abcnews.go.com/Politics/week-transcript-ted-cruz-john-kasich-marco-rubio/story?id=36918872.

25. At the time of Scalia's death, five Justices (Kennedy, Thomas, Scalia, Roberts, and Alito) had been nominated by Republican presidents while the remaining Justices (Ginsburg, Breyer, Sotomayor and Kagan) had been nominated by Democratic presidents. *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx.

26. Since John Roberts was elevated to Chief Justice in 2005, the Court has issued a number of controversial landmark decisions by a 5-4 split generally between the Justices nominated by Republican presidents and the Justices nominated by Democratic presidents. *See eg*., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (declaring parts of the Campaign Reform act unconstitutional). Majority: Kennedy, joined by Roberts, Scalia, Alito and Thomas and dissent Stevens (appointed by Ford), Ginsburg, Breyer, Sotomayor); *Shelby County v. Holder*, 570 U.S. 529 (2013) (declaring parts of the Voting Rights Act unconstitutional). Majority: Roberts, joined by Scalia, Kennedy, Thomas, Alito, and Dissent Ginsburg, joined by Breyer, Sotomayor, Kagan); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (allowing closely held for-profit corporations to be exempt from a regulation its owners religiously object to. Majority Alito, joined by Roberts, Scalia, Kennedy, Thomas and Dissent Ginsburg, joined by Sotomayor, Breyer, and Kagan).

27. *Id.*

death, President Barack Obama nominated Merrick Brian Garland, considered a judicial moderate, to fill Scalia's seat.[28]

To many Republicans, the prospect of Barack Obama (the First Black President) having the opportunity to choose Scalia's successor was horrifying.[29] On the day following Scalia's death, the Republican Majority Leader of the Senate, Mitch McConnell, stated in a Facebook post,[30] ". . . this vacancy should not be filled until we have a new President."[31] To achieve this result, he adopted a take-no-action strategy.[32] The Republican members of the Senate Judiciary Committee backed the strategy and announced that **no** President Obama nominee would even be considered,[33] ignoring the Senate's constitutional function to provide "Advice and Consent" on Supreme Court nominations.[34] McConnell bragged during a campaign speech on August 6, 2016 that "One of my proudest moments was when I looked at Barack Obama in the eye and I said, 'Mr. President, you will not fill this Supreme Court vacancy.'"[35] In accordance with Senate rules, Garland's nomination was returned without action on January 3, 2017 officially terminating its pendency by *sine die* adjournment,[36] a period of 294 days, setting a record for the longest interval from nomination to official termination for any nominee in history.[37] The subsequent, unexpected election of Donald J. Trump to the Presidency eventually resulted in the appointment of Neil M. Gorsuch, a self-described "committed originalist and

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28. Michael Shear, et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html.

29. *Id.*

30. Mitch McConnell, FACEBOOK (Feb. 13, 2016), https://m.facebook.com/McConnellForSenate/posts/1049668335055676.

31. *Id.*

32. Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About A Principle, Not A Person'*, NATIONAL PUBLIC RADIO (Mar. 16, 2016), https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person.

33. Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NATIONAL PUBLIC RADIO (June 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now. The 11 Republican members of the Senate Judiciary Committee signed a letter saying they had no intention of consenting to any nominee from Obama (*see* the text of the letter at: Chuck Grassley, UNITED STATES SENATE (Feb. 23, 2016), https://www.grassley.senate.gov/news/news-releases/judiciary-committee-republicans-mcconnell-no-hearings-supreme-court-nomination).

34. *Id.*

35. David Emery, *Did Mitch McConnell Say One of His Proudest Moments Was Telling Obama 'You Will Not Fill This Supreme Court Vacancy'?*, SNOPES (Feb. 2, 2017), https://www.snopes.com/fact-check/mitch-mcconnell-one-of-my-proudest-moments/.

36. Mark Strand & Tim Lang, *What is a Sine Die Adjournment?*, CONGRESSIONAL INSTITUTE (Jan. 5, 2015), https://www.congressionalinstitute.org/2015/01/05/what-is-a-sine-die-adjournment/, ("*sine die* adjournment has several implications for the legislative process. When one Congress expires, all the pending legislation goes with it . . .").

37. *Supreme Court Nomination of Merrick Garland*, BALLOTPEDIA, https://www.ballotpedia.org/Supreme_Court_nomination_of_Merrick_Garland (last visited Apr. 17, 2021).

textualist"[38] who was associated with[39] and endorsed[40] by the Federalist Society forming a five to four conservative majority on a Court that would likely have had a five to four progressive/centrist majority had President Obama been allowed to exercise his prerogative to select a qualified replacement for Scalia.[41]

Over four years later, on the same day that Ruth Bader Ginsburg's death was announced (September 18, 2020), Mitch McConnell indicated his intention to ram through a replacement of RBG by stating:

> Americans re-elected our majority in 2016 and expanded it in 2018 because we pledged to work with President Trump and support his agenda, particularly his outstanding appointments to the federal judiciary . . . Once again, we will keep our promise. President Trump's nominee will receive a vote on the floor of the United States Senate.[42]

McConnell was apparently untroubled by the jaw dropping inconsistency between this 2020 statement occurring only 50 days before a Presidential Election, promising swift action, and his 2016 statement, made approximately 200 days before a Presidential Election, refusing to take any action.[43]

The purpose of this article is to propose a Plan (modeled after historic precedents, discussed below) by which the effects of Mitch McConnell's wildly inconsistent, hyper-partisan handling of Supreme Court nominations could be at least partially undone or entirely eliminated should the Republicans refuse to cooperate in a bi-partisan de-politicization of the Justice selection process.[44] The proposed Plan involves legislation (Appendix A - Merrick Garland and RBG Supreme Court De-Politicization Act) that would immediately add two Supreme Court Justices, as permitted by the Constitution and substantial precedent, but only for a limited time.[45] The effect would be to convert the present six to three conservative super majority of the Court to a more balanced six to five tilt in favor of

38. Josh Gerstein, *Gorsuch takes victory lap at Federalist dinner*, POLITICO (Nov. 16, 2017), https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538.

39. Gorsuch admitted attending and speaking at Federalist Society meetings. *Questionnaire for Nominee to the Supreme Court*, SENATE COMMITTEE ON THE JUDICIARY, https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20(Public).pdf (last visited Apr. 17, 2021).

40. *See generally* David Montgomery, *Conquerors of the Courts,* WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/; Hulse, *supra* note 1.

41. *See* Montgomery, *supra* note 40.

42. Hulse, *supra* note 1.

43. *Id.*

44. *See infra* Part III.

45. *See infra* Part III, App. A.

conservatives or even six to seven in favor of Justices appointed by Democratic presidents.[46] To handle the inevitable firestorm of negative reaction, the legislation is paired with a Constitutional amendment (Appendix B)[47] that would freeze the number of Justices, first at eleven, and eventually nine, once the "Scalia" and "RBG" seats[48] are vacated.[49] Unlike many other proposals for Court reform advanced by progressives,[50] this proposed Plan is moderate and practical. In particular, the legislation would add third and fourth seats but only if the linked Constitutional amendment fails to be adopted by July 1, 2022.[51] By this strategy, virtually every argument opposing the first and second new seats can be turned into an argument in favor of the Constitutional amendment, thereby diverting the debate away from "court packing" and toward a "redress of McConnell's nomination thievery."[52] The proposed Plan involves inclusion in the proposed Constitutional amendment of a second section that provides for automatic confirmation (in the absence of a final Senate vote) of all Supreme Court nominations made ninety days or more before a Presidential Election Day.[53]

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46. *See infra* Part III.

47. *Id.*

48. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice.*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html. The Scalia seat, for which Garland was nominated, is now occupied by Neil McGill Gorsuch and the RBG seat is occupied by Amy Coney Barrett. The Plan proposed by this article is in no way intended to disparage the qualifications and/or service of either Neil Gorsuch or Amy Coney Barrett as a Supreme Court Justice. The proposed Plan is designed solely to address the norm-busting behavior of the Republican majority, led by Mitch McConnell, and the inaction of the Senate regarding such behavior as it pertains to Obama's nomination of Merrick Garland and the rushed consideration of Trump's nomination of Amy Coney Barrett.

49. *Id.*

50. *See generally* Aaron Belkin, *The Case for Court Expansion,* TAKE BACK THE COURT (June 27, 2019), https://www.takebackthecourt.today/the-case-for-court-expansion; DAVID FARIS, IT'S TIME TO FIGHT DIRTY ch. 4-5 (2018). Faris proposes a far more aggressive plan including immediate creation of multiple additional seats sufficient to form a majority of Justices appointed by Democratic Presidents followed by the threat of additional seats to force a Constitutional amendment setting term limits on Justices, providing for an additional Court appointment every two years to ensure that each president gets to make at least two appointments to the Court, and modifying the number of House of Representatives members. The Faris plan would likely be unsuccessful for its violation of the Vermeule Rule, "The very conditions that produce demand for structural reform of the Court also tend to produce counter-forces that block the movement for reform," discussed in Section II of this Article. The Faris Plan would likely be perceived as an over-reaching power grab with little chance of Congressional passage and less chance of receiving Biden's signature unless Biden's stated position on Court packing undergoes dramatic change. Nevertheless, the Faris Plan could certainly be added to the mix of other structural reform plans that Congress will be encouraged to consider under threat of third and fourth additional seats as proposed by the Plan described in this Article and discussed specifically in Section V.

51. *See infra* Part III. This date was chosen to provide time for consideration of the Constitutional amendment and yet sufficiently before the midterms when the Democrats could possibly lose their majority in the Senate. The date could be extended by Congress and the president could even hold off making nominations of the Twelfth and Thirteenth seats so long as progress toward adoption of the Constitutional amendment was being made.

52. *See infra* Part III.

53. *See infra* App. B.

A third section provides that no nomination may be made by the president during the period starting ninety days before the next Election Day for President and ending on the next occurring Presidential Inauguration Day.[54] Sections two and three would thus ensure that no future Majority Leader would be able to engage in the type of partisan maneuvering that characterizes Mitch McConnell's stewardship of the Senate's Supreme Court "Advice and Consent" functions.[55] Because the Democrats have recently secured the presidency and maintained its majority in the House as a result of the November 3, 2020 election and secured control of the Senate as a result of the Georgia runoff elections of January 5, 2021, the Plan is believed to be politically feasible.[56] In particular, just prior to his election to the Presidency, Biden stated that he would establish a bipartisan commission of scholars to study possible ways to overhaul the judicial branch.[57] The Plan advanced by this article should appeal to the Biden Commission because, if implemented, it would

a. allow Biden to appoint, immediately, only two Justices to convert the existing super majority of Justices (six to three), achieved in part by unprincipled maneuverings of Mitch McConnell, into a more balanced Court that still is slightly tilted toward conservative justices (six to five),
b. promote bi-partisan support for a Constitutional Amendment to avoid future tit for tat Court expansion, and
c. create a major incentive for bi-partisan adoption of reforms designed, in the long term, to de-politicize Supreme Court functioning.[58]

Mitch McConnell's norm-busting maneuvering[59] has installed an anti-progressive super-majority on the Supreme Court that could easily last three

54. *Id.*
55. *See generally id.*
56. *See infra* Part III.
57. Charlie Savage & Katie Glueck, *Biden Punts on Expanding the Supreme Court, Calling for a Panel to Study Changes*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/us/politics /biden-supreme-court-packing.html ("I will ask them to, over 180 days, come back to me with recommendations as to how to reform the court system, because it's getting out of whack."). Biden fulfilled his promise by appointing the Commission on April 9, 2021. *See supra* note 7.
58. *See infra* Part III.
59. The closest examples of a nomination pending before the Senate in an election year, without action until the Senate adjourned are the nominations of Edward Bradford (1852) and Reuben Walworth (1844) whose nominations were pending for 78 days and 137 days before the next presidential election. *See Election-year Supreme Court Nominations*, QUIZNOX (Jan. 31, 2017), https://quiznox.com/2017/01/31/election-year-supreme-court-nominations/. Like the Garland nomination, the nominations of both Bradford and Walworth were made by presidents whose party affiliation differed from that of the Senate majority. Garland's nomination occurred 237 days before the 2016 election day of November 8, thereby extending by 100 days the previous record for a Senate to take no action on a Supreme Court nomination by a President of an opposing party during a presidential election year. An interesting debate over whether McConnell's refusal to allow consideration of Garland's nomination on its merits was norm-busting can be found in the following materials: Robin Bradley Kar &

decades or more. This new structural advantage adds to a long list of structural advantages[60] that have allowed Republican politicians (such as Mitch McConnell) to embrace a range of extreme policies that are deeply unpopular with a majority of Americans.[61] A number of interest groups and individuals are promoting various Court expansion proposals.[62] Most are too radical to gain momentum.[63] Others are sufficiently moderate and warrant consideration but would require a Constitutional amendment which, in the present hyper-partisan atmosphere, means they are dead on arrival.[64] As discussed below, the proposed Plan has been carefully designed to comport with historic precedents, by which Congress has adjusted the size of the Supreme Court, yet avoids over-reaching that could doom its adoption.[65] By limiting expansion to two Justices at first, the proposed Plan only seeks to reduce the super majority (six to three) to a six to five tilt allowing the progressives to prevail if they are able to secure at least one defection from

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Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016); Ed Whelan, *Law Profs Kar and Mazzone Respond*, NATIONAL REVIEW (June 9, 2016, 7:32 PM), https://www.nationalreview.com/bench-memos/kar-mazzone-response-senate-duty/ (a series of posts from Ed Whelan and responses from Professors Kar and Mazzone.). This article derives from the author's belief that Professors Kar and Mazzone have, by far, the better arguments.

