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What Roosevelt Did to *Brown v. Board of Education*, or Race and Court Packing

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ABSTRACT

Roughly one-third of American schools remain segregated. Scholars have offered a variety of explanations, mostly social and cultural, but sometimes legal, for why desegregation did not proceed effectively after Brown v. Board of Education. This Article articulates a less expected and previously undocumented cause: President Roosevelt's prior attempt at court packing slowed—even derailed—desegregation.

The story of what Roosevelt's court packing did to make the work of integration harder is a cautionary tale, particularly for those who want to alter the U.S. Supreme Court now in furtherance of a modern cause. The only reasonable route for reforming the Supreme Court must be based on furthering the stability and legitimacy of the Court. The lesson of Roosevelt and Brown further provide that this reform must be done with a deep knowledge of the public understanding of the Court.

When the Court decided Brown v. Board of Education, Roosevelt's court packing attempt was within living memory, and strongly influenced reactions to the Court's decree that American schools must integrate. Members of the public and southern lawmakers capitalized on Roosevelt's attacks on the Court, rearticulating those claims to cast doubt on the legitimacy of Brown. Other opponents of integration argued that Roosevelt had succeeded in packing the Court (if by less direct means), and that the Brown Court did not legitimately have the

* Professor of Law, Washington and Lee University School of Law. A part of this research was shared at a roundtable at the University of Texas at Austin School of Law organized by Richard Albert and Ashley Moran, with further discussion organized by Jack Balkin. The Author would like to particularly thank the participants, including Sandy Levinson, Vicki Jackson, Samuel Issacharoff, Ward Farnsworth, and Lori Ringhand.

authority to determine constitutional law. Both lines of argument proliferated through the media, reducing public acceptance of the Brown decision.

The impacts of Roosevelt's court packing attempt, however, went beyond questions about the legitimacy of the Court. Roosevelt had another legacy in authoring a playbook of strategies for manipulating both state and federal courts. The public and southern lawmakers attacked Brown by employing these strategies, often directly claiming validity for their actions by way of Roosevelt's endorsement.

In the decades when Roosevelt's court packing attempt remained in lived memory, Brown was never going to fully succeed in the South, where it did not have the majority support of the population. The Court simply did not have the power to demand public acquiescence or sway public opinion. This understanding of the Court's power matters today, as both court packing and court reforms are brewing in American politics. Any future changes must be done with a nuanced understanding of how the public will view the Court and what precedents we set that will be mirrored at the state level.

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I. INTRODUCTION

Currently, more than one-third of U.S. students (K-12) attend a racially segregated school.[1] Recent research shows that racial segregation has increased by 35% over the past three decades.[2] In the 1980s, the Reagan Administration stopped progress on integration by fighting court-ordered integration plans.[3] But the problem dates back much further. Many believe that the U.S. Supreme Court's decisions in 1954 in *Brown v. Board of Education I*, which held school segregation unconstitutional,[4] and *Brown v. Board of Education II*, which mandated that all American schools desegregate with "all deliberate speed"[5] settled the issue of segregation. In fact, many scholars have regarded *Brown* as a defining moment of glory for the Court.[6] In reality, integration barely appeared until more than fifteen years later, and only after the Supreme Court had issued no less than six decisions between 1954 and 1969 demanding that the states proceed with desegregation.[7]

1. Edwin Rios, *US Schools Remain Highly Segregated by Race and Class, Analysis Shows*, THE GUARDIAN (July 15, 2022), https://www.theguardian.com/education/2022/jul/15/us-schools-segregated-race-class-analysis [https://perma.cc/4EBZ-VUQR] (relying on data from U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104737, K-12 EDUCATION: STUDENT POPULATION HAS SIGNIFICANTLY DIVERSIFIED, BUT MANY SCHOOLS REMAIN DIVIDED ALONG RACIAL, ETHNIC, AND ECONOMIC LINES (2022)).
2. Jenesse Miller, *New 'Segregation Index' Shows U.S. Schools Remain Highly Separated by Race, Ethnicity, and Economic Status*, U.S.C. NEWS (May 17, 2022), https://news.usc.edu/199812/new-segregation-index-shows-u-s-schools-remain-highly-segregated-by-race-ethnicity-and-economic-status/ [https://perma.cc/47L7-ELJD].
3. Law professor James S. Liebman summarized the problem as "the Reagan and Bush Administrations' ten-year campaign to limit the legal, remedial, and temporal scope of court-ordered integration plans throughout the nation." James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465 (1990).
4. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954) (holding that school segregation is unconstitutional).
5. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (establishing the requirement of "all deliberate speed").
6. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988) (describing *Brown* as one of the "most celebrated civil rights cases in American history"); Nathaniel R. Jones, *The Desegregation of Urban Schools Thirty Years After Brown*, 55 U. COLO. L. REV. 515, 553 (1984) (arguing that *Brown* transformed America).
7. Along with *Brown I* and *Brown II*, the Supreme Court issued several other desegregation descions. Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964) (emphasizing

Desegregation proceeded neither speedily nor evenly and thoroughly.[8] As a result, scholars have long debated whether the *Brown* decision was effectively a failure.[9] The reality is that school desegregation not only persists but also is the subject of ongoing litigation in many jurisdictions in recent years.[10] One reason is that private schools, generally white-only and often referred to as segregation academies, proliferated in the years after *Brown*.[11] This, however, is not a full explanation of the problem because segregation continued in public schools and continues today.

This Article proposes an important and previously undocumented part of the explanation: when the Supreme Court decided *Brown v. Board of Education*, the recent experience of Roosevelt's court packing attempt remained in living memory and strongly influenced reactions to the Court's decree that American schools must integrate. The public and southern lawmakers capitalized on Roosevelt's attacks on the Court, rearticulating those claims to cast doubt on *Brown*'s legitimacy. Other opponents of integration argued that Roosevelt had succeeded in packing the Court (if by less direct means), and that the *Brown* Court did not legitimately have the authority to determine constitutional law. Both lines of argument proliferated through the media, reducing public

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the need for faster, immediate desegregation); Green v. Cnty. Sch. Bd., 391 U.S. 430, 438-39 (1968) (same), Carter v. W. Feliciana Par. Sch. Bd., 396 U.S. 290, 291 (1970) (same); Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam) (same).

8. *See* Liebman, *supra* note 3, at 1470 (describing desegregation's varied impacts in different cities and states as "alive and well," "stillborn," or "yet to be conceived").

