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Against Court Packing, or a Plea to Formally Amend the Constitution

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INTRODUCTION

Court packing[1] has been, until recently, essentially a pejorative term. Court packing was, politically and constitutionally, "out of

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1 Mechanistically, court packing refers to altering the number of Justices on the Supreme Court. There might be a variety of reasons to do so. This term, however, particularly refers to efforts to impact the ideological composition of the court through transformative appointments.

bounds,"[2] in other words, "a wholly illegitimate means of seeking to alter existing Supreme Court doctrine."[3] As a result, "[n]o serious person, in either major political party, suggests court packing . . . ."[4]

That is no longer true.

The pressure to consider court packing began after the Senate refused to hear confirmation proceedings for nominee Merrick Garland and instead waited to allow incoming President Trump to fill that seat months later.[5] This refusal to fill a vacant seat, according to some, was court packing because it effectively reduced the size of the Court during the end of President Obama's term.[6] The renewed interest in court packing did not turn out to be a fleeting idea or mere "academic

2 Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 540–41 (2018). Grove explained that we find it "self-evident" that "'packing' the Supreme Court is wrong." *Id.* at 467; *see also* Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1124 (2020) ("The conventional wisdom has long been that federal court packing is something the President and Congress '*just cannot do*.' Even though the Constitution's text does not directly prohibit expanding or contracting the size of courts to change their political makeup, many have argued that there is a longstanding norm or convention against doing so." (quoting Michael C. Dorf, *How the Written Constitution Crowds out the Extraconstitutional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 74 (Matthew D. Adler & Kenneth Einar Himma eds., 2009))).

3 Ronald J. Krotoszynski, Jr., *The Unitary Executive and The Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1063–64 (2014).

4 *Id.* at 1064.

5 Levy, *supra* note 2, at 1125 (explaining that the justification for packing the Supreme Court "rests, in part, on a claim that the majority-Republican Senate 'unpacked' the Supreme Court by refusing to hold hearings upon the nomination of Judge Merrick Garland in 2016—in effect, the Senate reduced the number of seats on the Court from nine to eight, for political gain" (citing Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court [https://perma.cc/UM3P-DA9L])).

6 *See id.* at 1125, 1130 ("Specifically, there are those who argue that by holding open Justice Scalia's seat, the Republicans shrank or 'unpacked' the Court by one Justice.").

fantasy;"[7] it has' been in the wind regularly since then,[8] including making it onto the topics covered by Democratic presidential candidates.[9]

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7 Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 165 (2019). Epps and Sitaraman offer a variety of reforms including increasing the size of the Court. *Id.*; *see also* Levy, *supra* note 2, at 1125–26 ("[Court packing] has unquestionably happened in the past several years in state courts across the country. . . ." (footnotes omitted)). Academic interest in court packing has, if anything, increased since 2018. *See e.g.*, Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121 (2020) (examining the history of court packing at the state level, and arguing that it has been done regularly and "successfully"); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747 (2020); (examining the history of court packing and arguing that it poses "unprecedented dangers" if pursued in the current political climate); Stephen M. Feldman, *Court Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFFALO L. REV. 1519 (2020) (arguing that court packing is unlikely to weaken the court's popular support); Richard Mailey, *Court-Packing in 2021: Pathways to Democratic Legitimacy*, 44 SEATTLE U. L. REV. 35 (2020) (constructing an Ackerman-based approach to legitimacy in court packing); Alex Badas, *Policy Disagreement and Judicial Legitimacy: Evidence from the 1936 Court-Packing Plan*, 48 J. LEGAL STUD. 377 (2019) (arguing that court packing is not a threat to legitimacy as much as policy disagreement is).

8 *See, e.g.*, Aaron Blake, *Pack the Supreme Court? Why We May Be Getting Closer*, WASH. POST (Oct. 9, 2018), https://www.washingtonpost.com/politics/2018/10/09/pack-supreme-court-why-we-may-be-getting-closer [https://perma.cc/SH3J-4UX3]; Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court [https://perma.cc/UM3P-DA9L]; Ian Samuel, *Kavanaugh Will Be on the US Supreme Court for Life. Here's How We Fight Back*, GUARDIAN (Oct. 9, 2018, 4:00 PM), https://www.theguardian.com/commentisfree/2018/oct/09/kavanaugh-us-supreme-court-fight-back-court-packing [https://perma.cc/9KSU-73UZ]; David Faris, *Democrats Must Consider Court-Packing When They Regain Power. It's the Only Way to Save Democracy*, WASH. POST (July 10, 2018), https://wapo.st/2L3hHOC [https://perma.cc/N2XQ-B4XX].

9 *See* Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), https://www.motherjones.com/politics/2019/03/court-packing-2020 [https://perma.cc/VT2M-9E87] (finding that a number of candidates acknowledged the possibility of court packing in the future); *see also* 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 [https://perma.cc/AR5S-HE4W]; 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 [https://perma.cc/JR8L-C67N]; Epps & Sitaraman, *supra* note 7 (discussing the Democratic candidates and their interest in court packing); Jordain Carney & Rachel Frazin, *Court-Packing Becomes New Litmus Test on Left*, HILL (Mar. 19, 2019, 6:00 AM), https://thehill.com/homenews/senate/434630-court-packing-becomes-new-litmus-test-on-left [https://perma.cc/MJ3V-5QXJ] (discussing candidate support for or willingness to consider court packing); Michael Scherer, *'Court Packing' Ideas Get Attention from Democrats*, WASH. POST (Mar. 11, 2019), https://wapo.st/2J4MXxf [https://perma.cc/AL9K-XGA2] (noting the increased viability of court packing, as measured by political interest).

The death of Ruth Bader Ginsburg has only increased the fervor.[10] In 2020's first presidential debate, President Trump asked Democratic nominee Joe Biden whether he supported court packing; Biden refused to answer.[11] In the Vice Presidential Debate, Mike Pence asked Kamala Harris whether a Biden administration would seek to add seats to the Supreme Court. Harris wouldn't answer.[12] In other contexts, Harris has said she is open to the idea.[13] Senator Ed Markey has suggested court packing should be the plan, while Representative Alexandria Ocasio-Cortez has said that "all options" should be "on the table" with respect to the Supreme Court.[14] Elizabeth Warren agrees, saying, "It's a conversation that's worth having."[15]

But why are we having this conversation? Historically speaking, I argue court packing at the federal level, at least since the Civil War, is inevitably linked to a thwarted desire for constitutional amendment.[16] In light of the difficulty of formally amending our Constitution, Presidents have used judicial appointments to leverage the Supreme Court.[17] A conservative might look at the history and say that the one and only serious attempt at court packing, by Roosevelt in 1937, failed because the legislation to change the court size failed. A liberal could

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10 Senator Chuck Schumer said, "Let me be clear: If Leader McConnell and Senate Republicans move forward with [a nomination], then nothing is off the table for next year. Nothing is off the table." Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html [https://perma.cc/J76V-5QEW].

11 Dan Merica, *Joe Biden and Kamala Harris Don't Want to Talk About Changes to the Supreme Court*, CNN (Sept. 30, 2020, 1:06 PM), https://www.cnn.com/2020/09/30/politics/joe-biden-court-packing/index.html [https://perma.cc/JE3W-HD8B].

12 *2020 Vice Presidential Debate*, CNN, https://www.cnn.com/videos/politics/2020/10/08/pence-harris-court-packing-dbx-2020.cnn [https://perma.cc/3KBG-UX53].

13 Everett & Levine, *supra* note 9.

14 Jeff Jacoby, *Biden Is Right to Be Leery of Court-Packing*, BOS. GLOBE (Oct. 27, 2020, 7:11 PM), https://www.bostonglobe.com/2020/10/27/opinion/biden-is-right-be-leery-court-packing [https://perma.cc/SM3Z-FKB3]; Herndon & Astor, *supra* note 10.

15 Herndon & Astor, *supra* note 10. The conversation certainly seems to be happening now. *See* Quinta Jurecic & Susan Hennessey, *The Reckless Race to Confirm Amy Coney Barrett Justifies Court Packing*, ATLANTIC (Oct. 4, 2020, 3:50 PM), https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607 [https://perma.cc/DG3F-K3W3]; Emma Green, *Biden and Harris Need an Answer on Court Packing*, ATLANTIC (Oct. 8, 2020), https://www.theatlantic.com/politics/archive/2020/10/biden-harris-court-packing-vice-presidential-debate/616656 [https://perma.cc/5T4J-WTVF].

16 *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 50–57 (1993).

17 Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1166 (1988) ("Like Reagan, Roosevelt despaired of changing the Constitution by mobilizing the people to enact formal amendments in the way described by [A]rticle V. Instead, he sought to change the path of constitutional law by making transformative judicial appointments.").

look at that same history and say, "a switch in time saved nine."[18] Roosevelt's efforts were successful, because packing the court was not a desired outcome, only a mechanism for reaching a goal that was obtained: constitutional change. Court packing is never an end in itself; it is a method to establish constitutional change via, depending on your perspective, either judicial activism or the interpretive power of the Supreme Court. In light of this connection between court packing and the desire for constitutional amendment, the best approach to analyzing the viability of court packing as a political strategy within our democracy is to examine court packing in the context of the broader history of informal constitutional amendment.