60. The Republican structural advantages include: 1) A Senate that over represents states with small (mostly rural) populations which are drawn to the anti-progressive ideas of the modern, Trump dominated Republican Party; 2) Gerrymandering of House districts allowing Republicans to keep its majority even when Republicans consistently secure materially less than 50% of the popular votes cast for Representatives; 3) An electoral calendar that causes most state officials to be selected during non-presidential elections when low voter turn-out favors Republican candidates; 4) Democratic voters are concentrated in urban centers which naturally dilutes their voting power further contributing to the effects of gerrymandering; 5) The filibuster rules in the Senate allow Republican minorities to block Senate action; 6) The Hastert Rule in the House allows a majority of the Republican caucus (which is normally far less than a majority of the House) to dictate which bills the House can consider; 7) Republican Party is the party of "no" because its policies are normally advanced when the federal government is blocked from taking action accentuating the advantages of the fifth and sixth advantages, and 8) Generational, gendered, racial, and class-based disparities in wealth and political power manifestly favor the Republicans' older, more male, whiter, and wealthier coalition. *See* Thomas Schaller, *The Republican Advantage*, THE AMERICAN PROSPECT (Oct. 28, 2015), https://prospect.org/power/republican-structural-advantage/.

61. Jacob S. Hacker, *No Cost for Extremism*, AMERICAN PROSPECT (Apr. 20, 2015), https://prospect.org/power/cost-extremism/.

62. For example, Mondaire Jones, recently elected to the U.S. House of Representatives for the 17th Congressional District of New York, argued during his campaign that ". . . [i]t is time we do something about the Roberts court's assault on democracy. Expanding the Supreme Court is our only option." *See* Mondaire Jones, *To Save Our Democracy, We Must Expand the Supreme Court*, SALON (Apr. 26, 2020, 4:00 PM), https://www.salon.com/2020/04/26/to-save-our-democracy-we-must-expand-the-supreme-court/.

63. *See* Kalvis Golde, *With Democrats in Control, Supreme Court Reform Proposals Reclaim Center Stage*, SCOTUSBLOG (Jan. 26, 2021, 1:33 PM), https://www.scotusblog.com/2021/01/with-democrats-in-control-supreme-court-reform-proposals-reclaim-center-stage/.

64. *Id.*

65. *See infra* Part III.

the conservative side.[66] Adding two additional new Justices would be held in abeyance for a period sufficient enough to allow for a long-term solution (such as the proposed Constitutional amendment or any other reform that secures bi-partisan support).[67] Only if the Republicans obstinately refuse to cooperate in finding a bi-partisan solution to de-politicize the Supreme Court would the third and fourth seats be created to deliver a six to seven majority in favor of progressives.[68] The addition of the third and fourth seats would likely engender future tit for tat partisan expansion of the Court. Avoiding this long-term consequence is worth the Democrats giving up these seats in favor of a freeze in Court size. Creation of the first and second seats, however, is the minimum required to negate the effects of McConnell's hyper-partisan mishandling of the nomination process.[69]

The remainder of this article describes the Constitutional and historic background that gave rise to the practices and norms surrounding the selection of Justices for the present nine-member Court and the reasons for how the Plan for reform, proposed herein, will carefully utilize Congress's right to expand the Court for only a limited time and encourage adoption of a long-term solution to de-politicize the process of selecting Justices and for improved non-partisan functioning of the Court.[70]

I. During Its First 100 Years, Congress Repeatedly Exercised Its Power to Change the Number of Justices

Article III, section I of the Constitution provides for the Judicial power of the United States to be vested in a "Supreme Court" but provides virtually no structural details as to how the Court is to be constituted, and leaves even the number of Judges to the discretion of Congress and the president.[71] With

66. *Id.*

67. *Id.*

68. *Id.*

69. In an article authored by Michael C. Dorf, an option is advanced for consideration by the Biden Commission that, if found unconstitutional, would trigger a "fallback" involving an automatic expansion of the Court. *See* Michael C. Dorf, *Options for Biden's Supreme Court Reform Commission*, JUSTIA (Oct. 28, 2020), https://verdict.justia.com/2020/10/28/options-for-bidens-supreme-court-reform-commission. In contrast, the Plan proposed by this article uses the threat of adding the twelfth and thirteenth justices as a means to promote the adoption of a Constitutional amendment that: (1) freezes the court size and returns it over time to nine justices; (2) de-politicizes the nomination process by requiring nominations to be voted up or down if made more than 90 days before a presidential election and by precluding any nomination for the period starting 90 days before an election and ending on the next occurring inauguration day, and (3) allows for any further reforms, requiring a Constitutional amendment, that the Commission may wish to recommend. In short, the present Plan uses the threat of additional Court expansion as an inducement to achieve reforms that might otherwise be unsuccessful but includes the temporary addition of two seats as a necessary remediation of McConnell's norm-busting advice and consent procedures.

70. *See infra* Parts I-II.

71. U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

respect to lower Federal Courts, the Constitution allows for, but does not mandate, their creation.[72] Rather, the Constitution merely states that "inferior Courts" may be "ordained and established" by Congress from "time to time" but does not require their existence.[73] Surprisingly, as will be explained more fully below, the way Congress initially chose to exercise its discretion to shape the federal Judiciary caused the number of Justices serving on the Supreme Court to become intertwined with, and to some extent, dependent upon the creation and subdivision into "Circuits" of the "inferior Courts."[74]

As to the manner of selection of Supreme Court "Judges," the Constitution defines a combined Executive/Legislative procedure in Article II, Section 2, Clause 2. This Clause states, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . , Judges of the supreme Court."[75] The failure of the Senate to provide "Advice and Consent," including Judicial Committee consideration and a final vote, on the Garland nomination, and the stunning inconsistency in McConnell's treatment of a Democratic president's nomination as compared to a Republican president's nomination are the reasons for this article.[76]

JUDICIARY ACT OF 1789

Because the "Supreme Court" referenced in Article III, Section 1 was not self-actualizing, the first Congress turned early to the task of organizing the judicial branch.[77] A recognized authority, Bruce A. Ragsdale, describes the Congressional debate involved in this task as follows:

> [M]uch of the debate centered on whether to establish lower federal courts or to rely on existing state courts to exercise federal jurisdiction. Advocates of a strong central government thought a national system of federal courts was an essential requirement for energetic government. Other members of Congress, recalling the colonial experience under British rule, thought that justice was best served by courts tied to local communities. Those who were suspicious of the concentration of national power wanted to grant state courts authority to hear all cases involving federal law or to limit local federal courts to admiralty and maritime law. The judiciary act

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The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.").

72. *Id.*
73. *Id.*
74. *See infra* Parts I-II.
75. U.S. CONST. art. II, § 2, cl. 2.
76. *See supra* Abstract.
77. *See generally* Judiciary Act of 1789, 1 Stat. 73.

> approved in September 1789 established a federal court system with broad jurisdiction, but the act reserved a significant role for state courts and guaranteed that the diversity of legal traditions throughout the country would be recognized in the local federal courts.[78]

The Judicial Act of 1789[79] established three types of federal courts, sharing jurisdiction with state courts, including a Supreme Court consisting of a Chief Justice and five associate Justices, and inferior Courts including District Courts and intermediate Circuit Courts.[80] Each District Court would serve a limited geographic area (coinciding, typically, with the respective boundaries of the states) to which a single District Court Judge, living within the District, was to be appointed.[81] Circuit Court judges were not authorized.[82] Instead, each Circuit Court would be comprised of three members, the local District Court Judge, and two Supreme Court Justices.[83] Because the Circuit Courts were geographically dispersed, they were grouped into three distinct "Circuits" collectively covering the entire United States and thereby minimizing the travel required of the two Supreme Court Justices assigned to each Circuit.[84] When serving in this capacity, the Justices were said to be "circuit riding," and most came to hate this part of their work due to the extraordinary difficulty of interstate travel at that time.[85]

Responding to complaints from the Justices, Congress amended the Judiciary laws in 1793 to require only one Supreme Court Justice per Circuit Court.[86] The onerous duty to "circuit ride," however, continued and was not eliminated until 1891.[87] As will be explained below, each time Congress has successfully increased the number of Supreme Court Justices, the requirement for "circuit riding" was a primary motivator or was used to hide an ulterior purpose.[88]

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78. BRUCE A. RAGSDALE, ESTABLISHING A FEDERAL JUDICIARY 2-3 (Federal Judicial Center, 2017).

79. Judiciary Act of 1789, §§ 1-4, 1 Stat. 73.

80. RAGSDALE, *supra* note 78, at 3.

81. Judiciary Act of 1789, § 3, 1 Stat. 73.

82. *Id.* § 3-4.

83. *Id.* § 4.

84. *Id.*

85. BERNARD SCHWARTZ, HISTORY OF THE SUPREME COURT 18-19 (1993).

86. 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 3 (Maeva Marcus, ed.) (1998).

87. J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or Molehill?*, 71 CAL. L. REV. 913 (1983).

88. *See infra* Part I.

JUDICIARY ACT OF 1801[89]

Throughout the decade following enactment of the Judiciary Act of 1789, fierce battles over the organization and jurisdiction of the federal courts erupted between opposing factions, including the Federalist faction, led by Alexander Hamilton, who favored a strong national government and the "Democrat-Republican" faction, led by Thomas Jefferson, who favored "state's rights" over a weaker central government.[90] In 1801, after several years of debate, the lame-duck Federalist majority in Congress, with the approval of outgoing President John Adams, passed the Judiciary Act of 1801 barely two weeks before Thomas Jefferson was scheduled to assume the Presidency.[91] The Act sought to broaden the power of the federal judiciary at the expense of state courts and to relieve Supreme Court Justices from the burden of "circuit riding" by authorizing the appointment of several Circuit Court Judges.[92] Racing against time, Adams proceeded to appoint Federalist sympathizers to the new Circuit Courts just in time for Senate confirmation and before Jefferson and his supporters assumed control of the federal government.[93] One clause in the 1801 Act, especially relevant to this article, provided for a reduction in the number of Supreme Court Justices from six to five as follows: "And be it further enacted, That from and after the next vacancy that shall happen in the said [Supreme] Court, it shall consist of five justices only; that is to say, of one chief justice, and four associate justices."[94]

By attempting[95] to reduce the size of the Court, it is reasonable to assume that the Federalists were attempting to reduce Jefferson's ability to change the Federalist bias within the existing Judiciary. Now, in the fullness of time, the Federalist effort to use the Judiciary as a vehicle to extend its influence against the expressed will of the people appears rather crude. The 1801 Judiciary Act does provide a template, however, for how the size of the Supreme Court could be reduced without violating the provision in Article III, Section 1 of the Constitution stating that the Justices "shall hold their Offices during good Behaviour," which has been interpreted to provide

89. Judiciary Act of 1801, § 1, 2 Stat. 89.

90. David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 761 (2020).

91. *See* Judiciary Act of 1801, 2 Stat. 89 (1801) (Approved Feb. 13, 1801).