9. One scholar argued that *Brown* was effective, but only in "an indirect, almost perverse manner." Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 13 (1994). Klarman reasoned that "By propelling southern politics dramatically to the right on racial issues, [*Brown*] created a political climate conducive to the brutal suppression of civil rights demonstrations." *Id.* at 11. According to Klarman, such violence (once televised to the nation) meant that "previously indifferent northern whites were aroused from their apathy, leading to demands for national civil rights legislation which the Kennedy and Johnson [A]dministrations no longer deemed it politically expedient to resist." *Id. But see* Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 173–74 (1994) ("He is surely correct that lawyers have overestimated the importance of *Brown v. Board of Education* in the transformation of race relations that occurred in the latter part of the twentieth century. I suspect, however, that *Brown* was more important than Professor Klarman makes it out to be.").

10. *See* Danielle Holley-Walker, *A New Era for Desegregation*, 28 GA. ST. U.L. REV. 423, 424–25 (2012) (describing the recent history of ongoing desegregation litigation).

11. In 1973, political scientist Anthony Champagne wrote, "[I]t is apparent that segregated private schools have become the new vehicle for evading the principle of integrated education." Anthony M. Champagne, *The Segregation Academy and the Law*, 42 J. NEGRO EDUC. 58, 58 (1973).

Champagne also quoted IRS Commissioner Randolph Thrower as saying, "[I]t is not actually known how many of the 17,000 private schools in the nation have racially discriminatory policies and thus exact figures on the number of students attending these schools are unavailable." *Id.*

acceptance of the *Brown* decision and encouraging the many strategies of evading integration.

The impacts of Roosevelt's court packing attempt, however, went beyond questions about the legitimacy of the Court. Roosevelt's legacy also included authoring a playbook of strategies for manipulating both state and federal courts. The public and southern lawmakers attacked *Brown* by employing these strategies, often directly claiming validity for their actions by way of Roosevelt's endorsement.

In the decades when Roosevelt's court packing attempt persisted in lived memory, *Brown* was never going to fully succeed in the South, where it did not have majority support of the population. The Court simply did not have the power to either demand public acquiescence or sway public opinion.

The story of court packing and *Brown* matters not only as a piece of the complicated puzzle of why integration remains a challenge but also because the idea of court packing is in the air again. Court packing[12] is an old concept that enjoys seasons of popularity.[13] Currently both Democrats and Republicans[14] are working to pack courts at the state[15] and federal level.[16] This Article examines the public perceptions of court packing prior to Franklin D. Roosevelt's famous attempt, beginning with the public understanding of jury packing—fixing a jury for a particular outcome—as the basis for the term "court packing."

12. The term "court packing" has a variety of meanings, both broad and narrow. This Article will address the implications of this variety. For the purposes of general discussion here, the term refers to altering the number of Justices on the Supreme Court, particularly with the intent to change the jurisprudential trajectory of the Court. Later, this Article's historical exploration of the public perceptions allows for an expanded definition, explained throughout the sections.

13. *See* Alex Badas, *Policy Disagreement and Judicial Legitimacy: Evidence from the 1936 Court-Packing Plan*, 48 J. LEGAL STUD. 377, 400–01 (2019) (arguing that policy disagreement influences whether one views court packing as a threat to legitimacy of the Court); 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); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 165 (2019) (discussing alternative proposals to support the legitimacy of the Court); Stephen M. Feldman, *Court Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFF. 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, 40–65 (2020) (constructing an Ackerman-based approach to legitimacy in court packing).

14. *See infra* Part VI.B.

15. Max Burns, *Republicans are Ready to Pack the Courts*, THE HILL (May 12, 2022), https://thehill.com/opinion/judiciary/3485807-republicans-are-ready-to-pack-the-courts/ [https://perma.cc/P4LR-RJXB] (discussing Republicans' successful efforts to pack state courts). *See also* Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1145–54 (2020) (examining the history of court packing at the state level, and arguing that it has been attempted and done "successfully" several times).

16. *See infra* Part VI.B.

The public knowledge of jury packing dictated how the public would respond to Roosevelt's attempt to pack the Supreme Court. From 1937 to the 1950s, public discourse regularly recalled Roosevelt's court packing attempt, keeping the experience vivid in the public memory. Court packing became a significant part of the public political lexicon, operationalized by both the public and lawmakers when the Supreme Court overruled separate but equal precedents in *Brown v. Board of Education*.

The Roosevelt-era experience with court packing informed the public response to *Brown* in multiple ways. Public discussions post-*Brown* echoed the Roosevelt era, not in a generalized way, but in specific patterns traceable directly back to Roosevelt. The public and southern lawmakers attacked *Brown* by mirroring the strategies Roosevelt had used to attack the Court. Simultaneously, the public discourse capitalized on Roosevelt's actions to discredit the Court, maintaining that the Court lacked legitimacy and had become a political body created by Roosevelt's unconstitutional machinations. Thus, the public discourse in the South challenged the legitimacy of the Court, both building on the Roosevelt-era criticisms and, simultaneously, refusing to credit the *Brown* decision because of Roosevelt's politicization of the Court.

Changes in the public attitude to the Court after 1937 both lengthened and heightened the post-*Brown* social turmoil. The Roosevelt-era's attack on the Court also provided a step-by-step set of instructions for the post-*Brown* attacks on the Court as well as attacks on lawmakers who supported integration. In short, Roosevelt's attempt at court packing decades earlier slowed and even derailed desegregation after *Brown*.

The story of what Roosevelt's court packing did to make the work of integration harder is a cautionary tale, particularly for those who want to alter the Supreme Court now in furtherance of a liberal cause. The only reasonable route for reforming the Supreme Court must be based on the public understanding of the Court. The historical and sociological patterns of court packing discussed in this Article provide cautionary tales and insights into precisely how that reform should proceed.

The argument proceeds as follows: Part I provides the context for how the public would understand court packing, documenting the link between jury packing and court packing and the connection to race. Part II contains a historical and sociological exploration of how the public understood court packing against the background of jury packing and how the public reacted to Roosevelt's court packing plan. Part III explains the role the public already thought Roosevelt was playing in race and integration in the country. This perspective returned when *Brown* was decided and contributed to how the pubic understood not only court packing, but also *Brown* and integration. Part IV tells the history of the impact of Roosevelt's court packing attempt on the public reaction to *Brown* and desegregation as required by the Supreme

Court. Part V analyzes the Roosevelt-*Brown* history in terms of the modern push for court packing.

II. COURT PACKING, JURY PACKING, AND RACE

The connection between *Brown* and court packing begins with the connection between court packing and race as understood in the public discourse in the Roosevelt and *Brown* eras. This Part explains how when the public heard of Roosevelt's court packing plan, they were already thinking about not only race, but also exclusion, segregation, and integration. This link arises from the association of court packing with jury packing, and more specifically the history of packing juries with or without people of particular religions, classes, and races.