This Article suggests the link between constitutional amendment and court packing gives us the only good reason we currently have not to pack the court. Recent political science scholarship on court packing suggests that there are no excellent arguments against it. Evidence suggests packing the court would not weaken the court's legitimacy in the eyes of the public.[19] In fact, some evidence suggests the court's legitimacy is more threatened by a conflict between the policy views (values) of the public and the court.[20] One can surmise that a disagreement on a particularly polarizing issue such as abortion might even exacerbate the problem of legitimacy.

In the recent literature, Joshua Braver puts forth the primary argument against court packing. Like those who argue against packing, Braver focuses his concern on the relationship between court packing and the danger to legitimacy.[21] Braver's argument situates the historical examples of court packing in their political context, focusing on his definition of court packing as inter-branch retaliation. Braver's argument has three weaknesses.

First, Braver's argument does not contend with the scientific literature that provides two key findings: the court is not weakened by packing, and is weakened by policy conflicts with public values. Braver acknowledges that the problem of relying on history to determine the risk to legitimacy is that there are too few examples.[22] Second, Braver's approach does not consider whether in the current political climate—one that he describes as higher risk—the Court may already have

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18 The phrase was a contemporary catchphrase used at the time. William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L.J. 673, 673.

19 Feldman, *supra* note 7, at 1525.

20 Badas, *supra* note 7, at 377.

21 Braver, *supra* note 7, at 2749 (noting that the question is the "stability of the constitutional system as a whole").

22 *Id.* at 2751 ("But court-packing is almost unprecedented, and U.S. history provides little evidence about its effects on the legitimacy of the Supreme Court.).

damaged its legitimacy. Although it is beyond the scope of this article, I would argue that in effectively reversing *Roe v. Wade*, the Court may have damaged its legitimacy. In such circumstances, court packing might provide no worse risks than other methods of remedying what is already a crisis. Finally, and most relevant for this article, Braver's argument defines court packing as a retaliatory tactic between branches of government.[23] Focusing on retaliation reduces court packing to an instrument of revenge. Such a mechanistic view doesn't fit with the context of the most important court-packing attempts, from the U.S. Civil War to the present, which have all strongly aligned with pushing for shifts in constitutional rights. Most importantly, I would posit that the recent and current calls for court-packing fit the model of emphasizing constitutional rights.

This article offers an alternative argument against court packing, focusing on the nature of court packing as a tactic to create social change. I argue that the best argument against court packing is that it will not, at least in the long term, create a path to secure constitutional rights.

My claim is whatever constitutional rights change one seeks to accomplish by court packing, that change is unlikely to stabilize and therefore not worth any risks to legitimacy that court packing might bring.

The solution lies not in the Court, but in the Constitution, which Justices are sworn to uphold, and specifically in Article V. We have become unable to formally amend the Constitution, and this must change.

The consensus has been that informal constitutional change happens, at a minimum, through the process of interpretation or more grandly through a variety of mechanisms including citizen-driven minor revolutions. The arguments have focused on the legitimacy of this change.

My point is not the legitimacy of informal amendment, but instead the enduring effectiveness of it. Structural informal amendment appears to be far more effective and lasting than rights-based informal amendment. Informal constitutional amendment lacks the same binding effect as formal amendment, whether it comes by interpretation or by other mechanisms. The content of the new constitutional norm is less clear, and the potential for slippage over time is high.

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[23] *Id.* at 2749 (defining court packing as "striking back against the Supreme Court" and "the most radical form of retaliation").

The problem is simple: Informal constitutional changes involve an unavoidable fuzziness. In light of this, structural changes and rights-based changes fare differently in the long term. Without text, it is much more difficult to outline, preserve, and enforce a change in constitutional rights. Changes in structure, on the other hand, benefit from institutional mechanisms that preserve the status quo once established.

The arguments for and against court packing should take this understanding of informal constitutional change into account. Our history suggests that court packing could be utilized more clearly and lastingly for structural change, but not for a change in rights. Any attempt at change in substantive rights likely would encounter slippage in the future, even if temporarily effective.

The argument proceeds as follows: Part I explains the historical and institutional relationship between court packing and constitutional amendment. Part II sets forth the original arguments against court packing and reevaluates those in the modern historical and legal context. I conclude here that the original arguments against court packing carry limited weight. This is not, however, an endorsement of court packing. The heart of my argument is in evaluating court packing in light of how different types of informal constitutional change have endured. Thus, Part III focuses on making effective constitutional change outside of Article V. This Part summarizes scholarship on informal amendment and then considers how examples of rights-based and structural change fared differently over time. This Part then explains the values and risks of court packing in light of the potential for informal constitutional change. I conclude that the better argument against court packing is simply that it is unlikely to be effective for any long-term informal constitutional change that is rights-based.

I. THE RELATIONSHIP BETWEEN CONSTITUTIONAL AMENDMENT AND COURT PACKING

If citizens object to a constitutional decision of the Supreme Court, the remedy is found in a constitutional amendment.[24] Amendment is a

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24 This presumes, in some cases, that there is no part of the Constitution that is unamendable. Some commentators would debate this. *See* Richard Albert, *The Unamendable Core of the United States Constitution*, *in* COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION 13 (András Koltay ed., 2015) (discussing whether the Constitution requires unamendability). *But see* JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 70 (2010) ("Of course, a constitution prohibiting the amendment of some part of it could be overturned by revolution, but the same is true of any constitution.");

legal mechanism that, if done formally and correctly,[25] is outside the purview of the Supreme Court because it is not subject to the challenge of judicial review.[26] Bruce Ackerman explains, "[T]he familiar refutation runs, the Supreme Court's judgment may be overruled by constitutional amendment. But this process is so cumbersome that it can serve as a safety valve only under the most extreme conditions."[27] The other option involves somehow changing the composition of the Court's votes. In that way, constitutional amendment and court packing are, to some degree, natural alternatives.

The Roosevelt-era court packing discussions specifically relied on the idea that court packing was directly linked to changing the Constitution via interpretation. Testimony in front of the Senate Judiciary Committee made that clear. Edwin S. Corwin, a leading constitutional scholar, explained:

> I think the realities of the situation are these: In the first place, the doctrines of constitutional law of the majority of the Court involve the entire program of the administration in a fog of doubt as to constitutionality; and second, that cloud [of] doubt can be dispelled within a reasonable time only by reestablishing that mode of reading the Constitution which adapts it to present needs."[28]

President Franklin Roosevelt took essentially the same approach, although ironically through a different contention. Roosevelt claimed the Court was "reading into the Constitution words and implications which are not there."[29] Roosevelt specifically tied the process of interpretation to the potential "to amend the Constitution by the arbitrary exercise of judicial power."[30]

Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011) (noting that one reason for unamendability provisions of constitutions is to protect basic structural provisions that are necessary to democratic governance).

25 Correctness might be less surely attainable than we would expect, as there are procedural uncertainties. *See* Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 914 (2014).

26 Another way of thinking about this is that the process of judicial review has no access to proposed constitutional amendments: "[I]t is 'difficult to comprehend how [a] proposed constitutional amendment [could] be "unconstitutional" under our Constitution.'" Lawrence Friedman, *The Potentially Unamendable State Constitutional Core*, 69 ARK. L. REV. 317, 318 (2016) (alteration in original) (quoting Answer of the Justices to the House of Representatives, 377 N.E.2d 915, 916 n.2 (Mass. 1978)).

27 Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1057 (1984).

28 G. Edward White, *The Constitutional Journey of "*Marbury v. Madison,*"* 89 VA. L. REV. 1463, 1545 (2003) (quoting Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary, 75th Cong. 167–68 (1937) (testimony of Edward S. Corwin)).

29 *Id.* at 1547.

30 *Id.*

II. EVALUATING THE ORIGINAL ARGUMENTS AGAINST COURT PACKING

There are a variety of arguments against court packing, many of them dating to the 1937 court packing plan put forward by President Franklin D. Roosevelt.[31] This Part of this Article revisits that history briefly and then focuses on the primary objections, evaluating them in light of recent historical developments. The original arguments against court packing remain the most common. These include a threat to the Court's legitimacy, a loss of judicial independence and deviation from a long-established constitutional norm. These arguments are, to some degree, intertwined.[32] With that said, there is some value to separating them as much as possible for analytical clarity. Justice Breyer once described judicial independence as "revolv[ing] around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of government."[33] In the context of court packing arguments, however, it is more useful to separate "their own whims" from the "the will of the political branches."[34] Legitimacy of the Supreme Court is related directly to the idea that the judicial branch upholds the Constitution and the rule of law without judges making decisions based on their own political positions. That is to say, legitimacy requires judges to not make decisions based on *internal* pressures such as personal social, religious or moral beliefs. Judicial independence, on the other hand, concerns itself more with the ability of the other branches to either force a decision or exact revenge for one. Judicial independence focuses on the ability of the judiciary to withstand *external* political pressure.[35] Legitimacy, then, may logically be damaged if the public believes that judges make decisions based on their personal beliefs when those beliefs do not align with the values of the American public.[36]

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31 *See generally* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269–87 (2017) (discussing arguments against court packing).