92. RAGSDALE, *supra* note 78, at 4.

93. *See e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 157 (1803) (This seminal case arose out of one of those last-minute appointments failing to be delivered by Jefferson's newly appointed Secretary of State, James Madison.).

94. *See* Judiciary Act of 1801, § 3, 2 Stat. 89.

95. *See e.g.*, RAGSDALE, *supra* note 78, at 4. The attempt by the Federalist to reduce the number of Justices had no immediate effect because all previously authorized seats were occupied when the Judiciary Act of 1801 was passed.

lifetime tenure and to allow removal only upon impeachment and conviction for high crimes or misdemeanors.[96]

JUDICIARY ACT OF 1802

Unsurprisingly, it took the Jefferson administration, through its new majority in Congress, little time to repeal the Judiciary Act of 1801.[97] In April of the following year, the Judiciary Act of 1802 was enacted, reaffirming that the Court would consist of six members, somewhat indirectly, by referring to its then present membership as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passing of this act, the Supreme Court of the United States shall be holden by the justices thereof, or any four of them, at the city of Washington, and shall have one session in each and every year, to commence on the first Monday of February annually, and that if four of the said justices shall not attend within ten days after the time hereby appointed for the commencement of the said session, the business of the said court shall be continued over till the next stated session thereof.[98]

Because the Judiciary Act of 1801 was repealed before any vacancy occurred on the Supreme Court, no reduction in the size of the Supreme Court ever took effect as a result of its passage.[99] The old Circuit Courts were, however, restructured by the Judiciary Act of 1802 into six Circuits, with one Supreme Court Justice "circuit riding," but only if he elected to do so because the 1802 Act provided that the Circuit Court could convene with only a single Judge presiding.[100] However, by custom and practice (and later by statute), the requirement for "circuit riding" continued.[101]

JUDICIARY ACT OF 1807

By 1807, Kentucky, Ohio, and Tennessee had been admitted into the Union.[102] Demands on the Federal Judiciary had increased, necessitating the

96. *See* U.S. CONST. art. III, § 1.
97. *See* RAGSDALE, *supra* note 78, at 4.
98. Judiciary Act of 1801, § 1, 2 Stat. 89.
99. Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2758 T. 1 (2020).
100. Judiciary Act of 1802, § 4, 2 Stat. 156.
101. *See* RAGSDALE, *supra* note 78, at 4.
102. Samuel Shipley, *List of U.S States' Dates of Admission to the Union,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026 (last visited Apr. 17, 2021).

creation of a new Circuit.[103] In response, Congress passed the Judiciary Act of 1807.[104] For the first time, Congressional legislation actually caused the number of serving Justices to increase (from six to seven) as opposed to merely confirming the number of Justices who were already serving on the Court as happened in 1802.[105] Note that the Judiciary Act of 1807 reaffirmed the objectives of those legislators who argued in 1789 that federal judges should be tied to the communities in which their courts are convened.[106] In particular, the sixth associate justice was required to reside in the newly formed seventh circuit and would initially be required to attend the Circuit Courts formed within the seventh circuit.[107]

JUDICIARY ACT OF 1837

During the period between 1807 and early 1837, nine new States were admitted to the Union[108] and political power shifted from the East coast to newer States west of the Allegheny Mountains. This shift prompted yet another expansion of the Supreme Court by two seats (the eighth and ninth) along with the addition of two Circuits (the Eighth and Ninth) via enactment of the Judiciary Act of 1837 known as the Eighth and Ninth Circuits Act.[109]

The number of Supreme Court Justices was not altered again until the Civil War was well underway.[110] The Civil War caused both the Supreme Courts' make-up and activities to come under intense scrutiny.[111]

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103. *Landmark Legislation: Seventh Circuit,* FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/legislation/landmark-legislation-seventh-circuit (last visited Apr. 17, 2021).

104. Philip S. Bonforte, *Pushing Boundaries: The Role of Politics in Districting the Federal Circuit System,* 6 SETON HALL CIRCUIT R. 29, 34-35 (2009), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1028&context=circuit_review.

105. Seventh Circuit Act of 1807, 2 Stat. 420. "Be it further enacted, That the supreme court of the United States shall hereafter consist of a chief justice, and six associate justices, any law to (the) contrary notwithstanding. And for this purpose there shall be appointed a sixth associate justice, to reside in the seventh circuit, whose duty it shall be, until he is otherwise allotted, to attend the circuit courts of the said seventh circuit, and the supreme court of the United States, and who shall take the same oath, and be entitled to the same salary as are required of, and provided for the other associate justices of the United States."

106. *Landmark Legislation: Seventh Circuit*, *supra* note 103.

107. *See id.*

108. These states consisted of: Louisiana, Indiana, Mississippi, Illinois, Alabama, Maine, Missouri, Arkansas, and Michigan. Samuel Shipley, *List of U.S States' Dates of Admission to the Union,* Encyclopedia Britannica, https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026 (last visited May 4, 2021).

109. "Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall hereafter consist of a chief justice, and eight associate judges, any five of whom shall constitute a quorum; and for this purpose there shall be appointed two additional justices of said court, with the like powers, and to take the same oaths, perform the same duties, and be entitled to the same salary, as the other associate judges. Eighth and Ninth Circuits Act of 1837, 5 Stat. 176.

110. *Landmark Legislation: Seventh Circuit*, *supra* note 103.

111. David P. Currie, *The Constitution in the Supreme Court Civil War and Reconstruction, 1863-1873*, 51 U. CHI. L. REV. 131, 133 (1984).

CIVIL WAR JUDICIARY ACTS

Roger Taney, author of the notorious pro-slavery 1857 *Dred Scot v. Sanford*[112] decision (which some experts have alleged helped to start the Civil War),[113] was still serving as Chief Justice on April 12, 1861, the day of Abraham Lincoln's inauguration. Six of the associate Justices who joined with Taney[114] on the *Dred Scot* decision were also still on the Court.[115] As Lincoln contemplated the fate of important war related issues coming before the Court, he became increasingly concerned about Southern sympathies among the Justices. Some scholars believe that Lincoln used the unrelated need for an additional judicial circuit in the West (California had been accepted as a State in 1850) as a convenient excuse to support the addition of a Supreme Court Justice who could "circuit ride" on the west coast.[116] With passage of the Tenth Circuit Act of 1863, Lincoln obtained an opportunity to nominate a Justice reliably sympathetic to the Northern cause.[117] He chose an esteemed California lawyer, Stephen Johnson Field, to serve as the first tenth Justice on the Supreme Court, thereby providing an antislavery majority to the Court.[118]

JUDICIAL CIRCUITS ACT OF 1866

Andrew Johnson, Lincoln's Southern sympathizing vice president, assumed the Presidency and created the potential for the Northern bias of the Court to be reduced or eliminated should Johnson nominate one or more Southern sympathizers to the Court.[119] When Justice John Catron died on May 30, 1865, the Republican controlled Congress decided to take action by

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112. Dred Scott v. Sandford, 60 U.S. 393 (1857).

113. Gregory J. Wallance, *Dred Scott Decision: The Lawsuit that Started the Civil War*, HISTORYNET, https://www.historynet.com/dred-scott (last visited Apr. 17, 2021).

114. *Dred Scott v. Sandford*, BALLOTPEDIA, https://ballotpedia.org/Dred_Scott_v._Sandford (last visited Apr. 17, 2021).

115. These Justices were: Justices McLean, Wayne, Catron, Nelson, Greier, and Campbell. *See Justices 1789 to Present, supra* note 25.

116. PETER CHARLES HOFFER, ET AL., THE SUPREME COURT: AN ESSENTIAL HISTORY 105 (University Press of Kansas, 2007).

117. "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the supreme court of the United States shall hereafter consist of a chief justice and nine associate justices, any six of whom shall constitute a quorum; and for this purpose there shall be appointed one additional associate justice of said court, with the like powers, and to take the same oaths, perform the same duties, and be entitled to the same salary, as the other associate justices." *See* Tenth Circuit Act of 1863, 12 Stat. 794.

118. *Biographies of the Robes: Stephen Johnson Field*, PUBLIC BROADCASTING SERVICE SUPREME COURT HISTORY: LAW, POWER & PERSONALITY, https://www.thirteen.org/wnet/supremecourt/personality/robes_field.html (last visited Apr. 17, 2021).

119. Erick Trickey, *The History of Stolen Supreme Court Seats,* SMITHSONIAN MAGAZINE (Sept. 25, 2020), https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/.

passing the Judicial Circuits Act of 1866 on July 28, 1866.[120] Under the Act, the ten seat Court would be reduced to seven as vacancies occurred, thereby denying Johnson any likely ability to nominate a Southern sympathizer to the Court.[121] The language of the Bill states:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the said supreme court shall consist of a chief justice of the United States and six associate justices, any four of whom shall be a quorum; and the said court shall hold one term annually at the seat of government, and such adjourned or special terms as it may find necessary for the despatch (sic) of business.[122]

JUDICIARY ACT OF 1869

Once Johnson was safely out of office, Congress returned the authorized size of the Court in 1869 to nine Justices using the following language from the Judiciary Act of 1869:[123]

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum; and for the purposes of this act there shall be appointed an additional associate justice of said court.[124]

As one commenter noted, the various Judiciary Acts of the 1860s amounted to " . . . a mostly partisan attempt to shape the structure and personnel of the Supreme Court: the first *Court-packing* plan"[125] (emphasis added).

120. *Landmark Legislation: Seventh Circuit*, *supra* note 103.
121. *Id.*
122. Judicial Circuits Act of 1866, 14 Stat. 209.
123. *Landmark Legislation: Seventh Circuit*, *supra* note 103.
124. Judiciary Act of 1869, 16 Stat. 44.
125. Timothy Huebner, *The first Court-packing plan*, SCOTUSBLOG (July 3, 2013), https://www.scotusblog.com/2013/07/the-first-court-packing-plan/.

II. FDR Gave "Court Packing" A Bad Name While Achieving a Stunning Political Victory

FDR COURT PACKING PLAN

Despite numerous attempts to do so, the authorized size of the Supreme Court has remained unchanged since the Judiciary Act of 1869.[126] One particularly notable attempt arose during the second term of Franklin D. Roosevelt popularly known as the FDR Court-Packing plan.[127] Roosevelt had first been elected in 1932, during the depths of the Great Depression, on a "New Deal" platform, which promised aggressive use of the national government to improve the general welfare.[128] With the help of overwhelming Democratic majorities in Congress, he had generally delivered on his promises during his first term by signing a staggering amount of progressive legislation.[129] The problem for FDR was the Supreme Court.[130] A majority of the Courts' Justices believed in laissez-faire economic policies and used, among other principles, their interpretation of the Fourteenth Amendment, known as "Substantive Due Process," to strike down New Deal legislation as unconstitutional because they claimed the legislation interfered with the rights of individuals and corporations to enter into private contracts.[131]

By the time of his second inauguration on January 20, 1937, Roosevelt had concluded that it would be necessary for him to confront the Court.[132] Sixteen days after his second inauguration, he released his plan.[133] In essence, his plan was to enlarge the Court by adding a new seat for each Justice who reaches the age of seventy and a half years without retiring.[134] The total size of the Court would be capped at fifteen**,** meaning a total of six new Justices could be added.[135] It escaped virtually no one's attention that six of the existing Justices were over seventy and a half years of age which would give

126. Joanna R. Lampe, *"Court Packing": Legislative Control Over the Size of the Supreme Court*, 2-3, CONGRESSIONAL RESEARCH SERVICE (Dec. 14, 2020), https://www.everycrsreport.com/reports/LSB10562.html.

127. *See generally,* BURT SOLOMON, FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY (Walker & Company, 2009).

128. *President Franklin Delano Roosevelt and the New Deal*, LIBRARY OF CONGRESS, https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/ (last visited Apr. 17, 2021).

129. *Id.*

130. *How FDR lost his brief war on the Supreme Court*, NATIONAL CONSTITUTION CENTER (Feb. 5, 2021), https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2.

131. SOLOMON, *supra* note 127, at 43-44.

132. *Id.* at 5.