A. An Introduction to Jury Packing

Jury packing is, in one definition, "contriving to have a jury composed of persons who are predisposed toward one side or the other."[17] In its various iterations, jury packing refers to a practice of selecting or bribing jurors to obtain a particular result, no matter the evidence presented.[18] Jury packing, therefore, is closely related to the idea of sham trials.[19] Jury packing is neither technically complicated nor constitutionally theoretical; it is a concept that is easily understood by the average citizen. Moreover, jury packing attracts public attention by creating sensational headlines: "Innocent Men Are Convicted."[20]

Jury packing occurs when the system is "manipulated . . . to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process."[21] For example, in *Fay v. New York*, the defendants alleged jury packing based on two separate claims: "first, that it unconstitutionally excluded women, and, second, that it unconstitutionally excluded laborers, craftsmen, service employees, and others of like occupation, amounting in sum to the exclusion of an economic class."[22] Responding to the

17. Boozer v. Cashman, No. 19-427, 2019 U.S. Dist. LEXIS 73561, at *3 (W.D. Pa. Apr. 30, 2019).
18. Jury packing is also known as "salting the jury." *See* Brooks v. Beto, 366 F.2d 1, 28 (5th Cir. 1966) (referring to the practice as salting); Oliver v. Heritage Mut. Ins. Co., 179 Wis. 2d 1, 11, 505 N.W.2d 452, 456 (Ct. App. 1993) (same); Phillips v. Value City Stores, No. 96APE12-1711, 1997 LEXIS 4208, at *22–24 (Ohio Ct. App. Sept. 16, 1997) (same).
19. Fay v. New York, 332 U.S. 261, 288–89 (1947) ("But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense.") (citing Palko v. Connecticut, 302 U.S. 319, 327 (1937).
20. *Innocent Men are Convicted*, ATLANTA CONST., July 11, 1902, at 3.
21. *Fay*, 332 U.S. at 288–89.
22. *Id.*

allegations, the Supreme Court held that, "The defendant's right is a neutral jury."[23] This perspective, however, is a modern one.

Historically, within the common law, there were no procedures to secure a neutral, unbiased or random jury. As the Minnesota Supreme Court observed in 1896, "Fortuity in the selection of a jury was unknown."[24] Jury members were landowners who were "selected by the sheriff."[25] The sheriff could also select the jury individually for each case, a practice which "was subject to the objection that it opened the door for jury-packing by the sheriff."[26]

When a certain outcome is desired, procedures can be created to make jury packing "not so very difficult" by simply giving the government an unlimited number of strikes and the defense a limited number, such that the defense quickly loses the goodwill of the court.[27] Some tactics, such as appointing a special jury for one particular case, "necessarily raise[] a suspicion of jury packing," which then "taints the integrity of the indictment and the reliability of the verdict."[28] Similarly, the use of "bystanders brought in by the sheriff" as jurors also violated the statutory requirements.[29] Additionally, removing persons

23. *Id.*
24. Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 212, 68 N.W. 53, 56 (1896) ("It will be observed that the element of lot and the right of peremptory challenge were entirely wanting at common law in the selection of a special jury. It will also be found that the same is true of all the American statutes, except that in New York and Pennsylvania it seems that, under comparatively recent statutes, a limited right of peremptory challenge is given."). However, the Minnesota Supreme Court quotes Blackstone, who does suggest that the jury should be selected "indifferently" from the rolls: "Blackstone states the mode of procedure for selecting a special jury as follows: 'Upon motion in court and a rule granted thereupon [the sheriff is required] to attend the prothonotary or other proper officer with his freeholders' book, and the officer is to take indifferently forty-eight of the principal freeholders, in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel.'" *Id.* at 212, 68 N.W. at 55 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *357). *See also* Oliver v. Heritage Mut. Ins. Co., 179 Wis. 2d 1, 11, 505 N.W.2d 452, 456 (Ct. App. 1993) ("Still, the ethos of our system is a jury picked at random.").
25. *Lommen*, 65 Minn. at 211, 68 N.W. at 55.
26. *Id.*
27. *Jury Packing a High Science in Ireland*, CATHOLIC UNION & TIMES (Buff., N.Y.), June 13, 1901, at 4 (describing this procedure as one method used in jury packing in Ireland); *see also Mr. Balfour and Ireland*, BOS. EVENING TRANSCRIPT, Aug. 19, 1905, at 14 (describing the "stand aside" procedures, which effectively allow unlimited strikes for the government, while the defense has a limited number).
28. Brooks v. Beto, 366 F.2d 1, 28 (5th Cir. 1966) (Wisdom, J., concurring).
29. State v. Sumowski, No. 55194, 1989 LEXIS 1758, at *3–4 (Mo. Ct. App. Dec. 12, 1989) ("In light of the fact that four of the seven bystanders brought in by the sheriff eventually sat on the jury, we conclude that the court did not substantially comply with the statute.").

from the jury pool based on perceptions of their tendency to convict or acquit is a practice that "readily lends itself to jury packing."[30]

Jury packing is closely related to the idea of sham trials[31] and, therefore, both the inter-related ideas of judicial independence[32] and Supreme Court legitimacy.[33] The quintessential idea of fairness and due process is that a "[t]rial must be held before a tribunal not biased by interest in the event."[34] These issues of producing fair trials presented themselves regularly in the public and became a key part of how the public thought of the judicial process.

30. State v. Gresham, 637 S.W.2d 20, 26 (Mo. 1982) (holding the jury procedures were not in substantial compliance with the state statute).

31. Fay v. New York, 332 U.S. 261, 288–89 (1947) ("But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense.") (citing Palko v. Connecticut, 302 U.S. 319, 327 (1937).

32. *See* Debra Lynn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 662 (2005) ("Avoiding bias is also necessary to ensure public confidence in the courts.").

33. To aid in this discussion, it is helpful to tease out the separate meanings of the legitimacy of the Supreme Court and the idea of judicial independence. It is a somewhat dangerous exercise, as there is limited agreement on the meaning of the terms, as well as an important relationship between the two. Independence aligns, if not wholly contiguously, with the idea of impartiality, another term of somewhat debated definition, but which generally points to a lack of bias. 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." 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)).

Discussions of the legitimacy of the Supreme Court often focus on the Court's ability to enforce judgments if the public were to refuse peaceful compliance. 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.

With respect to a definition for legitimacy, and for reasons discussed further below, this Article adopts this narrower view of legitimacy as inherently linked to the ability to enforce a judgment.