32 *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1038 (2000) (finding in Roosevelt's era three "interconnected, yet distinct arguments" against court packing).

33 Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 217–18 (2012) (quoting Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996)).

34 *Id.* at 217.

35 William N. Eskridge, Jr. & Philip P. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26, 43 (1994).

36 Recent research supports this conclusion. *See* Badas, *supra* note 7, at 377.

A. *A Brief History of Court Packing*

The story of Roosevelt's court packing plan has been described as a "twice-told tale,"[37] but this is a vast understatement.[38] Court packing history is a perpetual favorite, perhaps precisely because it is so political. Admittedly, it is virtually impossible to tell a historical tale without adopting an interpretive position and moreover a lens that is, at least a little, either conservative or liberal. However, histories of the court packing plan tend to be written and rewritten with determinedly political glosses: Did the court packing plan *fail* or was it *abandoned as unnecessary*?

The pivotal moment is often regarded as the "switch in time that saved nine." The phrase tends to represent a particular reading of events that implies the Supreme Court switched political and interpretive positions intentionally and at least partially due to the threat of court packing. Bruce Ackerman has endorsed this reading of the history.[39] More recently, Barry Cushman argued that there was no politically motivated switch in time.[40] Cushman not only disputed the political explanation but also offered a non-political alternative reading of events. So many others have followed Cushman, that they may now be fairly divided into two camps: those like Ackerman, who saw the switch as motivated by external, political factors, and those, like Cushman, who gave internal, non-political explanations for the switch.[41]

For the purposes of this Article, a more important part of the history is the report of the Senate Judiciary Committee, which represented the views of both parties and sharply criticized the court packing plan. The report described court packing as designed "to

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37 Leuchtenburg, *supra* note 18, at 673.

38 For a brief review of many of the accounts of the court packing attempt of 1937, see Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 71 (2010).

39 *See* ACKERMAN, *supra* note 16, at 49, 119.

40 BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (arguing there was no sudden reversal caused by external pressures such as court packing); *see also* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

41 Ho & Quinn, *supra* note 38, at 71 (dividing the two camps of historians into "internalists" and "externalists"). Ho and Quinn created an empirical study of the historical moment, coming down not entirely squarely on either side, but not supporting the focus on the external force of the court packing plan. Ho and Quinn advised, "For internalists, the explanation as to differences in cases and litigating strategies must correspond to the abrupt temporary shift we identify. Unless the cases in the 1936 term themselves are sharply different, they cannot be reconciled with this evidence." *Id.* at 102–03. Similarly, they concluded, "For externalists, our account seems most consistent with the focus on the 1936 landslide election, thereby rebutting naive accounts that Roberts's vote in *Parrish* was a direct result of the court-packing plan." *Id.* at 103.

punish the Justices" for their decisions.[42] The plan was, therefore, "an invasion of judicial power," an encroachment on judicial independence.[43] The report found that court packing required a "dangerous abandonment of constitutional principle."[44] This report points towards two of the most common arguments against court packing: interference with judicial independence and the existence of a constitutional norm against court packing.

B. *Court Packing and Legitimacy of the Supreme Court*

The Supreme Court is famously known as the least dangerous branch. One reason for this assertion is the Court's lack of recourse if citizens do not respect the decisions of the Court. It has neither "purse nor sword." The ability of the Court to function effectively depends on the popular acceptance of the Court's legitimacy.[45]

Legitimacy, in part, stems from the Court's special relationship to the Constitution. "The very idea of a Constitution turns on the separation of the legal and the political realms."[46] This idea of a higher, constitutional law and an ordinary and more political law, was prevalent at the time of drafting.[47] The Supreme Court, as interpreter of the Constitution, assumed the role of maintaining this division and, theoretically, remaining above politics. Legitimacy is at risk when the public no longer has faith in this division.

Consider Posner and Sunstein's account of institutional flip-flops:

> An institutional flip-flop is a reversal of one's position on an institutional value based on partisan or political interests or

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42 Leuchtenburg, *supra* note 18, at 675 (quoting REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711 (1937)).

43 *Id.*

44 *Id.*

45 This Article follows Epps and Sitaraman in adopting Richard Fallon's sociological meaning of the term legitimacy, which "involves prevailing public attitudes toward governments, institutions, or decisions." Epps & Sitaraman, *supra* note 7, at 151 n.4 (citing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018)).

46 Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 695 (1996). This division, Sullivan argues, is the reason why we should be cautious of constitutional amendment: "Frequent constitutional amendment can be expected to undermine this respect by breaking down the boundary between law and politics. The more you amend the Constitution, the more it seems like ordinary legislation. And the more the Constitution is cluttered up with specific regulatory directives, the less it looks like a fundamental charter of government. Picture the Ten Commandments with a few parking regulations thrown in." *Id.* at 696.

47 Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 275 (1989).

> substantive commitments. Here is a way of specifying the idea: People flip-flop when (1) at two distinct points in time they take different positions on the validity of a claim of institutional authority for a set of policy decisions, and (2) there are no relevant differences that would justify the shift.[48]

Posner and Sunstein regard the Supreme Court as not at all immune from flip-flops, concluding that "[w]ithin the Supreme Court, it is also easy to find at least apparent flip-flops."[49]

Flip-flops are, to a certain degree, both normal and to be expected. Within the Supreme Court, the risk comes from what Posner and Sunstein would describe as tactical flip-flops.[50] Posner and Sunstein give this example of a tactical flip-flop:

> Recall that when Republicans hold a majority of the seats in the Senate, many of them decry the use of the filibuster by the Democratic minority, claiming that it is antidemocratic; but when Republicans are in the minority, many of them claim that the filibuster is sanctioned by the Senate's traditions.[51]

The problem is that an "apparently principled argument (about checks and balances or the need to break a logjam)" is applied situationally and inconsistently, and "in the interest of a substantive goal, which is all that they really care about."[52] Posner and Sunstein recognize that "[t]actical flip-flops are ubiquitous in politics," but we expect more of the courts.[53] If we expect tactical flip-flops of the Court, then the Court lacks legitimacy, because it is issuing decisions that are not based on principled reasoning and reliance to law, but instead opportunistically taking advantage of those to reach a political end. Some scholars believe this is exactly what happens on the Supreme Court: Justices select legal norms in service to personal political beliefs.[54] This depletes the public belief in legitimacy of the Court.

In terms of legitimacy and court packing, the weakness of the legitimacy argument lies in the assumption that the Court has a high level of legitimacy. Evidence suggests otherwise currently. Why is the timing of a judicial nomination so important? Because we all feel sure

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48 Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 493 (2016).

49 *Id.* at 500.

50 *Id.* at 511.

51 *Id.*

52 *Id.* at 512.

53 *Id.* at 511.

54 *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 80 (2002) ("[J]udges may pick and choose among precedents to find those that accord with their policy preferences, while simultaneously asserting that these are also the ones that best accord with the facts of the case at hand.").

of how the nominee will vote on key issues. That is, it is politics, not law. What is so unseemly about court packing? It means the Supreme Court is a deeply political institution. Having the public and Congress in a battle over the timing of a judicial nominee means exactly the same thing. In other words, it is a bit late now: The emperor has already lost his clothes. On our current trajectory, "it will become impossible to regard the [C]ourt as anything but a partisan institution."[55]

The problem of legitimacy has become critical: "[I]t is striking how many commentators—including prominent constitutional scholars, a former Attorney General, and current members of Congress—have recently questioned the legitimacy of the United States Supreme Court. Indeed, some critics suggest that the situation is so bad as to warrant extreme measures . . . ."[56] This critical low of legitimacy definitely undermines the argument against court packing.

To understand the current crisis of legitimacy, it is important to look to the recent history of the nominations process. But first, to set a baseline, consider how the process looked in retrospect after Rehnquist's nomination in the late 1980s. William Ross felt he could accurately describe the hearings as "turbulent."[57] Ross described the Senate as deviating from "its customary practice of confirming the president's nominee by an overwhelming vote," and instead approving "Rehnquist by the comparatively narrow vote of sixty-five to thirty-three, the thinnest margin any successful nominee has received since 1912."[58] Ross even felt the need to caution scholars that "[t]he Senate's careful and prolonged consideration of the Rehnquist nomination is a reminder that the Senate is not merely a rubber stamp for the president's nomination, even though the president's choice rarely encounters serious opposition."[59]

We do not live in the world Ross described, not even close. In three decades, we have shifted to a highly confrontational and politicized appointments process.[60] If Rehnquist's hearings signaled a departure

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55 Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html [https://perma.cc/V52W-3HHU].