133. *Id.* at 11.

134. *Id.* at 13-14.

135. *Id.*

FDR the immediate ability to nominate six new associate Justices should his legislation pass.[136]

In support of his plan, Roosevelt stated that he was concerned about the ability of the older Justices to keep up with their workload.[137] He said: "The personnel of the federal judiciary [are] insufficient to meet the business . . . Modern complexities call also for a constant infusion of new blood in the courts . . . Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation [*sic*]."[138]

For the next 168 days following Roosevelt's announcement of his plan, ". . . the fight over expanding the Court played out over the radio airwaves, across dinner tables all over America and inside the august and serene chambers of the nation's capital."[139] Roosevelt's opponents were not taken in by his stated concerns over the Justices being too old to keep up with the demands placed on the Court.[140] They could clearly see that he was concerned about the decisions the Court had rendered (and were threatening to render in the future) to block his New Deal programs.[141] His justification for proposing the plan was dealt a blow when Chief Justice Charles Evans Hughes testified before Congress that the Court was up to date in its work, countering Roosevelt's stated concern that the old Justices needed help with their caseload.[142]

Initially, as reported by Gallup, the public was as muddled as the Senate with a third in favor, a third against, and a third undecided (or in the case of Senators, "frightened for their political lives").[143] Opposition to the plan was bi-partisan and was led by a Republican Senator (William Borah of Idaho) and a liberal Democrat Senator (Burton Wheeler of the neighboring state of Montana).[144] Wheeler, an early supporter of FDR, set forth his reasons for opposing FDR's plan in a statement released on March 10, 1937[145] summarized by one commentator as follows:

1. Age, he argued, had little to do with competence or modern outlook, citing as examples the two most renowned liberal Supreme Court Justices Louis Brandeis (then still serving on the court at age eighty)

136. SOLOMON, *supra* note 127, at 14.
137. *Id.* at 13.
138. *Id.*
139. *Id.* at 6.
140. William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme court- and Lost*, SMITHSONIAN MAGAZINE (May 2005), https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.
141. *Id.*
142. SOLOMON, *supra* note 127, at 152.
143. *Id.* at 120.
144. *Id.* at 119, 120.
145. Burton K. Wheeler, *First Member of the Senate to Back the President in '32,* CHICAGO FORUM (Mar. 10, 1937), http://academic.brooklyn.cuny.edu/history/johnson/wheeler.htm.

and Oliver Wendell Holmes (who was still productive despite his advanced age).

2. The plan allowed the president to pack the Court and concentrate power stating, "Every despot has usurped the power of the legislative and judicial branches of the government in the name of the necessity for haste to promote the general welfare of the masses."[146]

In due course, Wheeler and Borah's efforts convinced the Senate Judicial Committee to reject FDR's plan, thereby supplying a rare legislative defeat to a popular president who had only recently won a landslide re-election victory.[147] But prior to the official turndown of this plan, the Supreme Court issued a startling decision in *West Coast Hotel Co. v. Parrish*[148] upholding a minimum wage law and reversing, by a five-four vote, a decision made the year before in *Morehead, Warden, v. People of the State of New York ex rel. Tipaldo* on facts which presented essentially the same constitutional issues.[149] So, what happened? One of the Justices, Owen J. Roberts had switched sides.[150] He continued thereafter to side with the four dissenting Justices in the *West Coast Hotel* case to uphold most of the New Deal legislation that came before the Court.[151] While FDR's court-packing plan had been a spectacular legislative defeat, the Court's switch delivered FDR a political triumph.[152] There is some ambiguity over what caused Roberts to switch because his initial decision to switch had apparently taken place before FDR announced his plan.[153] Most commentators believe that Robert's switch, which was dubbed the "switch in time that saved nine,"[154] was greatly influenced by his perception of public sentiment, especially as expressed by FDR's landslide reelection.[155]

So, why did FDR's plan for structural reform fail? Among the numerous attempts to answer this question is a thoughtful essay by Adrian Vermeule entitled "Political Constraints on Supreme Court Reform."[156] Vermeule's main thesis is that "The very conditions that produce demand for structural reform of the Court also tend to produce counter-forces that block the

146. SOLOMON, *supra* note 127, at 123.
147. SCHWARTZ, *supra* note 85, at 234.
148. 300 U.S. 379 (1937).
149. Morehead, Warden, v. People of State Of New York Ex Rel. Tipaldo, 298 U.S. 587 (1936).
150. Brian T. Goldman, *The Switch in Time That Saved Nine: A Study of Justice Owen Roberts's Vote in West Coast Hotel Co. v. Parrish*, 150 CUREJ 1, 5-6 (2012).
151. *Id.* at 5-7.
152. *Id.* at 7.
153. *Id.*
154. SOLOMON, *supra* note 127, at 162.
155. HOFFER, *supra* note 116, at 264.
156. Adrian Vermeule, *Political Constraints on Supreme Court Reform,* 90 MINN. L. REV. 1154 (2005).

movement for reform."[157] More particularly, Roosevelt's legislative court-packing plan failed, according to Vermeule, because:

1. The "switch in time" reduced or eliminated the need for immediate reform and the risk that the Court would "switch back" was insufficient to propel FDR's plan to success.[158]
2. Roosevelt had failed to campaign on Court reform, thus FDR's bold plan was a surprise to Party leaders and created fault lines within the Democratic majority.[159]
3. Counter intuitively, the overwhelming majority held by Democrats (including veto proof majorities in both the House and Senate) had the effect of magnifying the fear of an "executive tyranny."[160]
4. There was a widespread perception that FDR's court-packing plan was disingenuous. Although purportedly based on a concern about the competence of aging judges, the plan was widely seen as a gambit to increase the number of New Deal supporters on the Court.[161]
5. FDR's plan involved adding six new Justices that far exceeded the number required to achieve a majority on the Court favorable to the New Deal thereby amplifying the perception that FDR was over-reaching.[162]
6. A Constitutional amendment was an available alternative and provided an excuse for legislators to refuse to support FDR's plan.[163]

Based on the historic record of successful changes in the number of Supreme Court Justices during the nineteenth century and FDR's unsuccessful attempt to do so in the twentieth century, any proposal advocated by progressives to change the number of Justices should comply with the following rules:

1. No plan can involve removal of a sitting Justice given the accepted interpretation of "during good Behaviour" language in the Constitution, but there exists ample precedent for elimination of a seat upon the occurrence of a vacancy.[164]

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157. *Id.*

158. *Id.* at 1159.

159. *Id.*

160. *Id.* at 1162. Vermeule quotes Senator Henry Ashurst saying "[e]ven many people who believe in President Roosevelt . . . were haunted by the terrible fear that some future president might, by suddenly enlarging the Supreme Court, suppress free speech, free assembly, and invade other Constitutional guarantees of citizens."

161. Vermeule, *supra* note 156, at 1164.

162. *Id.* at 1165.

163. *Id.* at 1170.

164. *Circuit Judges Act*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/timeline/circuit-judges-act (last visited Apr. 17, 2021).

2. Congress is generally free to add seats to the Supreme Court[165] but, by custom, has only done so in combination with an increase in the number of Circuits although at least one such increase (the Tenth seat during Lincoln's administration) was undertaken, at least in part, to assure a majority of Justices sympathetic to the Northern cause during the Civil War.[166]
3. To be successful, the predictable end result of the proposed plan must satisfy the prevailing public sentiment. [The Judicial Act of 1801 did not and was therefore immediately reversed by the Act of 1802.[167] Additionally, the end result of the Roosevelt "court packing" plan could be considered "successful" only because the Court stopped blocking New Deal legislation.]
4. The proposed Plan cannot be perceived as so politically motivated that, if enacted, it will engender a series of tit for tat changes in the Supreme Court as the Presidency and Congress trade political control between the parties.[168]
5. Ideally, a Presidential candidate should announce during his campaign to avoid surprising the public, his own party or the opposing party.[169]
6. The Plan cannot support a convincing conclusion that it will result in a "power grab" by a "tyrannical" President but instead must be an appropriate and proportional solution to a perceived wrong.[170]
7. The arguments advanced in support of the Plan must be perceived as transparent with regard to the true motivation of its supporters and not a subterfuge for an ulterior motive.[171]
8. The Plan should achieve the right balance by providing enough reform to secure progressive support while being sufficiently

165. Senate Rules may need to be changed to allow passage of legislation increasing the number of seats on the Supreme Court by majority vote. The filibuster has already been eliminated for confirmation of Supreme Court nominations. *See* Camille Caldera, *Fact Check GOP Ended Senate Filibuster Supreme Court Nominees*, USA TODAY (Oct. 1, 2020), https://www.usatoday.com/story/news/factcheck/2020/10/01/fact-check-gop-ended-senate-filibuster-supreme-court-nominees/3573369001/.

166. *Landmark Legislation: Tenth Circuit*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/legislation/landmark-legislation-tenth-circuit (last visited Apr. 17, 2021).

167. *See id.*; *see also, Landmark Legislation: Judiciary Act of 1802*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1802 (last visited Apr. 17, 2021).

168. Vermeule, *supra* note 156, at 1156, 1163.

169. *Id.* at 1159 (noting that Roosevelt's Court-packing plan failed in part because he did not advocate for it during his reelection campaign).

170. *Id.* at 1162; Philip Elliott, *The Next Big Idea in the Democratic Primary: Expanding the Supreme Court?*, TIME (Mar. 13, 2019, 11:24 AM), https://time.com/5550325/democrats-court-packing/.

171. *Id.* at 1171.

restrained to avoid overwhelming opposition (as FDR's court-packing plan faced).[172]

III. The Proposed Plan Forces Progressives and Originalists/Textualists to Co-operate

THE PROPOSED PLAN

The Plan proposed by this article includes (1) legislation designated *The Merrick Garland and RBG Supreme Court De-Politicization Act* (Appendix A)[173] and (2) a Constitutional Amendment (Appendix B).[174] In particular, the Plan includes the following features:

a. Addition of two new seats by legislation (Appendix A),[175] on a temporary basis, so long as the Scalia replacement (Neil Gorsuch) and RBG replacement (Amy Coney Barrett) remain on the Court.[176]
b. A Constitutional amendment (Appendix B)[177] for freezing the size of the Supreme Court at eleven seats until the Scalia/RBG seats are vacated, at which time the Court would be frozen permanently at nine seats.[178]
c. To secure early adoption of the proposed Constitutional amendment, the Plan provides for third and fourth new seats (Twelfth and Thirteenth seats) unless the Constitutional amendment is adopted prior to July 1, 2022.[179] This date gives President Biden sufficient time to negotiate a long term bi-partisan plan to de-politicize the Supreme Court during his first term, and it is sufficiently ahead of the mid-term elections to allow for nomination and confirmation of candidates to fill the Twelfth and Thirteenth seats.[180]
d. The proposed Constitutional Amendment also provides for automatic confirmation of any presidential nomination to the Supreme Court when the nomination occurs more than ninety days before the end of the nominating President's term, "[u]nless his nomination is rejected in a final vote by a majority of Senators, with a quorum present, in which the yeas and nays are recorded."[181] Ninety days appears to be an appropriate time limit because the historic record indicates the

172. Vermeule, *supra* note 156, at 1161.
173. *See infra* App. A.
174. *See infra* App. B.
175. *See infra* App. A.
176. *Id.*
177. *See infra* App. B.
178. *Id.*
179. *See infra* App. A.
180. *Id.*
181. *See infra* App. B.

mean number of days from nomination to final Senate vote for all successful nominations since the Ford administration has been 73 days.[182]

e. Section 3 of the Constitutional Amendment provides that the President may not make a nomination during the period starting ninety days before the next Presidential Election and ending on the next Presidential Inauguration Day.[183]

On August 18, 2020, the Democratic Party adopted a platform including a plan endorsing consideration of unspecified structural reform of the courts including the Supreme Court.[184] The Plan described in this article is designed to be aggressive enough to be effective, yet moderate enough to secure enactment.[185] No single part of the proposed Plan would likely work on its own but, when considered as a whole, the Plan should have a reasonable chance for success (in view of the fact that the Democrats have unified control of Congress and the Presidency by virtue of the November 3, 2020 election and the Georgia Senate runoff elections of January 5, 2021).[186] Of course, the Senate Democrats will need to further modify the filibuster rule to allow Supreme Court seats to be added by a simple majority vote as has been done already for nominations to the Supreme Court and lower federal courts.