34. *Fay*, 332 U.S. at 288 (citing Tumey v. Ohio, 273 U.S. 510 (1927)). *See also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475–76 (1986) ("Even though the Supreme Court has often stated that the core rights of due process are notice and hearing, we shall demonstrate that, under certain circumstances, the values of due process might arguably be safeguarded absent those specific procedural protections. None of the core values of due process, however, can be fulfilled without the participation of an independent adjudicator.").

B. Race, Representation and Jury Packing

A longstanding theme of jury packing was the exclusion of portions of the eligible public based on race, ethnicity, or religion.[35] This was true not only in the U.S. but also across the common law tradition more generally.[36]

One of the most common types of jury packing in the U.S. occurred during the post-Civil War Reconstruction Era, when white southerners were intentionally excluded from juries to seat a jury that would convict Klu Klux Klan members who had committed violent felonies.[37]

Brown v. Allen,[38] a 1953 U.S. Supreme Court case that was a contemporary of *Brown v. Board of Education*, addressed the problem of jury packing specifically within the context of allegations of racially selected juries. The Court described jury packing as "a sinister species of art."[39] The Court accepted that it was "responsible . . . under the Constitution to redress . . . jury packing."[40] However, the Court refused to draw any conclusions based solely on the racial composition of the jury, finding that "it should not condemn good faith efforts to secure competent juries merely because of varying racial proportions."[41]

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35. *See* People v. Brophy, 304 N.Y. 391, 393, 107 N.E.2d 504, 505 (1952) ("There is no claim here that any member of the Grand Jury was individually biased or prejudiced against defendants, and hence there can be no prejudice in the exclusion of talesmen, unless it be shown that there was a "sustained, systematic effort by the court arbitrarily to exclude from the final panel persons of a particular classification.").
36. For example, in Ireland, there were extensive concerns about Catholics being excluded from juries and that this was a practice designed "by the [British] government." *Jury Packing*, FREEMAN'S J. (Dublin, Ir.), July 16, 1890, at 6. Archbishop Walsh of Dublin wrote in 1901 that "Jury packing—that is, the exclusion of Catholics from the jury box—is invariably resorted to whenever a Catholic is tried on any charge having any connection with politics." *Archbishop Walsh on Jury Packing*, CATHOLIC UNION & TIMES (Buff., N.Y.), Nov. 21, 1901, at 1.
37. *See* Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1187 (2011) (discussing the relationship between packing juries, jury nullification and the attempt to control the Klu Klux Klan in the Reconstruction era).
38. 44 U.S. 443 (1953). Ironically, *Brown v. Allen*, the only U.S. Supreme Court case to explicitly address jury-packing, is also the source of an often-quoted line from Justice Jackson that speaks to the legitimacy of the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." *Id.* at 540 (Jackson, J., concurring).
39. *Id.* at 471 (majority opinion).
40. *Id.*
41. *Id.* The Court relied on an earlier case, *Akins v. Texas*, 325 U.S. 398 (1945), holding that the defendant has the burden of proving racial discrimination and such purposeful intent cannot be simply assumed or supported by a bare assertion. *Id.* Later cases have followed this approach. *See, e.g.,* U.S. v. Johnson, 386 F. Supp. 1034, 1038 (W.D. Penn. 1974) (holding that a challenge to the composition of the jury because it consisted only of white persons was insufficient alone to establish unfair jury selection); United States v. Test, 399 F. Supp. 683, 691 (D. Colo. 1975) ("Under the overwhelming majority of decisions which address the issue, a failure

After *Brown v. Allen*, the Fifth Circuit decided *Brooks v. Beto*, a Texas case where the jury pool was intentionally changed because of the racial makeup.[42] Initally, Brooks, a black man, was indicted by an all-white grand jury for raping a white woman.[43] At that time, the system "concededly excluded" blacks from jury service.[44] During Brooks' subsequent jury trial, he was convicted.[45]

After Brooks' conviction, the judge became aware of *Stoker v. State*,[46] which reversed a criminal conviction "because over the past 50 years no Negro had been included in the grand jury list."[47] Because Brooks had been convicted by a jury from which Blacks were systematically excluded, the judge concluded that the Brooks should be retried with a new jury.[48]

The key fact within the public understanding was not simply that courts excluded people from juries based on race, gender, sex, religion, or class, but that the purpose of the exclusions was frequently to make certain of a particular verdict. Judges, prosecutors, and sheriffs saw representation as indicative of political persuasions and used representation as a proxy for picking the right jury for the right verdict.

III. WHAT ROOSEVELT TAUGHT THE PUBLIC ABOUT COURT PACKING

In 1937, President Roosevelt announced plans to expand the Supreme Court to as many as fifteen justices—a plan which infamously became known as the "court-packing plan." Roosevelt's court packing plan faced a public that already knew about and fully understood the evils of jury packing. This was one of many reasons why his effort failed to yield results. For the purposes of this Article, however, the key issue is what Roosevelt's political maneuvering convinced the public to believe about the Supreme Court.

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to establish systematic exclusion is fatal not only to a constitutional challenge to a jury plan but also to any challenge based on the Jury Selection Act.") (citations omitted). The firmness of the approaches to this issue does not necessarily reflect its fairness: studies have found that the race of jurors does matter for the purposes of consistent sentencing. Joseph Jacoby, & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J.L. & CRIMINOLOGY, 379, 379–87 (1982).

42. Brooks v. Beto, 366 F.2d 1, 5 (5th Cir. 1966).
43. *Id.*
44. *Id.*
45. *Id.*
46. 169 Tex. Crim. 59, 331 S.W.2d 310 (Tex. Cr. App. 1960).
47. *Brooks*, 366 F.2d at 5.
48. *Id.*

A. Roosevelt's Court Packing Attempt & the Persuadable Court

There are many accounts of the change in Supreme Court's jurisprudence when Franklin D. Roosevelt proposed court packing.[49] One of the central questions, and therefore reasons for at least two different accounts[50] is: "Did the court packing plan *fail51* or was it *abandoned as unnecessary*"[52] because the Court capitulated to Roosevelt's demands?

One version of the story describes the Supreme Court as changing its political and interpretive positions intentionally and at least partially due to the threat of court packing.[53] In the other version, the Supreme Court's positions changed more organically, or at least were not politically motivated.[54] After the Supreme Court's decision on the Wagner Labor Act,[55] Roosevelt claimed that the Court "began to

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49. 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).

    Roosevelt was very likely not the author of the idea of court packing. Some accounts attribute the idea to Homer Cummings who was Roosevelt's Attorney General. *'Court Packing' Advocate Dies*, SPOKESMAN-REVIEW (Spokane, Wash.), Sept. 11, 1956, at 5 (reflecting on Cummings' importance in national affairs at the time of his death).