56 Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132. HARV. L. REV. 2240, 2240–41 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

57 William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 633 (1987).

58 *Id.*

59 *Id.*

60 For a more detailed account of the politicization of the appointments process, see David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033 (2008)

from the traditional process, the Bork hearings finalized it. As Ackerman wrote just afterwards, the Senate did not "preserve[ ] the proceeding's deliberative character."[61] Bork had great qualifications, but the Senate was uninterested. Bork symbolized political change. Ackerman concluded, "Thus the scene had already been set for tragedy: if the Senate and the country decided that President Reagan should not be granted Roosevelt-like authority, they could express this judgment only by rejecting a nominee who, by normal criteria, was superbly qualified for the office."[62] From this point forward, qualifications would no longer be a defining question for the advice and consent process and politics became the focus: "The shadow of the failed 1987 nomination of Robert Bork has loomed over the judicial appointments process, and the recent vacancies were widely expected to produce a large-scale confirmation battle, with the prospect of nominees being defeated as Bork was."[63]

The Bush era solidified the new political nature of the appointments process, when Democrats followed the pattern Republicans had established in the Reagan era. Democrats successfully filibustered six Bush nominees and ignored Republican frustration.[64] Scholars did not help with their advice to senators to focus on substantive, political views rather than qualifications.[65]

Merrick Garland's nomination process was one step worse. The Senate would not even look at his qualifications. When Justice Scalia died, that very day, Senator Mitch McConnell, Republican Majority Leader, announced a moratorium on considering nominees that would last until the next President took office.[66] This move only heightened the political nature of the appointments process. The candidates immediately focused on substantive views of potential nominees:

(reviewing BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006); JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007)).

61 Bruce A. Ackerman, *Essays on the Supreme Court Appointment Process: Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988).

62 *Id.* at 1169.

63 Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 401.

64 *See* Laura T. Gorjanc, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435, 1435 (2004) (discussing the history of the nominations and the flippant responses of Democrats to the Republican outcry).

65 Whittington, *supra* note 63, at 401–02 (describing Tribe's and Sunstein's advice to senators).

66 Evan Osnos, *The Death of Antonin Scalia*, NEW YORKER (Feb. 13, 2016), https://www.newyorker.com/news/news-desk/the-death-of-antonin-scalia [https://perma.cc/ZBQ7-Z6W6].

During the 2016 election, former President Donald Trump publicly vowed to "appoint [J]ustices to the United States Supreme Court who [would] uphold our laws and our Constitution," stated that "Second Amendment people" could stop Hillary Clinton's Supreme Court picks, and released a list of Justices whom he purportedly planned to consider nominating to the Court's bench. [67] On the other hand, then-Democratic nominee Hillary Clinton declared that she would nominate only Justices who were willing to overturn the Court's controversial *Citizens United* decision regarding corporate campaign contributions, criticized the Court's precedent regarding the Second Amendment, and denounced Trump's list of prospective nominees as littered with "extreme ideologues."[68]

Most recently, Kavanaugh's confirmation vote was one of the closest yet, with only two votes to spare.[69] Moreover, "Justice Kavanaugh gave testimony to the Senate Judiciary Committee that many viewed as 'nakedly partisan.'"[70]

The culmination of this history is unfortunate: "For a variety of structural, external, and judicial reasons, however, the politics of federal judicial appointments have fundamentally changed in the last eighty years, especially since the 1980s. Today, for the Supreme Court and United States circuit courts of appeals, the appointments process is high-stakes, explosively partisan, and often nasty."[71]

When President Obama nominated Garland, he warned that a failure to consider the nominee by the Senate would indicate that the process was broken "beyond repair."[72] That now represents the consensus among scholars, as well as many members of the Senate who have described the process as: a "mess," "abysmal," "broken," "going in the wrong direction," and downright "disorderly, contentious, and unpredictable."[73] Looking at the criticisms, scholars concluded "there does seem to be general agreement that politics, philosophy, and

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67 Benjamin Pomerance, *Justices Denied: The Peculiar History of Rejected United States Supreme Court Nominees*, 80 ALB. L. REV. 627, 627–28 (2017).

68 *Id.*

69 Epps & Sitaraman, *supra* note 7, at 150.

70 *Id.*

71 David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (reviewing CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS (2007)).

72 Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs over the next Supreme Court Fight*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html [https://perma.cc/CM7N-8SX3].

73 Lee Epstein, Jeffrey A. Segal, Nancy Staudi, & René Lindstadt, *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145, 1146 (2005).

ideology now dominate a process that should emphasize ethics, integrity, and competence."[74] The history is not pretty, and, more bluntly, it lacks integrity. Unsurprisingly, "[t]he predictable result is a Supreme Court whose Justices—on both sides—are more likely to vote along party lines than ever before in American history. . . . That development presents a grave threat to the Court's legitimacy . . . ."[75]

A key indicator that legitimacy has become critical is the prevalence of doing what I like to call Supreme Court math, or cocktail party constitutional law. It is the bare guessing of the outcomes of cases, based on the personal political leanings of Justices. For example:

> If Justices Ginsburg, Kennedy, and Breyer all leave the bench during President Trump's term of office, President Trump will hold the power of appointing a total of four Supreme Court Justices. No President since Ronald Reagan has filled four or more vacancies on this powerful bench. Yet the impact of the new slate of nominees extends far beyond mere numbers. If the above-described scenario comes true, President Trump would replace the Court's longstanding conservative leader (Scalia), the Court's two more influential liberal Justices (Ginsburg and Breyer), and—perhaps most importantly—the swing voter on whom so many 5-4 decisions in recent years have hinged (Kennedy). With such a slate of nominees, the President could re-cast the Court's overall decisionmaking tendencies in a way that could reverberate for decades to come. For example, if President Trump decides to appoint reliably conservative Justices to fill all four roles, it would give the Court a substantial conservative majority, with the four new conservatives joining Justice Clarence Thomas, Justice Samuel Alito, and Chief Justice John Roberts to reach a 7-2 conservative advantage. Conversely, if President Trump appointed four Justices who unexpectedly turned out to be reliably liberal voters, it would establish a definite liberal majority on the Court, with the four new jurists joining Justice Sonia Sotomayor and Justice Elena Kagan to form a 6-3 liberal lead.[76]

When the outcomes of cases can be accurately predicted this way by counting Justices as either reliably conservative or liberal, then the distinction between politics and higher law is lost, and the Court can be fairly described as experiencing a crisis of legitimacy. Predicting Supreme Court jurisprudence should not sound like debating the baseball playoffs.

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74 *Id.*

75 Epps & Sitaraman, *supra* note 7, at 150–51.

76 Pomerance, *supra* note 67, at 631.

The question of whether this type of math works to accurately predict cases—and particularly in lieu of precedent—has long been debated.[77] For our current purposes, however, the winner of this debate is irrelevant. The question is whether people *believe* that case outcomes can be predicted by this simple, party-based math.

The lack of faith in Justices applying law over politics shines even more in the context of recusal or disqualification. Scalia once prompted outrage because he "declined to disqualify himself from hearing a case in which Vice President Dick Cheney was a named party, after flying with the Vice President on a government jet to Louisiana for a weekend of duck hunting, while the appeal was pending."[78] Similar and even worse incidents have peppered the state supreme courts in recent years.[79]

If concerns for the legitimacy of the Court have been a primary reason to oppose court packing, it would be hard to say that they exist now as they did in 1937. A lack of legitimacy does not necessarily mean we can ignore a threat to it; indeed, possibly we should consider such a threat all the more cautiously if there is little capital left. But it is also possible to see court packing as a *part* of the solution,[80] and it is one that has been adopted by a number of Democrats.

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77 For a review of this debate and examination of its two sides, see Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 905 (2005). In brief, Gerhardt separates the debates into two sides. The social scientists "conceive[ ] of precedent—understood as prior judgments or rulings of the Supreme Court as sources of authority for its decisions—as having very weak influence, if any at all, in constitutional adjudication." *Id.* Legal scholars refuse this evidence, "conceiv[ing] of precedent as having sufficient force to constrain the Supreme Court." *Id.*

78 Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 673–74 (2011).

79 Famously, West Virginia Justice Brent Benjamin refused to recuse himself due to his relationship with Massey Energy company's CEO. Later, the Supreme Court ruled that Benjamin should have recused himself. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009). More recently in West Virginia, Justice Evan Jenkins refused to recuse himself, creating a public backlash. *See* Ken Ward, Jr., *Jenkins Declines to Step Aside from Natural Gas Case*, CHARLESTON GAZETTE-MAIL (Oct. 10, 2018), https://www.wvgazettemail.com/news/wv_troubled_transition/jenkins-declines-to-step-aside-from-natural-gas-case/article_2360e8b7-9535-5f65-8f0e-e5a765f32ac0.html [https://perma.cc/477D-5CPM]. A similar incident occurred in Illinois: "[A] newly elected Illinois Supreme Court justice provoked media ire after he declined to disqualify himself from hearing a case in which a corporate defendant and its employees had made significant contributions to his election campaign while the appeal was pending. In 2005, that same justice cast the deciding vote in the defendant's favor." Geyh, *supra* note 78, at 673.

80 *See* Epps & Sitaraman, *supra* note 7 (suggesting increasing the number of Justices as a part of one solution to the current Supreme Court crisis).