The substantive arguments in support of the Plan proposed by this article can be summarized as follows:

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182. *See infra* App. D.

183. *See infra* App. B.

184. *See also 2020 Democratic Party Platform* 1, 58, DEMOCRATS (Aug. 18, 2020), https://democrats.org/where-we-stand/party-platform/. The Democratic Party formally adopted its Platform, which included the following paragraph:

> "The Republican Party has packed our federal courts with unqualified, partisan judges who consistently rule for corporations, the wealthy, and Republican interests. They have undermined the legitimacy of our courts through an anti-democratic, win-at-all costs campaign that includes **blocking a Democratic president from appointing a justice to the Supreme Court** and obstructing dozens of diverse lower-court nominees. The Democratic Party recognizes the need for **structural court reforms to increase transparency and accountability**" (emphasis added);

See also Carl Hulse, *Countering G.O.P. on Courts, Democrats Will Call for 'Structural' Change*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/us/democrats-judiciary-reform.html?referringSource=articleShare (suggesting that inclusion of this language was declared to be ". . . a major turning point and a very important step" by the Democratic Presidential candidate, Pete Buttigieg, who was the most vocal advocate of Supreme Court reform among the leading candidates; *see* also Savage & Glueck, *supra* note 57 (asserting that the provision in the 2020 Democratic Party Platform should avoid any credible charge that the public and, more importantly, Democratic legislators were not forewarned should this Plan (or another SC structural reform plan) be introduced. Joe Biden's statement supplies still further advance notice that the Democrats would be considering Supreme Court reforms.

185. Vermeule, *supra* note 156, at 1161.

186. Katherine Gypson, *With Control of White House and Congress, Democrats Have 2 Years to Make Big Changes*, VOICE OF AMERICA (Jan. 22, 2021), https://www.voanews.com/usa/us-politics/control-white-house-and-congress-democrats-have-2-years-make-big-changes.

1. The 2020 Democratic Platform constituted advance public notification that Court reform will be pursued by the Democrats.[187] Joe Biden specifically stated during his successful Presidential campaign, as noted above, that he would appoint a commission to look into structural reforms of the federal courts.[188]
2. The Plan only seeks to undo the effects of Mitch McConnell's hyper-partisan behavior.[189] McConnell is no doubt correct that the American public deserves to have a voice in the selection of future Court nominations.[190] The principle may be correct but its application by him has been inappropriate.[191] The Scalia vacancy occurred approximately 200 days before the next Presidential election providing ample time for full hearings during which the Senate could measure public sentiment.[192] A ninety-day cut-off (prior to a Presidential Election Day) of the sitting President's power to nominate a Justice (Section 3 of the proposed Constitutional Amendment)[193] gives form and substance to Mitch McConnell's argument that the American people should have a say in selecting a Supreme Court Justice whenever a Presidential election is imminent and because there is insufficient time for a thorough vetting by the Senate of the nominee.[194] The Senate should have ample time to provide "Advice and Consent" on any nomination that occurs before the ninety-day cut-off.[195] If the Senate declines to provide a final vote within ninety days, the proposed amendment recognizes the Senate's silence as approval of the nomination.[196] In this regard, the Plan is a restrained and proportional response to the perceived wrong committed by McConnell's norm-busting behavior.[197]
3. The Plan will not permit a series of tit for tat changes in the number of Supreme Court seats once Congress and the States adopt the Constitutional amendment (Appendix B)[198] that freezes the size of

187. *2020 Democratic Party Platform*, *supra* note 184, at 58.
188. Savage & Glueck, *supra* note 57.
189. Kelly, *supra* note 32.
190. *Id.*
191. *Id.*
192. Alicia Bannon, *Justice Ginsburg Should Not Be Replaced Until After the Election*, BRENNAN CENTER (Sept. 19, 2020), https://www.brennancenter.org/our-work/analysis-opinion/justice-ginsburg-should-not-be-replaced-until-after-election.
193. *See infra* App. B.
194. Kelly, *supra* note 32.
195. U.S. CONST. art. II, § 2, cl. 2 (Treaty Making Power; Appointing Power).
196. *See infra* App. B.
197. Kar & Mazzone, *supra* note 59, at 60-61.
198. *See infra* App. B.

the Court.[199] The conditional possibility of additional (Twelfth and Thirteenth) seats is designed to provide a major incentive for quick consideration and adoption of the proposed Constitutional amendment.[200]

4. Republicans could not credibly argue that the Plan is a "power grab" on the scale and scope of FDR's Court-packing plan[201] because it is limited, initially, to only two additional seats and only for a limited period of time[202] (i.e. until the departures of Neil Gorsuch and Amy Coney Barrett), provided that the Republicans provide the necessary votes for adoption of the companion Constitutional amendment.[203] In particular, the amendment will freeze the Court size, first at eleven seats, and then permanently at nine seats.[204] Democrats can support the Plan, knowing that they are giving the Republicans an entirely reasonable option to avoid most of the perceived downsides of FDR's Court-packing plan particularly because the Plan would leave a six to five tilt in favor of Justices appointed by Republican presidents.[205] If the Republicans fail to support the Constitutional amendment by the date specified (July 1, 2022), President Biden can stall nominating candidates for the Twelfth and Thirteenth seats to allow public pressure to build for the Constitutional amendment and to provide evidence that he is in no way attempting a "power grab" (à la FDR's proposal for six new Justices).[206]
5. The Constitutional amendment (Section 2) provides for automatic confirmation of nominations made more than ninety days before a Presidential Election Day unless a majority of Senators reject the nomination in their final vote, with a quorum present, in which the "yeas and nays" are recorded.[207] This Section will ensure that no future Senate Majority Leader will be able to prevent the Senate from performing its duty to provide "Advice and Consent" on Supreme Court nominations[208] simply by failing to allow consideration of any

199. *Id.*
200. *See infra* App. A.
201. Vermeule, *supra* note 156, at 1162.
202. *See infra* App. A.
203. *See infra* App. B.
204. *Id.*
205. *Compare with* Vermeule, *supra* note 156, at 1162 (suggesting that a possible supermajority in the Supreme Court caused by Roosevelt's Court-packing plan resulted in the plan's disfavor).
206. *See infra* App. A; Vermeule, *supra* note 156, at 1162.
207. *See infra* App. B.
208. U.S. Const. art. II, § 2, cl. 2.

nomination[209] (as was the position of the Republicans on the Senate Judiciary Committee during pendency of the Garland nomination).[210]

6. Section 3 of the proposed Constitutional amendment[211] recognizes that McConnell's stated objective (i.e. to give Americans a voice in the selection of future Supreme Court nominations)[212] has merit so long as it applies only to vacancies occurring close to a Presidential election.[213] Accordingly, Presidential nominations will only be blocked during the period starting ninety days before a Presidential Election Day up to the next occurring Presidential Inauguration.[214]
7. The Plan gives President Biden two Supreme Court nomination opportunities as recompense for McConnell's prolonged withholding of "Advice and Consent" on President Obama's nomination to replace Scalia[215] and for McConnell's rushed consideration of Amy Coney Barrett's nomination. By freezing the Court at eleven seats (until departures of Justices Gorsuch and Barrett) and then at nine seats, the Plan corrects the wrongs committed by McConnell in a restrained manner[216] (unlike FDR's disproportionate Court-packing plan).[217] The Plan refrains from seeking to flip the majority unless the Republicans fail to take advantage of the proposed Constitutional amendment, in which case, Biden will ultimately have the opportunity to fill the Twelfth and Thirteenth seats by nomination and confirmation.[218] Even at this point, as noted above, Biden could delay his appointments until after the mid-term elections to

209. Kar & Mazzone, *supra* note 59, at 55.

210. *Id.* at 56. Under the present regime of Constitutional provisions and Senate procedural Rules, McConnell has shown that the Majority Leader need only secure approval from his caucus in order to tell a President that he will not be able to nominate and secure confirmation of any candidate. Forcing the Senate to have a recorded vote in order to decline a Presidential nomination will force Senators from swing states to consider voting for a nominee even if the nomination was by a president from an opposing party. An important purpose of Section 2 of the proposed Constitutional amendment is to re-establish the norm that a president is entitled to nominate whomever he prefers and to have his nomination considered by the Senate via a recorded vote. This process has often resulted in members of the opposing party voting for a nominee despite such members, no doubt, preferring a different person. *Compare with* Linda Greenhouse, *Senate, 96-3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. TIMES (Aug. 4, 1993), https://www.nytimes.com/1993/08/04/us/senate-96-3-easily-affirms-judge-ginsburg-as-a-justice.html (noting that Justice Ginsburg was confirmed 96 to 3); *see also* National Public Radio, *John Roberts Sworn in as U.S. Chief Justice*, NPR (Sept. 29, 2005), https://www.npr.org/series/4761752/ john-roberts-sworn-in-as-u-s-c. . .ief%20Justice%20At%20a,succeed%20the%20late%20William%20Rehnquist (noting that Chief Justice Roberts obtained 78 votes, including 22 votes from Democratic senators).

211. *See infra* App. B.

212. Kelly, *supra* note 32.

213. *See infra* App. B.

214. *Id.*

215. Kar & Mazzone, *supra* note 59, at 55.

216. *See infra* App. B.

217. Vermeule, *supra* note 156, at 1162.

218. *See infra* App. A.

incentivize adoption of the companion Constitutional amendment at any time during his entire first term.[219]

8. The Plan involves reduction in the size of the Court only upon occurrence of vacancies and is, therefore, in compliance with Section 2, Clause 2 of Article II providing for lifetime appointment for "good Behaviour."[220]

IV. By Seeking to De-Politicize the Nomination Process, the Proposed Plan is Designed to Survive Politically Motivated Attacks

LIKELY CHALLENGES AND IMPEDIMENTS

a. The Proposed Plan Amounts to "Court Packing"

In response to a number of recent proposals for adding Justices to the Supreme Court,[221] numerous commentators and academics have reacted, generally negatively, by describing the undesirable effects of "Court-packing."[222] For example, Steve Vladeck, professor at the University of Texas School of Law, opined:

> If Congress increases the size of the Supreme Court for transparently partisan political reasons, it would cement the idea the justices are little more than politicians in robes, and that the court is little more than an additional—and very powerful—arm through which partisan political power can be exercised. And although many Americans already hold this view of the court, court-packing for transparently partisan reasons would only make things worse, especially if it set a precedent for future Congresses to do the same.
>
> Indeed, if one of the most important justifications for an independent, un-elected judiciary is the ability to protect the rights of minorities against the tyranny of the majority, a court that is beholden to whichever party is currently in power would likely lack both the inclination and the legitimacy to stand up to the political branches. Indeed, that Congress has not revisited the size of the court in 150 years is a powerful testament to just how ingrained the norm of nine

219. *Id.*

220. U.S. CONST. art. II, § 2, cl. 2; Judicial Power, Tenure, and Compensation, U.S. CONST. art. III, § 1; *infra* App. A.

221. Burgess Everett & Marianne Levine, *2020 Dems Warm to Expanding Supreme Court*, POLITICO (Mar. 18, 2019, 5:04 AM), https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625.

222. Steve Vladeck, *Why Does the Supreme Court Have Nine Justices? And Why Can't Democrats Add More?*, NBC NEWS (Apr. 10, 2019, 4:31 AM), https://www.nbcnews.com/think/opinion/why-does-supreme-court-have-nine-justices-why-can-t-ncna992851.