50. Ho & Quinn, *supra* note 49, 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.

51. Roosevelt did succeed in setting up what was seen as "bait" for retirement in the Supreme Court—the ability to retire at age seventy with full pay. Bascom N. Timmons, *High Court Changes Not Far Away*, NEWS & OBSERVER (Raleigh, N.C.), July 6, 1953, at 2.

52. Jill Fraley, *Against Court Packing, or a Plea to Formally Amend the Constitution*, 42 CARDOZO L. REV. 2777, 2786 (2021). Either way, as one commentator who recalled the events described it, "its final demise in the summer of 1937 was hardly noticed." Eli Schwartz, *Public Values Supreme Court's Independence*, MORNING CALL (Allentown, Penn.), Sep. 16, 2005, at 11 (discussing his personal memory of following the court packing debate of 1937).

53. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 49, 119 (1993).

54. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 40–42 (1998) (arguing there was no sudden reversal caused by external pressures such as court packing); *see* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

55. Labor was at the heart of the problem for Roosevelt who wanted the Court to "concede[] to Congress power to protect the lifelines of national economy from private industrial warfare." Richard L. Worsnop, *Supreme Court: Legal Storm*

interpret the Constitution instead of torturing it."[56] Thus Roosevelt may have believed that he "frightened the [C]ourt into that decision."[57]

A bipartisan report of the Senate Judiciary Committee criticized the court packing plan as designed "to punish the Justices" for their decisions.[58] The Committee described the plan as "an invasion of judicial power."[59] At issue was "the very existence of the free judiciary."[60]

The public response to the court packing bill focused on Roosevelt and his desire to subvert the normal constitutional structure by subjecting the Court to his own desires. Contemporary commentary suggested that Roosevelt at least believed that the Court was "amenable to presidential direction."[61] In fact, according to newspaper reports at the time, Roosevelt not only admitted his influence on the [C]ourt, he also "boast[ed] of it."[62]

B. Casual Criticism of the Court

A key impact of Roosevelt's court packing attempt was the way that the Supreme Court became a topic of casual and critical public discussion. Ray Tucker, a reporter with decades of experience reporting on the Court, recounted the changes in reporting on the Court and its decisions in 1956.[63] Tucker maintained that "Roosevelt was really responsible for bringing the Court under unprecedented study and criticism."[64]

Tucker said, "When I came to Washington in 1924, reporters never tried to go behind the scenes of the tribunal—then sitting in the cellar of the Capitol—to question its decisions, or to analyze the members as liberals or conservatives, jurists or politicians."[65] According to Tucker,

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Center, IRONWOOD DAILY GLOBE (Mich.), Oct. 8, 1966, at 4 (describing a history of the Supreme Court's power, including in the Roosevelt era).

56. *Makes Reply to F.D.R.: Gannett Warms of 'Court Packing*,' BILLINGS GAZETTE (Mont.), Oct. 8, 1941, at 7 (discussing publisher Frank Gannett's statement as head of the Committee for Constitutional Government).
57. *Id.*
58. William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, a Second Death*, Duke L.J. 673, 675 (1985) (quoting S. REP. NO. 75-711, at 11 (1937)). By some accounts, Senator Henry Fountain Ashurst of Arizona, chairman of the committee, was a key part of the defeat of Roosevelt's proposal. *Ashurst Won Senate Fame with Oratory*, PITTSBURGH PRESS, June 1, 1962, at 12 (describing, on the occasion of Ashurt's death, his role in "defeat[ing] FDR on court packing").
59. Leuchtenburg, *supra* note 58, at 675 (quoting S. REP. NO. 75-711, at 11 (1937)).
60. *Now For Court Reform,* MARSHFIELD NEWS-HERALD (Wis.), July 29, 1937, at 4.
61. *Makes Reply to F.D.R.: Gannett Warms of 'Court Packing*,' *supra* note 56.
62. *Id.*
63. Ray Tucker, *Why Criticism is Heaped on the Court*, GREENVILLE NEWS (S.C.), July 7, 1956, at 4 (discussing the "general dissatisfaction" with the Supreme Court and its frequent public criticism by "so many respected sources," as witnessed through his 32 years as a journalist).
64. *Id.*
65. *Id.*

reporters "simply reported their Monday opinions without comment or interpretation. The judges were sacrosanct."[66]

However, after Roosevelt released his plan, reporters were invited to critique the Court more because Roosevelt "himself laughed and scoffed at them."[67] Insiders started revealing "the personal or political foibles" of the justices to "newspaper friends."[68] As a result, Tucker and others "began to write as intimately, as emotionally, and as critically as reporters do about local politicians and aldermen."[69] Tucker believed that both Roosevelt and Truman's appointments exacerbated the situation because both presidents chose justices on their politics rather than their qualifications.[70] It was not simply that the nominees were political, but that they lacked solid judicial qualifications. Of the Roosevelt and Truman appointments, "only two . . . had had previous judicial experience" and one of those "only as a Police Court Judge many years ago for 18 months."[71] Tucker concluded that "Roosevelt and Truman appointments did not tend to elevate the Supreme Court in legal or public opinion."[72] The Roosevelt and Truman eras produced a Court subject to public debate which was therefore more frequently—and vividly—featured on the front pages. As a result, the public debates over the Court and court packing proliferated.

C. Understanding the Supreme Court as Partisan

Party control of the courts became a substantial part of the public understanding of court packing. While partisanship in the Court is a subjection of both much variation over time and much debate, there is evidence in the years prior to Roosevelt's first term that the public saw the Court in a less partisan light.

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66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id. See also* Raymond Moley, *Let's Have the Facts*, KINGSPORT TIMES-NEWS (Tenn.), June 16, 1946, at 4 ("Look at the list of Roosevelt appointees and consider what reasons contributed to their selection. The answer is ideology and service to New Deal activities and purposes.")
71. *See* Tucker *supra* note, 63, at 4.
72. *Id.* Some would argue that this trend has continued because it carries a particular advantage: "Presidents have begun nominating obscure persons whose views are unknown to Senate Democrats and the public and whose careers lack the distinction that should be a prerequisite for positions on the high court." Russell W. Galloway, *Senate is Not Doing its Job as Advisor to Supreme Court Appointments*, ARIZ. DAILY STAR (Tucson, Ariz.), Aug. 21, 1991, at 12. *But see Jackson Grew with Service on Bench*, DES MOINES REGISTER, Oct. 12, 1954, at 8 (reflecting on Justice Jackson's death that "More often than not men named to the court have grown far beyond their apparent capabilities when they have had to shoulder the immense responsibilities of the court.")