Kamala Harris's justification for court packing lies precisely on the idea of remedying the lack of public faith in the Court.[81] Harris explained that she was open to the idea of court packing precisely because "[w]e are on the verge of a crisis of confidence in the Supreme Court."[82] She is not alone in that perspective: "The Court's legitimacy will be questioned in the coming years—perhaps as never before. Indeed, even those who think the threat might be overblown still believe that coming challenges to the Court need to be taken seriously."[83]

The crisis of legitimacy may derive in part from the overall political dynamic of hyper-polarization that has developed,[84] but the Supreme Court may be at the nexus. Kavanaugh's confirmation process "deeply divided the country," but was only a part of a trend of "an increasingly politicized fight over Justices."[85] Supreme Court legitimacy is called into question,[86] because we have "a Supreme Court whose Justices—on both sides—are more likely to vote along party lines than ever before in American history."[87]

C. *Court Packing and Judicial Independence*

Judicial independence is another mechanism for ensuring the Court is insulated from political pressures—in this case external ones. "[J]udicial independence is essential, because it insulates judges from external interference with their impartial judgment that could corrupt

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81 *See* Quinta Jurecic & Susan Hennessey, *The Reckless Race to Confirm Amy Coney Barrett Justifies Court Packing*, ATLANTIC (Oct. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607 [https://perma.cc/E5MR-8QFM] (developing an argument for adding Justices to restore legitimacy to the Court); *see also* Ramesh Ponnuru, *Biden and Harris Should Just Be Honest About Court-Packing*, BLOOMBERG (Oct. 7, 2020, 10:00 AM), https://www.bloomberg.com/opinion/articles/2020-10-07/biden-harris-should-be-honest-about-court-packing [https://perma.cc/9SSB-GFG5] (critiquing the Jurecic and Hennessey argument). Ponnuru attributes the argument to Jurecic and Hennessey, but it already was made by both Elizabeth Warren and Kamala Harris. *See* Herndon & Astor, *supra* note 10; Everett & Levine, *supra* note 9.

82 Everett & Levine, *supra* note 9.

83 Epps & Sitaraman, *supra* note 7, at 165–66.

84 *See* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1432 (2018) ("From the moment Donald Trump was elected president, critics have anguished over a breakdown in constitutional norms.").

85 Epps & Sitaraman, *supra* note 7, at 150.

86 Epstein & Posner, *supra* note 55. *But see* Robert Barnes, *Polls Show Trust in Supreme Court, but There Is Growing Interest in Fixed Terms and Other Changes*, WASH. POST (Oct. 24, 2019), https://www.washingtonpost.com/politics/courts_law/polls-show-trust-in-supreme-court-but-there-is-growing-interest-in-fixed-terms-and-other-changes/2019/10/24/dcbbcba4-f64c-11e9-8cf0-4cc99f74d127_story.html [https://perma.cc/ZN32-AYHH].

87 Epps & Sitaraman, *supra* note 7, at 150.

the rule of law."[88] Judicial independence is a crucial norm for the rule of law across the world: "[T]he Constitution Project declares that 'judges are supposed to be responsive only to the rule of law and the Constitution, not to majority will or public, political, or media pressure . . . .'"[89] Protecting judicial independence means preventing other institutions—from parties to branches—from directly interfering with the judgment of the Justices, either individually or as a group.

Congress has opportunities to impact the Court through such mechanisms as impeachment or changes in the Court's jurisdiction. But more informally, Congress can "hurt the Court by refusing to raise judicial salaries to keep up with inflation, by ignoring the Chief Justice's administrative and personnel requests, and by overloading the judiciary with too many cases."[90] All of these mechanisms provide Congress with opportunities to infringe upon the Court's judicial independence.

From the beginning, a loss of judicial independence was one of the key arguments made against court packing.[91]

In one crucial way the current situation differs from the 1937 attempt at court packing: In 1937 what Roosevelt needed was a change in jurisprudence. There were specific decisions that Roosevelt wanted overturned because those decisions impeded his New Deal plan for a federally based financial recovery from the Great Depression. The desire to reverse those decisions specifically was never a secret. Roosevelt acknowledged the intent directly, and Senate testimony confirmed.

I believe that in the current situation, court packing is not about changing a particular decision or set of decisions from the Supreme Court. Instead, the desire stems from an understanding of the political makeup of the Court itself. The ability to do Supreme Court math accurately is again the problem. Both Congress and the public seem to believe that they will be able to accurately predict how Justices will decide cases based on political parties. In that way, it is the loss of legitimacy that is truly at issue, not a loss of judicial independence. Nor is the challenge to the Court's independence the same when packing would not be retributive for a particular decision, but instead a more generalized desire to ensure the political balance of the Court.

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88 Geyh, *supra* note 33, at 217–18.

89 *Id.* (quoting *The Newsroom Guide to Judicial Independence*, CONST. PROJECT (2006), https://archive.constitutionproject.org/pdf/37.pdf [https://perma.cc/E2LG-B9J2]).

90 Eskridge & Frickey, *supra* note 35, at 40 n.52 (citing Robert D. Tollison, *Public Choice and Legislation,* 74 VA. L. REV. 339, 345–47 (1988)).

91 Friedman, *supra* note 32, at 1038.

D. *Court Packing as Against Constitutional Norms*

Constitutionality is not a strong argument against court packing. Recently, scholars have regularly concluded that changing the number of Justices is constitutionally acceptable.[92] Historically, the idea of constitutionality was more intertwined with the idea that not changing the size of the Court was an inviolable constitutional norm. Raymond Moley testified before the Senate, stating that "that there was now a 'custom of the Constitution' against Court-packing, which he contended was 'as binding upon public officials as a written provision of the Constitution itself.'"[93] Similarly, Erwin Griswold testified both that it was possible court packing was unconstitutional and that "not all things that are constitutional are things that should be done."[94]

The norm certainly has been strong in American constitutional culture.[95] In 2018, Tara Leigh Grove wrote about the crystallization of conventions into legal rules and used court packing as an example of why "such crystallization is not necessary."[96] She explained, "There can be a strong convention against a court-curbing measure, even if the legal community thinks the measure would be 'legal.'"[97] She concluded the example with a strong statement of how court packing would never now be considered.[98] Yet, now we know that court packing is not far from consideration by reasonable minds. A norm is culture, and culture changes.

The norm against court packing may have existed, in part, due to the fact that court packing didn't succeed in 1937 and has not been utilized since then. Josh Chafetz argued,

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92 Michael C. Dorf, *How the Written Constitution Crowds out the Extraconstitutional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, 69, 74 (Matthew D. Adler & Kenneth Einar Himma eds. 2009) (concluding that "we have excellent textual and historical reasons to think that the Constitution poses no obstacle . . . ."); *see also* Grove, *supra* note 2, at 541.

93 Bradley & Siegel, *supra* note 31, at 280 (quoting *Reorganization of the Fed. Judiciary: Hearings Before the Comm. on the Judiciary*, 75th Cong. 546 (1937) (statement of Raymond Moley)).

94 *Id.* (quoting *Reorganization of the Fed. Judiciary: Hearings Before the Comm. on the Judiciary*, 75th Cong. 767 (1937) (statement of Erwin Griswold)).

95 This is true to the degree that court packing can essentially be used as an insult. Thus, Barry Friedman could write that something "smacks of Court-packing" with scholars understanding his critique. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 430 (1998).

96 Grove, *supra* note 2, at 541.

97 *Id.*

98 *Id.*

> The claim that some behavior is unprecedented carries with it a distinct whiff of impermissibility: if it's never been done before, then at the very least the burden is on those who would want to do it to show that it is permissible. A thumb is very firmly placed on the scale against constitutional novelty.[99]

In the current climate, a primary challenge to the norm reaches precisely to Chafetz's point: it may not be novel. Some commentators have reduced the Democratic reliance on the Garland nomination refusal to a revenge-like quest of tit-for-tat. But the recent history matters in light of Chafetz's point. If a filibuster or a declared moratorium on appointment hearings accomplishes the same purpose—changing the size of the Supreme Court—then novelty is no longer as viable an argument.

Overall, the arguments against court packing cannot reasonably be evaluated now on the same terms as they were in 1937. The Supreme Court and the appointments process have become highly politicized, diminishing the public understanding of their legitimacy. For some of the same reasons, we doubt the existence of judicial independence, at least on the Supreme Court. We might be willing to venture further afield to locate a solution, or senators and presidential candidates would not be discussing court packing. To some degree, all of the original arguments against court packing have lost their shine. There is, however, another reason to forego court packing, and that reason is based on our history of formal and informal constitutional change and the effectiveness of those changes.

III. MAKING EFFECTIVE CONSTITUTIONAL CHANGE

This Part examines the formal constitutional amendment procedure under Article V and evaluates its current availability as a mechanism for change. After concluding that the potential for formal amendment is limited, this Part examines the evidence that informal constitutional change happens and summarizes the scholarship on the methods and legitimacy of informal change. Finally, I consider examples used to support informal constitutional change and evaluate the long-term effectiveness of rights-based and structural changes. Using this evidence, I examine how and whether court packing could be used to achieve informal constitutional change.

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99 Josh Chafetz, *The Supreme Court, 2016 Term: Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 96 (2017).