> has become—and how concerned different political constituencies have been at different times about preserving the court's power.[223]

Professor Vladeck recognizes that the Republicans are not blameless in causing renewed interest on the part of Democrats in adding Justices by noting:

> "To be sure, there are some who see the addition of two new seats to the court as a proportional response to hardball tactics by Republicans—first by holding open the seat vacated by Justice Antonin Scalia for nearly a year so that it could not be filled by President Barack Obama, and then by confirming Justice Brett Kavanaugh notwithstanding broader concerns about both the nominee and the president who nominated him.
>
> Not only do two wrongs not make a right, though, but once Congress gets back into the business of messing with the size of the court, it's impossible to imagine it stopping. Thus, Democrats might expand the court to 11 seats in 2021, but nothing would stop Republicans from expanding the court to 15 when next they control both chambers of Congress and the White House—and so on. It would only be a matter of time before the court had 37 justices—and no legitimacy."[224]

One commentator on the right went so far as to say, "Few things would push this nation more swiftly down the path toward the dissolution of two centuries of stable self-government than Court-packing. Nothing else on the policy menu of either party in 2020 is remotely as alarming."[225]

Ignoring entirely the norm-busting actions of the Republicans, other right-wing commentators had this to say about "packing the Court":

> Political democracy depends on the existence of a responsible opposition that challenges the party in power vigorously while remaining loyal to our basic institutions. Those institutions depend on respecting certain norms and boundaries, and on a large degree of

223. *Id.*
224. *Id.*
225. Dan McLaughlin, *Against the Democrats' Court-Packing Scheme*, NATIONAL REVIEW (June 6, 2019, 10:48 AM), https://www.nationalreview.com/magazine/2019/06/24/against-the-democrats-court-packing-scheme/.

> regard and toleration for political opponents. The politics of nihilism, however, will lead only to destruction.[226]

The Plan advanced by this article is intentionally limited to only two additional seats to rectify the wrongs committed by McConnell.[227] However, the Plan refrains from adding third and fourth new seats to encourage the Republicans to engage in fashioning a bi-partisan reform of the Court structure[228] to eliminate the negative effects caused by partisan excesses, particularly those engendered by McConnell's stewardship over Supreme Court nominations.[229]

b. An Even Number of Justices Could Cause Gridlock on the Court

One likely challenge will be that the Constitutional amendment could cause the Court membership to remain at ten members for an extended period of time. This would occur if the departure dates of Gorsuch and Barrett are spaced apart by an extended period. Some might argue that this will cause the Court to gridlock excessively at five to five, especially because the Court might be evenly split between five Justices appointed by Democratic presidents and five Justices appointed by Republican presidents. In an excellent article by John V. Orth,[230] the desirability of having an odd number of judges in any court is discussed at length noting that an odd number ". . . makes perfect sense: if the court is fully staffed and all judges participate, the possibility of a tie vote is eliminated."[231] As Orth points out and as the history of the US Supreme Court (described above) shows, the first Congress did not find this logic convincing and chose to set the initial Court size at six where it remained for eighteen years[232] (except for a few months between the passage of the Judiciary Act of 1801 and its repeal in 1802 with no effect because no vacancy occurred).[233] There was also a period, as noted above, between the Judiciary Acts of 1863 and 1866 when Congress increased the size of the Court to ten to accommodate a Tenth Circuit established on the West Coast and to provide a majority in favor of Northern interests during

226. John Yoo & Robert Delahunty, *The Foolish Court-Packing Craze*, NATIONAL REVIEW (July 19, 2018, 6:30 AM), https://www.nationalreview.com/2018/07/court-packing-ideas-threaten-judicial-independence/.

227. Kelly, *supra* note 32; Levine, *supra* note 2.

228. *See infra* App. A.

229. Kelly, *supra* note 32.

230. John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?*, 19 CONSTITUTIONAL COMMENTARY 536, 681 (2002), https://scholarship.law.umn.edu/concomm/536.

231. *Id.* at 686.

232. *Id.* at 684.

233. *Id.* at 684-85.

the Civil War.[234] Orth also reports that numerous common law courts operated for centuries with four judges each and notes several historic examples of courts operating with even numbers of judges.[235] Acknowledging a historic trend toward Courts having odd numbers of judges, Orth speculates that the trend likely derives from an assumption that more often than not ". . . deliberation on legal subjects by trained judges is likely to result in disagreement" rather than unanimity.[236]

Is any relevant evidence available regarding the effects of cases being resolved by an odd number of Justices on the US Supreme Court compared to an even number of Justices? Surprisingly, such evidence exists.[237] Even more surprisingly, this evidence demonstrates, strongly and consistently, that an even number of Justices results in a higher percentage of cases being resolved by overwhelming majorities and very few evenly split decisions.[238] In particular, the Washington University Law School maintains a Supreme Court Database that allows online access to coded information regarding each Supreme Court decision.[239] Using this database, Sarah Tuberbville, Director of The Constitutional Project at the Project on Government Oversight and Anthony Marcum, Research Associate for the Governance Project at the R Street Institute authored an article published by the Washington Post containing the following bar graph:[240]

234. Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794.

235. Orth, *supra* note 230, at 686.

236. *Id.*

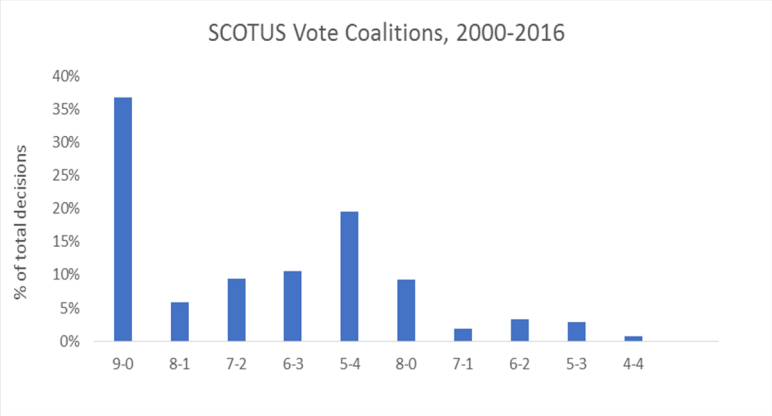
237. Wash. Univ. St. Louis, *About the Collection*, THE SUPREME COURT DATABASE, http://scdb.wustl.edu/about.php (last visited Mar. 22, 2021).

238. *See infra* App. C – Supreme Court Vote Coalitions.

239. Wash. Univ. St. Louis, *supra* note 237.

240. Sarah Tuberville & Anthony Marcum, *Those 5-4 Decisions on the Supreme Court? 9 to 0 Is Far More Common*, WASH. POST (June 28, 2018, 6:00 AM), https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/.

FIGURE 1



The graph lists along the horizontal axis the possible outcomes by vote coalitions.[241] The vertical axis denotes the percentage of all decisions rendered during the covered period which were decided by the respective vote coalitions.[242] The first five bars from left to right list the percentages of the total cases decided by each of the following possible vote coalitions in which all nine Justices participated: 9-0, 8-1, 7-2, 6-3 and 5-4.[243] The next five columns list the percentages for each of the following possible vote coalitions when the cases were decided by eight Justices: 8-0, 7-1, 6-2, 5-3 and 4-4.[244] The graph in Figure 1 includes all decisions by the Court for the period of 2000-2016.[245] While the Court is allowed to render decisions, so long as a quorum of six Justices hears the case, by practice, the Court has apparently elected to render decisions, with some exceptions such as motions for emergency hearings, only when at least eight Justices are able to consider the case.[246] This practice, no doubt, derives from the reasoning expressed below by Chief Justice Marshal in 1834 when the Court consisted of seven Justices.[247]

> In cases where constitutional questions are involved, unless four judges of the court concur in opinion, thus making the decision that

241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. Tuberville & Marcum, *supra* note 240.
246. Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44 (1963).
247. *Marshall Court (1830-1834)*, OYEZ, https://www.oyez.org/court/15258/marshall18 (last visited Mar. 23, 2021).

> of a majority of the whole court, it is not the practice of the court to deliver any judgment, except in cases of absolute necessity.[248]

While the graph from Figure 1 demonstrates that the most prevalent outcome is a unanimous verdict for both the nine Justice courts and the eight Justice courts, the graph illustrates another fairly surprising result. When a case is decided by nine Justices, the most common outcome, aside from unanimity, is a five to four split, evidencing the least amount of agreement among the Justices with decisions showing greater agreement being less prevalent (i.e., six to three, seven to two, and eight to one).[249] Compare these results with cases heard by eight Justices where outcomes showing more agreement between the Justices (seven to one, six to two, and five to three decisions) are far more likely than is the category showing the least agreement (four to four decisions).[250] That is to say, when eight Justices hear a case, the least likely outcome is a four to four decision.[251] One might argue that when a Court consists of an even number, the Justices work harder to avoid an even split because such an outcome leaves the case undecided and the lower court's judgement is controlling in the matter, thereby rendering the Supreme Court's efforts unproductive on that case.[252] Whatever the reason, the difference in vote coalitions between courts with an even number of Justices versus an odd number of Justices is stark.[253] While the graph presented by Tuberville and Marcum in Figure 1 is highly suggestive of an even number of eight Justices being more likely to result in greater agreement among the Justices, the question arises as to whether the pattern of outcomes over the 2000 to 2016 period is idiosyncratic, that is, dependent on factors other than the number of Justices.[254] To seek an answer, the cases held in the Washington Law School Supreme Court Database were searched to determine the coalition spread for different periods defined by the following date ranges: 2000 to 2020; 2000 to 2010; 2010 to 2020; and 1980 to 2000.[255] The data derived for each of these periods was placed in the same bar graph form as Figure 1 above and appears

248. Briscoe v. Bank of Commonwealth of Kentucky, 33 U.S. 118, 33 (1834). *See also* Fuentes v. Shevin, 407 U.S. 67, 2003 (1972) (demonstrating a 4-3 vote.); Thomas M. Burke, *Is a 4-3 Decision of the United States Supreme Court the "Supreme Law of the Land"?*, 2 FLA. ST. U.L. REV. 312, 320 (1974) (quoting Chief Justice Marshall). *But see* Roofing Wholesale Co., Inc. v. Palmer, 502 P.2d 1327, 1130-31 (Ariz. 1972) (refusing to bind the state of Arizona's courts to the decisions of the Supreme Court).

249. Tuberville & Marcum, *supra* note 240.

250. *Id.*

251. *Id.*

252. Mark Fahey, *The Supreme Court Can Deal with Eight Justices*, CNBC (Mar. 3, 2016), https://www.cnbc.com/2016/03/03/the-supreme-court-can-deal-with-eight-justices.html.

253. Tuberville & Marcum, *supra* note 240.

254. *Id.*

255. *See* Wash. Univ. St. Louis, *supra* note 237.

on the next page in Figure 2 through Figure 5 for the periods indicated in each graph.[256] Appendix C includes all of the raw data for each period.[257]

FIGURE 2[258]

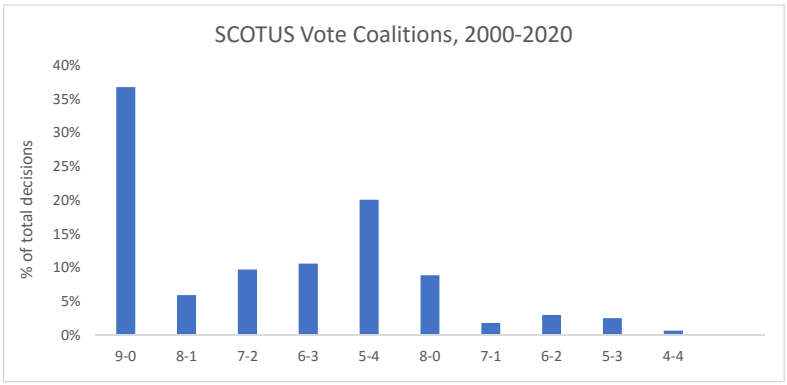
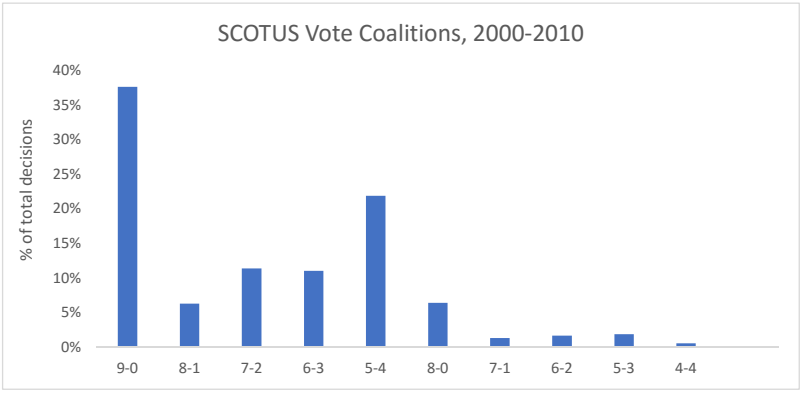


FIGURE 3[259]



256. *See infra* Figures 2-5.
257. *See infra* App. C – Supreme Court Vote Coalitions.
258. *Id.*
259. *See infra* App. C – Supreme Court Vote Coalitions.