One example of the public's aversion to a partisan Court occurred during the 1904 presidential race. William Jennings Bryan "declare[d] 'the coming campaign will not be for the election of a president, but for the election of a supreme court."[73] Bryan was met with harsh criticism, accusing him of a "deliberate assault on the integrity and independence of all the present supreme court justices."[74] His opponents further alleged that Bryan's purpose in such statements was "to shake popular confidence in the . . . [C]ourt." [75]

Further, some evidence suggests that in the early 1900s, the public not only eschewed choosing justices by their party but also the practice of asking nominees to commit to particular issues in advance and to adhere to those as promises once on the bench.[76] The topic came up during the discussion of the constitutionality of The Women's Suffrage Act.[77] One candidate for the Supreme Court, Arthur H. Shay, created controversy after he "was reported to have 'pledged' himself to a certain line of action in advance of his nomination."[78] His supporters then urged others "that it was the duty of all Progressives who have made woman suffrage a part of their programme to elect Shay, who was pledged to make the act valid."[79] Newspaper reports described this as "not only making a partisan issue of the judiciary," but also "adopting a course that can scarcely be differentiated from what is called 'packing the court.'"[80]

From this perspective, the ideal justice is one that men "would never have stopped to inquire to what political party he belonged."[81] The important facts would simply be that he was "an able and an honest man, ranking high in the profession of the law—and they would have trusted that he would bring his ability and his honesty to his task."[82]

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73. *The Supreme Court at Stake*, VICKSBURG HERALD (Miss.), Apr. 12, 1904, at 4.
74. *Id.*
75. *Id.*
76. *The Progressive Policy of Court Packing*, BOS. EVENING TRANSCRIPT, Oct. 15, 1913, at 19.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* By the time Earl Warren was appointed to be Chief Justice of the Supreme Court, newspapers at least guessed at his positions on issues, even if they did not seek his promise to adhere to prior positions. *See, e.g., New Chief Justice Facing Vital Issue—Racial Segregation*, STATESMAN JOURNAL (Salem, Ore.), Oct. 4, 1953, at 21 (listing Warren's positions on a number of critical issues in contemporary debates).
81. *'Court Packing,' Idle Talk*, BOS. EVENING TRANSCRIPT, Aug. 21, 1902, at 7 (discussing Oliver Wendell Holmes, the general characteristics a citizen should want in a justice, and arguing that talk of Holmes' appointment as packing was inaccurate).
82. *Id.*

In contrast, the heart of Roosevelt's plan was making the Court partisan and normalizing this partisanship. What Roosevelt intended was "loading the Court down with rubber stamp party hacks."[83]

D. Roosevelt's Court Packing Attempt and Public Legitimacy of the Court

Public discussions after 1937 reflect a distinct loss of respect for the Court as an institution. In 1946, reporter Raymond Moley wrote that Roosevelt had "a purely political concept of the [C]ourt's function," making it not a part of "the distinguished Anglo-American tradition of the centuries from Coke to Stone" but instead "an adjunct to a temporary political regime."[84] Moley concluded that Roosevelt's era had "irreparably injured" the Supreme Court.[85]

In 1953, Justice Jackson, in his concurrence in *Brown v. Allen* expressed his own concern about the loss of respect for the Court.[86] Jackson said, "Rightly or Wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices."[87] Jackson placed blame on the Court itself: "Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."[88]

Years later, in 1956, one newspaper columnist described the court packing attempt as the moment when: "They deliberately tore the halo from the hitherto holy of holiest. We began to write as intimately, as emotionally, and as critically as reporters do about local politicians and aldermen. We brought the black-gowned lawgivers down from a judicial Olympus to reportorial earth."[89] Consequently, the Court no longer commanded the same respect as an expert, independent institution.

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83. *Hail and Farewell*, PITTSBURGH COURIER, Nov. 26, 1938, at 10.
84. Moley, *supra* note 70, at 4.
85. *Id.*
86. Brown v. Allen, 344 U.S. 443 (1953). Justice Jackson was no stranger to this issuing having "assumed his duties under a cloud" due to his appointment by Roosevelt in 1941 after the court packing attempt. *Jackson Grew with Service on Bench*, *supra* note 72, at 8.
87. *Brown*, 344 U.S. at 535 (1953) (Jackson, J., concurring).
88. *Id.*
89. Ray Tucker, *The National Whirligig*, VALLEY TIMES (North Hollywood, Cal.), July 7, 1956, at 16 (answering the question of why there was so much current anger at the Supreme Court).

E. A Supreme Court of Popular Opinion

The public saw the Court not as an independent evaluator with legal expertise but instead as a political body, swayed by the public or at least some members of the public. Some accused Roosevelt of trying to "recall judicial decisions" in favor of public opinion.[90] Others worried this shift in the treatment of the Court would mean that "there will soon be an end to law and to the power and integrity of the courts."[91] One illustration of these concerns can be seen in the reaction to William Seward's speech in the U.S. Senate regarding reorganizing the Supreme Court: "It announces a determination to place on upon the bench of the Supreme Court, men who will shape their judgments to the changing tides and shifting gales of popular madness."[92] Shifting the Court to the public will was the goal of at least one representative who proposed court packing; he "remarked that his plan would result in a [C]ourt more in tune with the American people."[93]

F. Roosevelt's Court as Legislator

Another theme in commentary on the Court reflects the idea of the Court as legislator. These articles maintain that a political decision by the courts is necessarily a legislative decision by courts, and therefore an affront to democracy as legislation from an unelected body.[94] Critics of Roosevelt believed that the Court had "embarked on a social and economic revolution."[95] Decades later, critics of the Court traced a pattern of the Court's "unrestrained power" back to Roosevelt's political pressures.[96]

G. Normalizing Court Packing

From Roosevelt on, there were regular efforts to impact the size and composition of the federal and state supreme courts,[97] or at least