A. *The Failure Formal Amendment*

"Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."[100]

The framers debated proper mechanisms for constitutional change, including forcing change on a regular basis,[101] and settled on Article V as the explicit formal method for constitutional change. The framers regularly expressed fear of majoritarian politics, including regular movements to amend the Constitution. Adapting a stable, relatively permanent mechanism for formal amendment may have been an attempt to codify science over impulse.[102] Such a process reinforces the distinction between a higher constitutional law and everyday politics.[103]

The Article V process is onerous.[104] Compared to other constitutions around the world, the U.S. Constitution is one of the hardest to amend in terms of the mechanics required.[105] Empirically

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100 Ullmann v. United States, 350 U.S. 422, 428 (1956).

101 Hamburger, *supra* note 47, at 300–01 (discussing the positions of framers, including Jefferson who wanted a sunset provision on the constitution as well as ordinary laws).

102 Kahn argued, "The movement from the Declaration of Independence to the Constitution, however, was one of increasing realization of the need for a science to inform this right of political experimentation. The people may have 'an inherent right . . . to alter or abolish,' but without political science, what 'to them shall seem most likely to effect their safety and happiness' is not likely to do so in practice." Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 453–54 (1989). George Washington's farewell address affirmed this perspective: "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed." Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 140 n.1 (1998) (quoting Washington's speech).

103 Bruce Ackerman explains, "[A]ll the time and effort required to push an initiative down the higher law-making track would be wasted unless the Constitution prevented future normal politicians from enacting statutes that ignored the movement's higher law achievement." BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 9 (1993 ed.).

104 *See* Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692 (1996) (explaining the mechanisms and concluding that "[o]ur Constitution is extraordinarily difficult to amend"). Notably, the process does not seem to be entirely clear in terms of the mechanics. *See* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 681 (1993) (describing the lack of clarity in the amendment process).

105 DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 171 (2006); *see also* Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 895 (1990) ("An important part of what makes the Constitution so conceptually awkward is its literal incorrigibility: the Constitution is markedly obdurate to textual change.").

speaking, the amendment process has rarely succeeded.[106] Still, amendment occurred with some regularity in the earlier years.

Like the Supreme Court appointments process, the Article V amendment process has changed drastically. Our most recent successful attempt at amendment took 202 years, culminating in ratification by a state that did not exist when the amendment was proposed.[107] Within living memory, we seem incapable of federal constitutional change. This is despite the fact that the states manage the feat regularly.[108] Despite the framers' attempts to create an effective and enduring amendment process,[109] scholars agree that the Article V process has become non-viable.[110]

B. *Accounts of Informal Constitutional Change*

In the absence of a functioning formal amendment process, scholars have focused on how constitutional law changed

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106 Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 112-113 (1993) ("Since the adoption of the Constitution in 1789, only twenty-seven amendments have been enacted out of the more than 10,000 proposed in Congress.").

107 *See* Paulsen, *supra* note 104, at 679 (discussing Michigan's ratification of the Twenty-Seventh Amendment).

108 *See* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 1–8 (2018) (explaining that states use of formal amendment both regularly and effectively); John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27 (2016) (describing formal amendment as the primary method of state constitutional change); *see also* Jonathan L. Marshfield, *Courts and Informal Constitutional Change in the States*, 51 NEW ENG. L. REV. 453, 456–58 (2017) (arguing that informal constitutional change is presumed to happen less in the states because of lower barriers to the formal amendment process). Notably, there is evidence that the states consciously adopted lower barriers to amendment in an effort to restrain judicial activism. *See* Jonathan L. Marshfield, *The Amendment Effect,* 98 B.U.L. Rev. 55, 59 (2018) ("Records from early-twentieth-century state constitutional conventions in the United States show that several states made their amendment procedures more flexible based on the assumption that this would restrain judges.").

109 *See* Boudreaux & Pritchard, *supra* note 106, at 112–13 (explaining that the Article V process was specifically created to be less burdensome than the alternative under the Articles of Confederation).

110 *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (examining Article V's limitations and arguing for a new constitutional convention); Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1291 (2009) (noting agreement that after the Equal Rights Amendment the Article V "process was no longer a viable path to constitutional change, except perhaps for very specific, technical alterations"); Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. Rev. 1029 (discussing Article V's decline and unavailability).

nevertheless.[111] Heather Gerken wrote, "Anyone who was awake in law school is aware that constitutional meaning has evolved over time even as the text has not."[112] Although scholars debate both the pathways and the legitimacy of informal or extra-textual amendment, she concludes, "I take it that no one doubts that it has done so."[113] Thurgood Marshall similarly saw opportunities for informal change:

> I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.[114]

Some norms seem to be effectively entrenched such that they exceed everyday politics. David Strauss concluded, "There are settled principles of constitutional law that are difficult to square with the language of the document, and many other settled principles that are plainly inconsistent with the original understandings."[115] Strauss argued, "[W]hen people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years."[116] He discounted the role of

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111 For an introduction to these issues, see generally 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Morton J. Horowitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32 (1993); RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1465 (2001).

112 Heather Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 929 (2007); *see also* Clifton McCleskey, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1012 (1968) ("Every schoolboy knows that our Constitution is subject to change through informal processes as well as through formal amendment.").

113 Gerken, *supra* note 112; *see also* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 4 (1998) (explaining the conflict between the idea of the "living constitution" with originalism).

114 Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

115 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877–78 (1996).

116 *Id.*

the text in favor of extra-textual influences: "In fact, in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires."[117] Later, David Strauss took a stronger position, not only recognizing constitutional change outside of the formal amendment process but also arguing that Article V is neither necessary nor sufficient for constitutional change.[118]

Arguably, the difficulty of amending formally via Article V created the processes of change outside the text.[119] The shift to informal constitutional change when Article V is unavailable is all the more expected in a functioning republic if we accept that amendability is, in fact, necessary for the basic legitimacy of the government. Walter Dellinger made this point well decades ago: "An unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed."[120]

The key debates about informal constitutional change focus on two intertwined aspects: the mechanisms for those changes—including the

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117 *Id.*

118 Strauss, *supra* note 111. For a critique of Strauss's approach, see Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 248–49 (2002).

119 *See* Gerken, *supra* note 112, at 933 ("The simple point of my hydraulics argument is that an informal amendment process exists because formal amendment is so difficult."); Albert, *supra* note 110, at 1062 (adopting Gerken's argument that the formal pathway is blocked); *see also* Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2121 (1996) ("While the legalization of the Constitution made it enforceable, it also narrowed the scope of constitutional law and opened the way for significant constitutional changes to occur through ordinary political means."); Richard Albert, *Quasi-Constitutional Amendments*, 65 BUFF. L. REV. 739, 742 (2017) ("[Q]uasi-constitutional amendments are the result of a self-conscious circumvention of onerous rules of formal amendment in order to alter the operation of a set of existing norms in the constitution . . . Where constitutional actors determine, correctly or not, that the current political landscape would frustrate their plans for a constitutional amendment to entrench new policy preferences, they resort instead to sub-constitutional means—for instance, legislation or political practice—whose success requires less or perhaps even no cross-party and inter-institutional coordination.").

120 Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 386–87 (1983). Dellinger concluded, "Without a viable process for changing the original governing norm, however, the Constitution would fail to provide a sufficient underpinning for the legitimacy of government." *Id.* at 387. Notably, Dellinger did not make this argument in the context of recognizing informal change. Indeed, Dellinger worried about exactly that problem: "If we are to agree on what the fundamental law is, we need to have an amendment process that operates with a fair degree of certainty. Substantial doubt about whether amendments had properly been adopted would be a matter of serious concern: it would leave us without an agreed-upon text to serve as the basic reference point from which to assess the legitimacy of government and its actions." *Id. But see* ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 82 (2009) ("[B]elow some threshold, flexibility should clearly enhance constitutional endurance . . . .").

interpretive approach which minimizes change—and the legitimacy of such changes.[121]

Those who focus on interpretation often argue against extra-textual change, accounting for any shifts in terms of simply the vagaries of judicial interpretation. To some degree, the interpretive position is a reaction to those who have set forth accounts of legitimate extra-textual change.[122] Some accounts of interpretation sharply discount extra-textual change. One reason to do so is that sharp deviations through judicial interpretation present a problem for a democratic republic,[123] particularly when the Court's interpretations prompt change rather than responding to popular demand.[124]

Other accounts of interpretation recognize that a high level of change might occur simply through interpretive shifts: the Constitution "has been dramatically refurbished from time to time through the judiciary's interpretation of its provisions."[125] Lawrence Lessig, for example, accounted for constitutional change in an interpretive context, but denied that such change "*requires* amendment."[126] The

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121 Heather Gerken, *supra* note 112; *see also* Strauss, *supra* note 115, at 878 ("An air of illegitimacy surrounds any alleged departure from the text or the original understandings.").

122 Responding to Ackerman and Akhil Reed Amar, who both outlined ideas of change outside Article V, David Dow wrote, "My thesis is that the only way to amend the Constitution is in accordance with the mechanism outlined in article V. My further claim is that the mechanism outlined in article V is clear, exclusive, and that it means what it says. There are simply no other ways to amend the Constitution." David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 4 (1990).

123 *See* Sager, *supra* note 105, at 896–97 ("Judicial change by reinterpretation, of course, is different than popular amendment of the Constitution for these purposes: it is much harder to account for as a prominent feature of government in a nation which extols popular sovereignty. Indeed, it is robust judicial interpretation of the Constitution which often is seen as the difficulty in squaring our constitutional tradition with the precept of popular sovereignty.").