FIGURE 4[260]

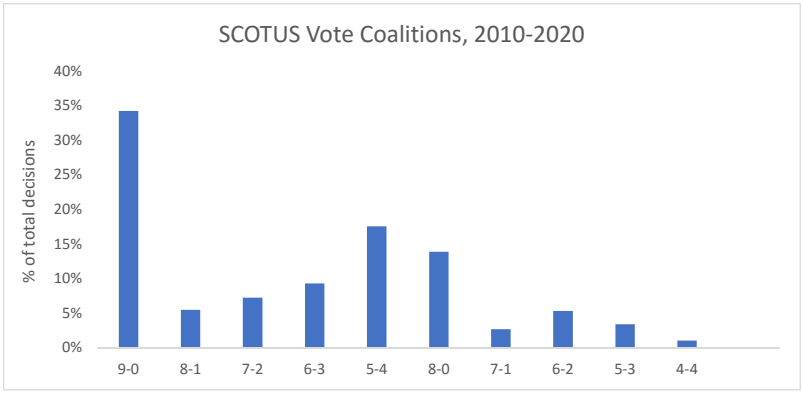
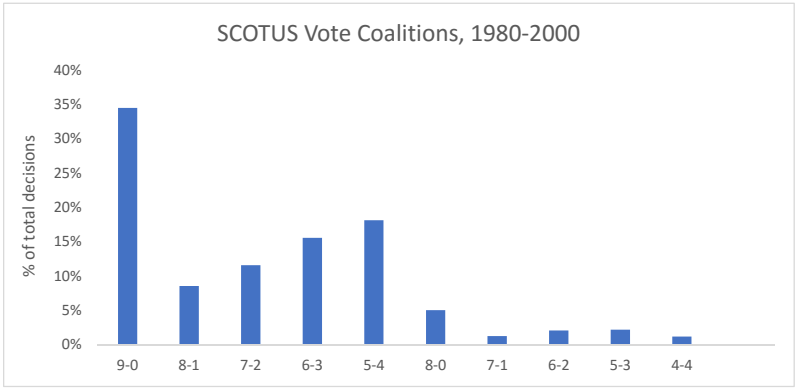


FIGURE 5[261]



The results of this study show a stunning similarity in the pattern of coalition outcomes regardless of the time period selected or even the mix of Judges on the Court.[262] In particular, the Judges sitting from 1980 to 2000 (Figure 5) were substantially different from the Judges sitting from 2010 to 2020 (Figure 4).[263] During each timeframe, the Courts made up of eight Justices consistently reached an even four to four split on fewer occasions than results showing more consensus (seven to one, six to two, and five to three decisions), whereas the Courts made up of nine Justices consistently reached a five to four split more often than any other outcome except for unanimous decisions.[264] This data is highly suggestive of future behavior of

260. *Id.*
261. *Id.*
262. *See supra* Figures 2-5.
263. *See* Lee Epstein et al., *Revisiting the Ideology Rankings of Supreme Court Justices*, 44 J. LEGAL STUD. 295, 304-05 Table 1 (2015) (demonstrating the ideologies of Supreme Court Justices).
264. *See supra* Figures 4-5.

the Court because it covers actual compositions of the U.S. Supreme Court when sitting as a Court made up of nine Justices, which will occur when a ten member Court considers cases with one Justice missing.[265] The data show this happens in about one in five cases.[266]

In summary, this study supplies strong evidence that a United States Supreme Court comprised of an even number of Justices would likely deadlock less frequently than would a Supreme Court comprised of an odd number of Justices.[267] Accordingly, a Constitutional amendment that provides that two seats (namely Justice Gorsuch's and Justice Barrett's seats) will not be replaced upon their respective departures would not likely increase (but would likely decrease) the number of decisions on which the Court is deadlocked, despite the fact that the full Court could experience an extended period (assuming Justices Gorsuch and Barrett depart on dates that are widely separated) during which the full Court will have an even number of sitting Justices.[268]

It is hard to imagine a more relevant study of likely coalition outcomes from a ten-member Supreme Court than is suggested by the consistent coalition patterns illustrated in Figure 1 through Figure 5.[269] In particular, the above study strongly suggests that a Supreme Court made up of ten members would likely produce a higher percentage of decisions evidencing strong agreement than would the present nine member Court when all nine Justices participate in the decisions.[270] Thus, the data displayed above provide a strong rebuttal to any argument that a Court formed of an even number of Justices will promote disagreement among the Justices and result in an excessive number of decisions in which the Justices are deadlocked.[271]

c. A Constitutional Amendment is not Needed to Add Justice(s)

A constitutional amendment is not required for one or even four seats to be added to the Court.[272] The Judiciary Act of 1807 and The Tenth Circuit Act of 1863 added one Justice to the Court and the Judiciary Acts of 1837

265. Fahey, *supra* note 252.
266. *Id.*
267. *Id.*
268. *Id.*
269. *See supra* Figures 1-5.
270. Tuberville & Marcum, *supra* note 240.
271. Fahey, *supra* note 252.
272. *See e.g.*, Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44; Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794; Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176; Act of Feb. 24, 1807, ch. 16, § 2, 2 Stat. 420.

and 1869 added two Justices to the Court.[273] However, the proposed constitutional amendment provides several critical benefits.[274]

First, with legislation only, the Republicans would be free to add an additional Justice or Justices as soon as they regain unified federal government control, causing a likely unending tit for tat exchange as unified government is traded back and forth between the Republicans and Democrats.[275] Section 1 of the proposed constitutional amendment precludes any further increases in the size of the Court and returns the number of Justices to nine as soon as Justices Gorsuch and Barrett depart from the Court.[276] Thus, the proposed constitutional amendment is restrained in scope and emphasizes the limited, remedial purpose of undoing the Republicans' (1) refusal to consider any President Obama nomination for 294 days and (2) ram through a replacement just before the 2020 Presidential Election.[277] Even if the amendment is not adopted, the Democrats will have afforded the Republicans an extended opportunity to participate in a reform process designed to depoliticize the Court.[278]

Second, legislation alone cannot prevent a future Republican controlled Senate from repeating the complete refusal to consider any Supreme Court nomination by a Democratic President for any period of time including an entire four-year term as has been threatened.[279] The second section of the proposed constitutional amendment requires a recorded final vote.[280] This will likely be considered reasonable by the public and make the proposed process more appealing politically because it will emphasize the remedial purpose of restoring a Supreme Court pick that was unfairly denied for nearly a year.[281]

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273. Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44; Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794; Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176; Act of Feb. 24, 1807, ch. 16, § 2, 2 Stat. 420.

274. *See supra* Part IV.c. *See also infra* App. B – Proposed Constitutional Amendment.

275. *Frequently Asked Questions – General Information*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/faq_general.aspx (last visited Mar. 25, 2021).

276. *See infra* App. B – Proposed Constitutional Amendment.

277. Jennifer L. Brinkley, *Ruth Bader Ginsburg: Examining Her Path to the High Court Bench and Its Intersection With the ACLU*, 6 LINCOLN MEMORIAL U.L. REV. 1, 25 (2019); Barbara Sprunt, *Amy Coney Barrett Confirmed, Takes Constitutional Oath*, NATIONAL PUBLIC RADIO (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court.

278. *See e.g.*, Christopher Ingram, *Republican Talk of Holding a Supreme Court Seat Vacant for Four Years is Without Precedent*, WASH. POST (Nov. 1, 2016, 12:41 PM), https://www.washingtonpost.com/news/wonk/wp/2016/11/01/republican-talk-of-holding-a-supreme-court-seatvacant-for-four-years-is-without-precedent/ (describing Congress threatening to hold open a Supreme Court seat based on the outcome of a presidential election).

279. *Id.*

280. *See infra* App. B – Proposed Constitutional Amendment.

281. Ben Jacobs, *How the Battle to Fill Ruth Bader Ginsburg's SCOTUS Seat Could Provoke a Constitutional Crisis*, INTELLIGENCER (Sept. 18, 2020), https://nymag.com/intelligencer/2020/09/how-battle-over-rbgs-seat-could-spark-constitutional-crisis.html.

Third, the proposed constitutional amendment could be important in securing President Biden's approval.[282] While previously expressing a negative view of any plan involving Court expansion, President Biden was careful during his 2020 presidential campaign to avoid locking himself into a position (for or against the expansion of the Court) by stating that he would appoint a commission to study Supreme Court structural reform.[283] The Plan advanced by this article is carefully designed to allow for remediation of Mitch McConnell's partisan manipulation of the Senate's "Advice and Consent" function by providing for an immediate expansion of two seats while only threatening to add an additional two seats in order to provide a major incentive for Republicans to agree to a constitutional amendment that would preclude the type of partisan maneuvering in which McConnell engaged.[284] Moreover, the threat of adding two additional seats could motivate Republicans to avoid stonewalling other types of reasonable structural reforms, such as those advanced by Ryan Doerfler, Samuel Moyn, Daniel Epps, and Ganesh Sitaraman.[285] By agreeing not to fill the third and fourth seats immediately, President Biden could enhance his image as a restrained moderate.[286] If the Republicans refuse to support the proposed amendment, it will be their fault if a tit for tat war breaks out.[287]

Fourth, President Biden could take up to the end of his first term to secure passage of the proposed constitutional amendment even if the Republicans regain control of the Senate in 2022.[288] The Constitution provides for a three-part process consisting of a nomination by the President, then a confirmation by the Senate, and an appointment by the President.[289] President Biden could secure confirmation of nominees to the twelfth and thirteenth proposed seats but announce in advance his intent to withhold appointment.[290] By delaying his Biden could add still more luster to his image as a moderate.[291]

Fifth, the proposed constitutional amendment will eliminate a structural advantage the Republicans have in repeating a "McConnell" type refusal to

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282. Matthew Spalding, *Joe Biden's Not-So-Secret Plan to Restructure the Supreme Court*, REALCLEAR POLICY (Oct. 26, 2020), https://www.realclearpolicy.com/articles/2020/10/26/joe_bidens_not-so-secret_plan_to_restructure_the_supreme_court_581935.html.

283. *Id.*

284. *See supra* pp. 30-31.

285. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 152 (2019); Ryan D. Doerfler & Samuel Moyn, *Reform the Court, but Don't Pack It*, ATLANTIC (Aug. 8, 2020), https://www.theatlantic.com/ideas/archive/2020/08/reform-the-court-but-dont-pack-it/614986/.

286. Paul Waldman, *Opinion: How Joe Biden is Holding on to his Image as a Moderate,* WASH. POST (Sept. 22, 2020), https://www.washingtonpost.com/opinions/2020/09/22/how-joe-biden-is-holding-his-image-moderate/.

287. *Id.*

288. *See infra* App. B – Proposed Constitutional Amendment.