90. *The Progressive Policy of Court Packing*, *supra* note 76, at 19.
91. *Id.*
92. *The First Great Blow*, LIBERATOR (Bos.), Apr. 2, 1858, at 1.
93. *Court Packing Idea Has Not Improved*, FORT WORTH STAR-TELEGRAM (Tex.), Aug. 3, 1967, at 4-E.
94. *See* David Lawrence, *The Right of Dissent*, BIRMINGHAM NEWS (Ala.), Mar. 7, 1956, at 14 (describing Supreme Court decisions as "political or legislative" when they deviate from traditional practice of the Court).
95. *New Court-Packing Plan Would Upset U.S. System of Checks and Balances*, MARSHALL NEWS MESSENGER (Tex.), June 23, 1946, at 4.
96. Richard L. Worsnop, *supra* note 55, at 4 (describing a history of the Supreme Court's power, including in the Roosevelt era).
97. *See, e.g.*, *Says Proposed Constitution Does Little to Improve State Court Setup*, COURIER-NEWS (Bridgewater, N.J.), May 23, 1942, at 11 (discussing the new proposed constitution for the state of New Jersey and making comparisons to court packing); *Court Packing Charged in House Bill*, NEWS TRIB. (Tacoma, Wash.), Jan. 30, 1959, at 5 (discussing a Washington state bill that would allow lower court

a fear of those efforts.[98] In 1941, a well-known newspaper publisher claimed "that the nation 'must still be on guard' against 'court packing' proposals."[99] In 1946, Senators Eastland and Bridges proposed a constitutional amendment that would limit the number of justices that could be appointed by any president to three, effective retroactively.[100] The proposal was, allegedly, "a court unpacking plan," which, like Roosevelt's, was "designed to meet a particular situation and . . . therefore unsound."[101]

In 1954, the Senate considered court packing enough of a realistic possibility to pass the Butler Amendment, which was a constitutional amendment to prevent court packing and establish other parameters for the courts.[102] The idea was that a constitutional amendment would prevent a "submissive Congress" from allowing "a future President" to "put through a packing plan."[103] As Representative Bill Bray explained, "To preserve the independence of the Court, the Senate believes packing should be made impossible."[104] The Butler Amendment, however, also made its own proposal for shifting the structure of the Court by including a mandatory retirement age of seventy-five for federal judges, including Supreme Court justices.[105]

IV. ROOSEVELT'S CONNECTION TO RACIAL INTEGRATION

In the New Deal era, some already saw both Roosevelt's legislation and changes to the Supreme Court as pushing an integration agenda. Indeed, some legislators and members of the public explicitly opposed

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judges to fill in for Supreme Court judges by appointment, a measure that was allegedly needed due to the work load of the state Supreme Court); Richard Coe, *GOP Candidates Attack 'Court-Packing*,' ANNISTON STAR (Ala.), Oct. 12, 1994, at 11 (discussing a plan "to expand Alabama's highest courts and appoint black judges to fill the seats," a plan that was criticized as court packing).

98. In part, this continuous discussion of the Court may have been caused by the newly political nature of appointments. A reporter in 1956 observed: "The sin of making appointment based on political considerations is one of which Presidents Franklin Roosevelt, Truman and Eisenhower have all been guilty." *A Successor to Minton*, BIRMINGHAM POST-HERALD (Ala.), Sept. 10, 1956, at 10.

Theoretically, though, I would argue that if court packing were ever going to work, it should have worked in 1937 when Roosevelt had a significant majority in both houses of Congress.

99. *Makes Reply to F.D.R.: Gannett Warms of 'Court Packing*,' *supra* note 56*,* at 7.

100. *New Court-Packing Plan Would Upset U.S. System of Checks and Balances*, *supra* note 95, at 4 (critiquing the Eastland-Bridges proposal).

101. *Both Ideas Wrong*, COLUMBIA REC. (S.C.) June 21, 1946, at 4.

102. *Court-Packing*, ITHACA J. (N.Y.), May 17, 1954, at 6 (discussing the Butler Amendment and its provisions).

103. *Court Packing Amendment*, SOUTHERN ILLINOISAN (Carbondale, Ill.), Apr. 14, 1954, at 4.

104. Bill Bray, *A Congressman Reports from Washington*, EDINBURG DAILY COURIER (Ind.) May 25, 1954, at 1.

105. *Court Packing Amendment*, *supra* note 103, at 4.

the New Deal for this reason alone. This Part explains how the public connected race, segregation, and New Deal politics.

The New Deal and the court packing proposal were intrinsically linked with racial inequality in the U.S. in a number of ways. This created one of the foundations for directly linking Roosevelt's court packing attempt with the Supreme Court's later decision in *Brown*. One lens the public could use to understand *Brown* was through the politics of the New Deal.

First, the New Deal was overwhelmingly about labor and working conditions—issues that were highly racialized in the South. And advocates for Black Americans saw the New Deal as an opportunity for "precise and mathematical equality."[106] Frank Kent, a conservative columnist wrote in 1937, "a situation confronts Southern Democrats supporting the administration" in the context of Roosevelt's legislative proposals.[107] The problem, as Kent saw it, was that a Roosevelt's path was leading to "pressure upon . . . administration politicians to end 'suffrage abuses in the South.'"[108] The columnist further worried that one member of Roosevelt's cabinet had "favored mixed schools, urged the repeal of all segregation ordinances, and, according to Senator Glass, 'practically committed the administration to a new force bill for the South.'"[109]

The New Deal's pro-labor provisions apparently motivated a revival of the Klu Klux Klan ("KKK"). "Almost the entire Southern press, which voices the views of Southern planters, bankers, and manufacturers, has expressed bitter disapproval of the National Labor Relations Act and the proposed Wages and Hours Bill."[110] "At the same time the NAACP reports a sharp increase in the number of cases of peonage brought to its attention."[111] "Reports from many points tell of an increasing number of [KKK] meetings, parades and cross-burnings, and of a new and strenuous effort on the part of organizers to increase [KKK] membership through contacting old members and new prospects."

Reports from the same places tell of increasing opposition to efforts of the Committee for Industrial Organization (CIO) to unionize unorganized, underpaid and poorly protected workers of both races."[112] "The CIO industrial unionism, buttressed by the Labor Relations Act, further strengthened by the proposed Wages and Hours legislation, and including all workers regardless of color or creed, [is] a menace to reactionary Southern employees because it unites instead of dividing

106. *Who Will Be General?,* EVENING SUN (Baltimore, Md.), Apr. 30, 1938, at 4.
107. Frank R. Kent, *The Great Game of Politics*, ST. LOUIS GLOBE-DEMOCRAT, Apr. 22, 1937, at 22.
108. *Id.*
109. *Id.*
110. *Behind the Ku Klux Klan Revival*, PITTSBURGH COURIER, Oct. 2, 1937, at 10.
111. *Id.*
112. *Id.*

labor."[113] "It is significant that this organization should be launching a drive right at this time when economic antagonism between white and black workers in the South is less than at any time since 1930."[114]

This perspective on the New Deal in the South explains why the public in the southern states, who supported segregation, would challenge the New Deal legislation and, later, dismiss *Brown* as a product of Roosevelt's machinations.