124 *Id.* at 896 ("Moreover, much of the change in our constitutional tradition has been at the hands of the judiciary and by no means in simple harmony with changes in popular sentiment or judgment on the matters in question. Judicial interpretation of the Constitution at times has preceded and been an active catalyst of widespread changes in social practice and commitment; at times it has lagged rather badly behind such changes; and at times, while simply never achieving general rapport with popular perspectives, it has still clung tenaciously to its conclusions.").

125 *Id.* at 896; *see also* Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 33 (Sanford Levinson ed., 1995) (challenging the idea that there is an effective way to distinguish between interpretation and amendment).

126 Lessig, *supra* note 111, at 400. Lessig explains, "It is this assumption that I challenge directly in the account below. As I argue, we have long recognized cases where, in the face of changes in context, the proper act of fidelity is a changed reading of the constitutional text—constitutional change, that is, without constitutional amendment. As others have before, I will call this a justification of *translation* . . . ." *Id.* (emphasis added). In a similar vein, Richard Albert has outlined a theory of quasi-constitutional amendments. *See* Albert, *supra* note 119, at 742.

unavailability of formal amendment may, in fact, increase the likelihood that Justices will engage in more flexible and inventive interpretation.[127]

Many scholars move beyond simple interpretation to acknowledging methods of constitutional change explicitly extra-textual or outside of Article V. One of the foremost accounts of informal constitutional change comes from Bruce Ackerman. Ackerman articulated a history of a limited number of specific, intentional, and political acts by the people involving extensive debate and conflict,[128] ultimately confirmed multiple branches of government that he views as having created enduring constitutional change. Ackerman viewed these changes as the product of "wrenching social crisis" that drove Americans to "move beyond normal politics."[129] According to Ackerman, these changes are legitimate, so long as they occur within the constitutional moments pattern he identifies.[130] In terms of the process of amendment, Ackerman did not support this informal process over Article V, instead saying that his theory is interpretive of the history of constitutional change, rather than normative about the methodology.

Ackerman's account of informal constitutional change focuses, in part, on the court packing threat of 1937. Ackerman concludes that "the President and Congress left it to the Justices themselves to codify the New Deal revolution in a series of transformative judicial opinions, threatening to pack the Court unless it accepted this novel

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127 *See* Marshfield, *The Amendment Effect*, *supra* note 108, at 56 ("Many Americans and prominent scholars believe that Article: V's arduous amendment procedures embolden the Justices because they know that unpopular constitutional rulings are unlikely to be displaced by responsive amendments. This is surely true to a degree. The Supreme Court has all but admitted that it takes more liberty in overruling constitutional precedent because of Article: V's rigidity."). Marshfield observes that it is "commonplace in constitutional scholarship to identify Article V's rigidity as a cause of the court's relative activism." *Id.* at 57.

128 Sustained debate is a key feature, although not a sufficient one for constitutional change in other accounts as well. *See* Melissa Schwartzberg, Should *Progressive Constitutionalism Embrace Popular Constitutionalism?*, 72 OHIO ST. L.J. 1295, 1308 (2011) (reflecting on sustained deliberation within Eskridge and Freejohn's model and the requirement more generally).

129 ACKERMAN, *supra* note 103.

130 *See* Ackerman, *supra* note 27, at 1056 ("Thus, when today's lawyers invoke the name of *Lochner v. New York*, they are dealing with a constitutional symbol with all the potency of a formal amendment under Article V."); *see also* Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 8 (2002) ("The 'Roosevelt revolution,' he maintains, should 'be viewed as a constitutive act of popular sovereignty that legitimately changed the preceding Republican Constitution.' For Ackerman, 'the language of popular sovereignty provides an appropriate description for the constitutional transformations achieved during this period.' Constitutional lawyers should therefore 'recognize that Americans of this era hammered new fundamental commitments which we today have a constitutional obligation to honor.'" (quoting 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 280 (1998)).

constitutional responsibility."[131] Ackerman's account suggests that the Supreme Court intentionally switched positions for the sake of its continued institutional legitimacy. As a result, the court accepts the "unchallengeable constitutional reality" of "an activist, regulatory state."[132]

Ackerman's account of informal constitutional change now competes with a number of other well-known accounts. Mark Tushnet explained constitutional change in terms of workarounds,[133] which may be considered more like the interpretive position in that these workarounds express fidelity to at least some part of the textual Constitution.[134] Tushnet's workarounds "arise (a) when there is significant political pressure to accomplish some goal, but (b) some parts of the Constitution's text seem fairly clear in prohibiting people from reaching that goal directly, yet (c) there appear to be other ways of reaching the goal that fit comfortably within the Constitution."[135] Tushnet's theory accounts for constitutional change only where "[o]ne part of the text prohibits something, other parts of the text permit it, and the Constitution itself does not appear to give either part priority over the other."[136] Therefore, the workarounds theory, at most, accounts for only a portion of the constitutional change recognized by other scholars.

William Eskridge and John Ferejohn's account of super-statutes accounts for some level of informal constitutional change that may also be seen as interpretive. Their super-statutes result from "lengthy normative debate about a vexing social or economic problem" that results in a law that is "robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture."[137] A super-statute becomes "one of the baselines against which other sources of law—

131 ACKERMAN, *supra* note 103, at 119.

132 *Id.* at 40.

133 Mark Tushnet, *Constitutional Change: Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503–04 (2009). Tushnet provides a typology of these workarounds. *Id.* at 1504–08. Jonathan Marshfield's more recent theory of "amendment creep" appears to be a subcategory of Tushnet's workarounds—one specific to the use of Article V to interpret other constitutional provisions. *See* Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215 (2016) (examining how judges use the formal Article V rules "when interpreting other constitutional provisions").

134 Tushnet situates his approach as similar to both the interpretive positions and Ackerman's theory: "Yet another way of understanding constitutional workarounds is to see them as a method of amending the Constitution without altering its text, in the same family as judicial interpretation and 'constitutional moments.'" Tushnet, *supra* note 133, at 1510.

135 *Id.* at 1503.

136 *Id.* at 1504.

137 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

sometimes including the Constitution itself—are read," and therefore "[o]ccasionally, super-statutes can reshape constitutional understandings."[138] Eskridge and Ferejohn recognize a concept of "quasi- constitutional" laws, capable of "alter[ing] substantially the then-existing regulatory baselines with a new principle or policy."[139]

Eric A. Posner and Adrian Vermeule advance a theory of legislative entrenchment. In their definition, such statutes "are binding against subsequent legislative action in the same form."[140] Posner & Vermeule reject an equivalence with constitutional change,[141] because these statutes lack powers normal to constitutional amendment, such as expanding governmental powers.[142] They conclude that "entrenching statutes are just a unique legal instrument," and yet they describe entrenching statutes as having the power to "bind later legislatures."[143] This understanding is only possible if one is willing to break with the traditional higher/ordinary law dichotomy, which would suggest that any law capable of binding future legislatures is some form of constitutional change, if not an explicit amendment.

All of these accounts seek to explain and/or legitimate a process of informal constitutional change, and thereby—while disagreeing on a variety of points and having many distinct features—all acknowledge not only the existence, but also the importance of informal constitutional change.

C. *Structure, Rights & Effective Constitutional Change*

Theories of informal constitutional change incorporate examples of rights-based changes, structural changes,[144] or a mixture of the two. Ackerman's constitutional moments theory contains examples of multiple types. He described the New Deal in terms of the rise of the federal economic order and social welfare, as well as the development of the administrative state. Ackerman's account followed soon after Michael Parrish's, which pointed to the New Deal as a "constitutional

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138 *Id.*

139 *Id.* at 1230.

140 Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1680 (2002).

141 Posner & Vermeule conclude, "Entrenching provisions are not amendments, nor are they 'equivalent' to amendments in either a de jure or a de facto sense." *Id.*

142 *See id.* at 1680–81.

143 *Id.* at 1681.

144 Structural constitutional changes may be defined as those involving the powers, purposes, or functions of primary governmental institutions recognized in the Constitution, along with the relationships among those institutions.

revolution," which not only "permanently and dramatically changed the role of the judiciary,"[145] but also resulted in the development of a national economic policy,[146] the creation of a federalized social-welfare system,[147] and the rise of the "imperial presidency."[148] On the other hand, Ackerman's account of the Civil Rights Revolution posits rights-based changes rather than structural ones.[149]

But of the many examples of informal constitutional amendment, which ones created enduring constitutional change? The evidence more clearly favors informal change successfully creating constitutional changes that are structural, rather than rights based. Those that are rights-based tend more towards slippage over time.