289. U.S. CONST. art. II, §§ 2, cl.2, 3.

290. U.S. CONST. art. II, § 2, cl. 2.

291. Waldman, *supra* note 286.

consider future Supreme Court nominations by Democratic presidents.[292] In particular, the Republicans have a major structural advantage in the Senate over Democrats due to the disproportionate representation, on a per capita basis, enjoyed by small population states.[293] This advantage will likely yield more instances where there will be a Democratic president with a Republican Senate than there will be instances of a Republican president with a Democratic Senate.[294] The second section of the proposed constitutional amendment will help to eliminate the consequences of this structural advantage.[295]

d. Freezing the Size of The Supreme Court Will Disadvantage One Party More Than the Other

The threat of being able to add Supreme Court seats was certainly at play in 1937 and may have contributed to Justice Owen Roberts' decision to switch sides.[296] This scenario could play out again but it is hard to predict which Party might benefit the most from an elimination of the threat to expand the Court except for the Republican's structural advantage in the Senate mentioned above.[297] So long as this advantage continues, all other factors being equal, it is reasonable to conclude that the Republicans will be in charge of the Senate more often than Democrats.[298] If this is true, the inability to expand the number of seats in the future might disadvantage the Republicans slightly more than the Democrats.

e. A Majority of Democratic Presidential Candidates Took a Stand Against "Court Packing"

During the recent Democratic primaries, the candidates were asked if they would be open to adding Justices to 'pack the Supreme Court.[299] The results reported by the Washington Post were as follows: Steyer said yes; Booker, Bullock, Buttigieg, Gillibrand, Harris, Inslee, Klobuchar, Moulton, Warren, and Yang said they were open to it; Biden, Bennet, Bloomberg, Castro, Delaney, de Blasio, Gabbard, Hickenlooper, O'Rourke, Ryan, Sanders, Sestak, Swalwell, and Williamson said no.[300]

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292. *See infra* App. B – Proposed Constitutional Amendment.
293. Schaller, *supra* note 60.
294. *Id.*
295. *See infra* App. B – Proposed Constitutional Amendment.
296. Goldman, *supra* note 150.
297. Schaller, *supra* note 60.
298. *Id.*
299. *Supreme Court Packing: Where Democrats Stand*, WASH. POST, https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-packing/ (last visited Mar. 13, 2021).
300. *Id.*

During an interview with the Iowa Starting Line, Joe Biden is reported to have stated his objection to expanding the Supreme Court as follows: "No, I'm not prepared to go on and try to *pack* the court, because we'll live to rue that day" (emphasis added).[301] This comment implies that Biden is opposed to an expansion plan that provides no way of handling the inevitable backlash once the Republicans regain unified control of Congress and the Whitehouse.[302] As noted above, Biden has backed away from this position and instead, promised to appoint (and in fact has appointed) a commission to study the issue.[303] The Plan proposed in this article includes a mechanism to incentivize the Republicans to agree to the proposed amendment that would freeze the Court size while providing for a remediation of McConnell's refusal to act on any Obama nomination and his hyper-partisan, rushed replacement of RBG.[304] Once the Biden commission is properly briefed on the proposed Plan, the hope is that a majority of the commission will see this proposed Plan as something materially different from a plan that simply "packs" the Court.[305] Moreover, as noted above, the Plan allows Biden to withhold appointment of individuals to the twelfth and thirteenth seats even after the trigger date of July 1, 2022 has passed in order to use it to build public support for any constitutional amendment the commission may wish to advance.[306] The logic of this strategy is believed to be compelling, and it is hoped that the commission will agree.[307]

V. The Proposed Plan Creates Opportunities for Competing Structural Reform Plans to be Considered

ALTERNATIVE PLANS FOR COURT REFORM

A number of alternative plans for structural reform of the Supreme Court exist and have been actively debated in numerous scholarly articles.[308] One of the best among these is an article by Daniel Epps and Ganesh Sitaraman[309]

301. Naomi Jagoda, *Biden Says He Opposes Expanding the Supreme Court*, THE HILL (July 5, 2019), https://thehill.com/homenews/campaign/451778-biden-says-he-opposes-expanding-the-supreme-court.

302. *Id.*

303. Savage & Glueck, *supra* note 57.

304. *See supra* pp. 30-31.

305. A vital part of the briefing will be to point out that the 6-3 super majority of Justices appointed by Republican presidents now on the Court could do serious damage to Biden's progressive agenda. *See* Epstein, *supra* note 263, at 304-05 Table 1. The Proposed Plan could significantly improve the chances that Biden will have a successful first term. *See supra* pp. 30-31.

306. *See infra* App. A – Proposed Legislation.

307. Savage & Glueck, *supra* note 57.

308. *See* Epps & Sitaraman, *supra* note 285, at 188-89; Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665032.

309. Epps & Sitaraman, *supra* note 285, at 188-89.

published last year in the Yale Law Review proposing two separate plans for court reform:

1. The Supreme Court Lottery

> Under this plan ". . . every judge on the federal courts of appeals would also be appointed as an Associate Justice of the Supreme Court. The Supreme Court would hear cases as a panel of nine, randomly selected from all the Justices. Once selected, the Justices would research and prepare cases from their home chambers before traveling to Washington to hear oral arguments for two weeks, after which, another set of judges would replace them. The panel members would then return to their home chambers to complete their opinions. By law, each panel would be prohibited from having more than five Justices nominated by a president of a single political party (that is, no more than five Republicans or Democrats at a time). In addition, only a six to three supermajority of the Court, rather than a simple majority, could hold a federal statute (and possibly state statutes, depending on how one weighs federalism values) unconstitutional.[310]

2. The Balanced Bench

> Under this plan ". . . the Supreme Court would start with ten Justices. Five would be affiliated with the Democratic Party, and five with the Republican Party. These ten Justices would then select five additional Justices chosen from current circuit (or possibly district) court judges. The catch? The ten partisan-affiliated Justices would need to select the additional five Justices unanimously (or at least by a strong supermajority requirement). These additional Justices would be chosen two years in advance, for one-year terms. And if the Justices failed to agree on a slate of additional colleagues, the Supreme Court would lack a quorum and could not hear any cases for that year."[311]

Epps and Sitaraman argue that either of these plans could be implemented without a constitutional amendment[312] but recognize that others will disagree, making their respective plans problematic from the standpoint of political feasibility. Both plans have a number of attractive features but are audacious and, therefore, are likely to fail because of the Vermeule thesis quoted above, namely, "The very conditions that produce demand for structural reform of

310. *Id.* at 181-82.
311. Epps & Sitaraman, *supra* note 285, at 193.
312. *Id.* at 185, 200.

the Court also tend to produce counterforces that block the movement for reform."[313] The Plan proposed by this article could be a way out of this dilemma. In particular, passage of the Merrick Garland and RBG Supreme Court De-Politicization Act (Appendix A) would allow for immediate appointment of the tenth and eleventh Justices that would eliminate a super majority in favor of a six to five tilt toward the more conservative members appointed by Republican presidents.[314] The legislation also allows for, but does not mandate, the creation of twelfth and thirteenth seats.[315] As noted above, this feature of the proposed Plan is designed to provide a powerful incentive for both Parties to work together to adopt a Constitutional amendment to put in place a permanent reformation of the Court, such as freezing the number of Justices at eleven initially and nine ultimately once Gorsuch and Barrett depart the Court.[316] However, there would be no reason why either of the above proposals could not be considered, as an alternative, by Judiciary Committee deliberations (or by a Commission appointed for such purposes) to consider the above alternative proposals of Epps and Sitaraman, or a modification thereof, or any other proposal deemed most desirable by Congress and the president on a bi-partisan basis.

Recently, a very thoughtful analysis of both means and ends for Court reform was released by Ryan D. Doerfler and Samuel Moyn concluding that the:

> . . . prevailing view [is] that we should use non-neutral means of reform that correct distortions in membership on the bench in order to achieve the neutral end of an apolitical Supreme Court. In opposition to this view, our argument has favored the neutral means of democratization—which shifts power to whoever wins elections to determine the fate of the country—as the most plausible way to achieve non-neutral ends.[317]

Doefler and Moyn's arguments would have been more compelling had RBG remained alive until Donald Trump's tenure was ended. But her death just eight days[318] after the release of their article has allowed the formation of a super majority of deeply ideologically driven textualists/originalists who may dominate the Court for decades. This article proposes a hybrid approach that

313. Vermeule, *supra* note 156, at 1154.
314. *See infra* App. A.
315. *Id.*
316. *See supra* Part IV(b).
317. Doerfler & Moyn, *supra* note 308, at 71.
318. Peter Baker & Maggie Haberman, *McConnell Vows Vote on Ginsburg Replacement as Her Death Upends the 2020 Race,* N.Y. TIMES, (Sept. 22, 2020), https://www.nytimes.com/2020/09/18/us/politics/mitch-mcconnell-supreme-court-ruth-bader-ginsburg.html.

seeks the same ends as Doefler and Moyn (a more apolitical Court) by engaging first in a dramatically political reform (the addition of two justices) combined with a threat to engage in even more court expansion to provide political motivation to achieve reform of the type favored by Doefler and Moyn.[319] Emergency reform is justified to avoid the threat of decades-long domination by activist Justices that are deeply anti-progressive.[320] This emergency reform can then be moderated by more thoughtful reforms, such as those proposed by Doefler and Moyn or by Epps and Sitaraman.

The important point here is that the Plan proposed by this article will inherently incentivize both parties to work together to find a mutually acceptable long-term solution because the Republicans will desperately want to avoid the appointment of twelfth and thirteenth Justices selected by a Democratic president and confirmed by a Democratic majority in the Senate. On the other hand, Democrats will likely recognize that the adoption of a long-term solution that prevents a future tit for tat expansion by the Republicans is worth giving up the opportunity to fill the twelfth and thirteenth seats. If the Republicans fail to cooperate, the installation of additional Justices may be an acceptable (although far less desirable) outcome.

Finally, as noted above, President Biden can delay his nomination of the twelfth and thirteenth seats past the July 1, 2022 deadline, especially if progress toward a long-term solution, likely in the form of a constitutional amendment, is close to agreement.[321] The Constitution allows the president to "nominate" a candidate, and the Senate is able to provide "Advice and Consent" followed by the final step by which the president would "appoint" the confirmed Justice.[322] This interpretation would allow Biden to obtain Senate confirmation of his nominee but to withhold "appointment" until he has secured an acceptable Constitutional amendment. Withholding "appointment" would extend President Biden's authority to act until near the end of his four-year term, even if the Senate were to be retaken by the Republicans in the midterm election, provided only that he secures "confirmation" prior to installation of the new Congress following the midterm elections.

SUMMARY

In summary, the Plan proposed by this article seeks to:

319. *See* Doerfler & Moyn, *supra* note 308, at 71.
320. *Id.* at 6.
321. See *supra* Part III(3).
322. U.S. CONST. art. II § 2, cl. 2.

a. correct the injustice of denying Senate "Advice and Consent" on any nomination by Barack Obama to fill Scalia's seat for a norm-busting 294-day[323] period and of the installation, in a hyper-partisan manner, of RBG's replacement, during the final days of a Presidential election period, in violation of the arguments advanced by McConnell to refuse to consider the Garland nomination[324], and
b. achieve the right balance for a structural reform of the Supreme Court by providing enough desirable features to secure progressive support while, at the same time, remaining sufficiently restrained to avoid engendering overwhelming opposition (like the successful opposition engendered by FDR's over-reaching court-packing plan).

The proposed Plan further seeks to channel oppositional energy toward a desirable end result in which the Court size is permanently frozen at nine members, or in which an even better, long-term solution is hammered out, such as one of the Plans proposed by Epps and Sitaraman, or by Doefler and Moyn, or by modifications of or substitutions for their Plans.

323. Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait,* NBC NEWS, (July 20, 2016), https://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541.

324. Baker & Haberman, *supra* note 318.

Appendix A- Proposed Legislation

Merrick Garland and RBG Supreme Court De-Politicization Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That:

Section 1: Up to July 1, 2022, and subject to any superseding Constitutional Amendment, the Supreme Court of the United States shall consist of a chief justice and ten associate justices, any seven of whom shall constitute a quorum; and for this purpose, there shall be appointed two additional associate justices of said Court, with like powers, and to take the same oaths, perform the same duties, and be entitled to the same salary, as the other associate justices provided, however, that no vacancy in the office of associate justice held by Neil McGill Gorsuch or in the office of associate justice held by Amy Coney Barrett shall be filled by appointment and, upon the occurrence of such a vacancy by either, the Supreme Court shall consist of a chief justice and the number of associate justice offices existing at the time of such vacancy minus the one office vacated.

Section 2: On and after July 1, 2022, and subject to any superseding Constitutional Amendment, the Supreme Court of the United States shall consist of a chief justice and twelve associate justices, any nine of whom shall constitute a quorum; and for this purpose, there shall be appointed two additional associate justices of said Court, with like powers, and to take the same oaths, perform the same duties, and be entitled to the same salary, as the other associate justices provided, however, that no vacancy in the office of associate justice held by, or previously held by, Neil McGill Gorsuch or in the office of associate justice held by, or previously held by Amy Coney Barrett or in the office of either of the two associate justices created by this section shall be filled by appointment and, upon the occurrence of such a vacancy, the Supreme Court shall consist of a chief justice and the number of associate justice offices existing at the time of such vacancy minus the one office vacated.