Ackerman ties his 1937 "constitutional moment" to two key structural changes: first, the development of the administrative state and second, the rise of presidential power. Ackerman was far from the first scholar to emphasize the New Deal's role in the rise of the federal regulatory world. For at least four decades historians and legal scholars have traced the rise of the administrative state. Robert Rabin explained the development of the modern administrative state in terms of "eras" of regulatory change.[150]

Scholars also regularly explain why the administrative state is unconstitutional. In 1994, Gary Lawson wrote about "[t]he [d]eath of [c]onstitutional [g]overnment" in connection with the administrative agencies.[151] Lawson argued multiple reasons why the agencies offended the structural systems laid out within the Constitution:

> Moreover, Congress frequently delegates that general legislative authority to administrative agencies, in contravention of Article I. Furthermore, those agencies are not always subject to the direct control of the President, in contravention of Article II. In addition, those agencies sometimes exercise the judicial power, in contravention of Article III. Finally, those agencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III.[152]

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145 Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 726 (1984).

146 *Id.* at 726.

147 *Id.* at 727.

148 *Id.* at 726–27.

149 ACKERMAN, *supra* note 16.

150 Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1191 (1986).

151 Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994).

152 *Id.*

Lawson concluded, "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."[153] Moreover, by his account, this was no accident. He alleged, "The original New Dealers were aware, at least to some degree, that their vision of the national government's proper role and structure could not be squared with the written Constitution."[154]

The only way to deny a constitutional problem with the modern administrative state is to reject the idea that any change has occurred. In this approach, "The scope of national regulatory power finally sustained by the Supreme Court in the late thirties is said to find firm roots in 1789 understandings and early Marshall Court decisions construing the necessary and proper and commerce clauses, and the contrary intervening case law is dismissed as in error."[155]

Whether or not the rise of the administrative state is constitutional, this modern form of government has shown great tenacity. Gary Lawson concluded, "Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck."[156] By his evaluation, despite the questionable status, "the essential features of the modern administrative state have, for more than half a century, been taken as unchallengeable postulates by virtually all players in the legal and political worlds, including the Reagan and Bush administrations."[157] As a result, Lawson determined, "The post-New Deal conception of the national government has not changed one iota, nor even been a serious subject of discussion, since the Revolution of 1937."[158]

Similarly, scholars agree on the enduring change to the power of the presidency.[159] To some minds, the rise of presidential power is enough of a constitutional change to potentially unbalance our constitutional structure. In 1973, Two-time Pulitzer prize winning historian Arthur Schlesinger Jr., wrote The Imperial Presidency, a book that narrates a history of the rise of presidential power and plots

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153 *Id.* at 1231.

154 *Id.*

155 Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 730 (1988).

156 Lawson, *supra* note 151, at 1231.

157 *Id.* at 1232.

158 *Id.* at 1231.

159 *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001) (noting scholarly agreement that the expansion of executive power created informal change).

solutions for the problem of expanding, centralized power.[160] Eric Posner and Adrian Vermeule, similarly traced this history, although arguing that the centralization of power within the President is a natural byproduct of modernity.[161] Andrew Rudalevige would place the blame, at least part, on Congress, which he says has not effectively engaged mechanisms to check presidential power.[162] Ackerman argued that not only has presidential power increased unreasonably, but also that it has reinforced political extremism.[163] This rise of presidential power appears to be an enduring, informal constitutional change.

On the other hand, many scholars linked the New Deal not only to the administrative state, but also to a particular social perspective: that of the activist, regulatory, welfare state. In the 1980s and early 1990s, scholars, traced the evolution of the Commerce Clause specifically to the New Deal era decisions, concluding that congress possessed broad powers to remedy national social ills.[164] Elizabeth Price explained, "Broad judicial construction of the power to regulate commerce, particularly since the New Deal, has, in the eyes of many (if not most) legal scholars, effectively given Congress a general police power."[165] Whether viewed as a product of improper jurisprudence and reinterpretation,[166] or an informal constitutional change, many scholars

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160 ARTHUR M. SCHLESINGER JR., THE IMPERIAL PRESIDENCY (1973).

161 ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010).

162 ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE (2006).

163 *See generally* BRUCE A. ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010).

164 Michael Belknap wrote, "When Roosevelt took office, the Court was still interpreting the Constitution in such a way as to impose significant restraints on the regulatory activity of the federal government. By the end of the New Deal, however, federal power over economic and social matters had become essentially limitless." Michael Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 67–68 (1983).

165 Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 142 (1998); *see also* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253 (1996) ("In the 1930s the powers of the national government were expanded in an extraordinary way, in favor of a system that exercised something close to general police powers."); Lawson, *supra* note 151, at 1233 ("The United States Congress today effectively exercises general legislative powers, in contravention of the constitutional principle of limited powers.").

166 Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) (rejecting this line of interpretation of the Commerce Clause because of the improper powers with which it imbues Congress); Donald H. Regan, *How to Think About the Federal Commerce Power & Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 554 (1995) (concluding that the interpretation that will "allow Congress to do anything it wants under the commerce power").

commented on this historical trajectory toward a stronger and stronger welfare state.

Then the Supreme Court decided *Lopez* and *Morrison*. In 1995, *United States v. Lopez* declared the Gun Free Schools Act unconstitutional under the Commerce Clause.[167] Then in 2000, after exceptional social energy went into enacting a federal civil-remedy for victims of gender-based violence, the Supreme Court struck the statute down in *United States v. Morrison*.[168] Gender-based violence was, in the view of the Morrison Court, a local matter, and the "Constitution requires a distinction between what is truly national and what is truly local."[169] More importantly, gender-based violence is a social and criminal issue, and like guns, not an economic one.[170] Scholars could no longer clearly trace a general police power of Congress back to 1937. At the same time, the administrative state and the assorted regulatory regimes continued unhindered, as did the expanded executive power. While the social welfare component of the constitutional change experienced slippage, the structural component remained steady.

The problem is simple: Informal constitutional changes involve an unavoidable fuzziness. Gerken argued, "it is hard for judges to define the precise content of informal amendments and even harder for judges to acknowledge their existence, informal amendments occupy an odd constitutional status. They make it hard for anyone to claim access to an authentic account of constitutional meaning."[171] She described this as a product of the "vagueness and quasi-illicit status of informal amendments."[172] Ackerman acknowledged that an "evolutionary approach contains great dangers," emerging from the fact that the movement does not "pin its transformative message down in a formal amendment," and as a result "relies very heavily on the good judgment of courts."[173] When compared, structural changes and rights-based changes differ in their cultural fluidity. Without text, it is much more difficult to outline, preserve, and enforce a change in constitutional

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167 United States v. Lopez, 514 U.S. 549 (1995).

168 United States v. Morrison, 529 U.S. 598 (2000).

169 *Id.* at 617–18.

170 This was precisely the distinction used by the court when affirming the Controlled Substances Act in Gonzales v. Raich, 541 U.S. 1 (2005).

171 Gerken, *supra* note 112, at 929; *see also* Price, *supra* note 165, at 144 ("[I]f we accept that there may be (or are) legitimate, implicit constitutional amendments, the Constitution to which we pledge fidelity necessarily extends beyond the written text to inchoate, unwritten policies, the outer contours of which can be defined only by the subjective divination of unelected federal judges.").

172 Gerken, *supra* note 112, at 929.

173 ACKERMAN, *supra* note 16.

rights. Changes in structure, on the other hand, benefit from institutional preservation of power and institutional maintenance work.

This conclusion about informal constitutional's change and its effectiveness should be alarming. If any type of change should be done, carefully, deliberatively, and formally, it should be a change that alters the very structure of our republic.

D. *Court Packing and Effective Constitutional Change*

If the primary purpose of court packing or the threat of court packing is informal constitutional change, then the key question should be what type of change is desired. Our history suggests that court packing could be utilized more clearly and lastingly for structural change. The problem, however, is that the direct structural change of court packing is simply a larger court. Additionally, to the degree that court packing feels retributive, this type of structural change, set only in a single statute, would likely reverse with the next election of a President from the opposing political party. On the other hand, one could, potentially, aim for a specifically politically balanced court, as the one suggested by Epps and Sitaraman.[174] If however, such a court is created by statute—as court packing could be—then it would need entrenchment, which might or might not be feasible, for any chance at longevity.

Any attempt to change substantive rights via court packing would encounter slippage in the future, even if temporarily effective. Logically then, court packing should be used only if needed for a temporary goal. For example, court packing might be necessary and effective in the short run if the current Justices so altered voting rights that constitutional amendment became impossible without first re-establishing proper access to voting. In this example, court packing would be a corrective and temporary measure, put in place as a part of a larger plan of constitutional change. Court packing would need to be followed with a better method of establishing long-term change, such as formal amendment, or at least a statute that might achieve the special status of "transformative" in Ackerman's lexicon or a "super-statute" in Eskridge and Ferejohn's.

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174 Epps & Sitaraman, *supra* note 7, at 193.

CONCLUSION

The original arguments against court packing carry less weight in the current social and constitutional era. Less weight, however, implies some validity to those concerns and within those arguments is an acknowledgement that court packing comes with some risk to governmental stability. Still, the original arguments against court packing cannot be categorized as strong in the current climate.

A better argument against court packing is simply that it is unlikely to be effective for any long-term informal constitutional change that is responsive to key social issues. Informal constitutional change is more clearly stable when it involves structural change rather than rights-based change. In light of this, a goal of an enduring and publicly accepted statute is more promising than court packing. A better solution is re-learning how to formally amend the constitution.