V. ROOSEVELT'S COURT PACKING, DESEGREGATION AND THE RESPONSES TO BROWN V. BOARD OF EDUCATION

The Court's ruling in *Brown v. Board of Education* in 1954 was not the end of segregation, but instead the beginning of a decades-long period of turmoil in the southern states, with fights over segregated schools continuing through the 1980s. In 1956, an Alabama columnist proclaimed, "Every primary, election, or other test of popular sentiment and opinion in the last few weeks has made one thing crystal clear—the Southern states are not accepting, except in isolated instances, the Supreme Court ruling on school segregation."[115] By 1958, Edward Mearns, a professor at the University of Virginia Law School, wrote that "the murmurs raised against the Supreme Court have become a crescendo of criticism and abuse."[116]

The public discussions post-*Brown* echo the Roosevelt era in a number of significant phenomena: (1) proposals of impeachments and court packing with the hopes of overruling *Brown*, (2) attacks specifically targeting the legitimacy of the Court by the public and lawmakers, (3) attacks echoing Roosevelt's criticisms of the Court, including the Court as a lawmaker. This Section outlines the post-*Brown* attacks on the Supreme Court and argues that the politicization of the Court from 1937 forward provided substantial fodder for the flames of objection in the southern states.

First, southern senators mirrored Roosevelt's tactics by introducing bills to reform the Supreme Court, including requirements for prior experience and mandatory retirement ages.[117] Commentators advised impeaching Supreme Court justices or introducing a court packing bill.[118] In 1958, the Harvard Law Review also reawakened the question of whether to enlarge the Supreme Court, although ostensibly

113. *Id.*
114. *Id.*
115. *Straws in the Wind*, ALABAMA J. (Montgomery), June 1, 1956, at 4.
116. Edward A. Mearns, Jr., *Checkreins Upon Government*, 44 VA. L. REV. 1117, 1117 (1958).
117. James Marlow, *World Today*, PROGRESS-INDEX (Petersburg, Va.), June 1, 1956, at 4 (discussing the proposals for reform but declaring them unlikely to be successful).
118. *Why Didn't the University Nullify Autherine*, MONTGOMERY ADVERTISER (Ala.), Mar. 8, 1956, at 4 (discussing the options to avoid desegregation).

for the purpose of addressing the "ever increasing work load of the [C]ourt."[119] Another alternative was to curb the Court's jurisdiction.[120] These tactics did not end in the 1950s but continued through the 1980s when Congress debated "whether federal courts should be prohibited from issuing or enforcing orders designed to remedy unconstitutional school segregation."[121] The Senate considered legislation that "would nullify virtually every Supreme Court and lower federal court decision ordering remedies for unconstitutional segregation, including the landmark decision of [*Brown v. Board of Education*.]"[122] By 1956, there were "perhaps 50 proposals in Congress—bills, resolutions, constitutional amendments—to curb the power of the government or the [C]ourt, undo what the [C]ourt has done, or otherwise rebuke it."[123]

Second, pro-segregation lawmakers and commentators targeted the legitimacy of the Court, building on the Roosevelt-era rhetoric and simultaneously refusing to credit the *Brown* decision because of Roosevelt's politicization of the Court. Roosevelt had popularized an entire menu of potential complaints against the Supreme Court—at the time when the Court did not do precisely what the public wanted. Roosevelt had famously referred to the Supreme Court as "nine old men," a particularly contemptuous statement that removed any mystique the Supreme Court had[124] and was often repeated in the press.[125] Similarly, southern newspapers, following *Brown*, argued that it was no longer the Supreme Court of the United States ruling but, "a handful of men sitting on the Supreme Court."[126] Rather than deferring to the Court's expertise, the public and lawmakers believed they need to "curb what

119. *A Bigger Supreme Court*, MONTGOMERY ADVERTISER (Ala.), Jan. 7, 1958, at 4 (concluding that southerners should not bother to support the measure on race grounds, because it would take ten more members to overturn the unanimous decision in *Brown v. Board of Education*).

120. *Everybody's Fight*, CENTREVILLE PRESS (Ala.), Oct. 16, 1958, at 2.

121. John Shattuck & David Landau, *Brown Decision—to the Junk Pile?*, HERALD & REVIEW (Decatur, Ill.), Feb. 25, 1982, at 12 (writing against legislation proposed by Orrin Hatch and John East).

122. *Id.*

123. James Marlow, *Supreme Court Holding Steady Despite Storms*, NEWS TRIB. (Tacoma, Wash.), June 1, 1956, at 11. Marlow did not seem personally concerned about the attacks on the Court. He concluded "The [C]ourt has been the target from the beginning of the government. Each time the source of the attack depends on whose ox is gored." *Id.*

124. *See Sketches of Nine Justices Joining in Segregation Ruling*, ST. LOUIS POST-DISPATCH, May 18, 1954, at 13 (noting that Roosevelt used the appointment of Hugo Black to break up the "nine old men" he had declared as the problem).

125. Holmes Alexander, In Defense of the President Not Making Up War Scares to Win Election, HERALD-NEWS (Passaic, N.J.), Apr. 9, 1948, at 10 ("The court-packing plan was launched in an atmosphere of urgency lest the nine old men ruin the country.")

126. *Everybody's Fight*, *supra* note 120, at 2.

is frequently regarded as the 'tyranny' of the [C]ourt."[127] Articles about the desegregation and the Supreme Court echoed much of the criticism of the Court used in the Roosevelt era.[128]

The same comparison of attacks on the Supreme Court arose in the context of the southern lawmakers' post-*Brown* manifesto.[129] The manifesto was endorsed by nineteen southern senators and eighty-one southern congressmen whom all sought to abrogate the *Brown* decision.[130] The goals of Roosevelt and the manifesto lawmakers aligned in that both "[led] a crusade designed to undermine the authority of the [C]ourt as the ultimate adjudicator of the Constitution."[131] Commentary at the time praised the methods of the manifesto, which endorsed "any lawful means" and suggested a Constitutional Amendment—in contrast with Roosevelt's attempt to pack the Court.[132]

Lawlessness is a key part of the problem in the context of the court packing and the legitimacy of the Supreme Court.[133] One of the primary approaches to legitimacy is to define it in terms of the willingness of the public to refuse to comply with court orders.[134] This was a substantial concern with the desegregation-era attacks on the courts. The public encouraged schools to "disobey as null and void" the orders of judges to enforce desegregation.[135] A 1956 Alabama article even outlined the history of moments when states—especially southern states—had been effective in defying the Supreme Court's authority.[136] The newspaper recounted the Georgia response to *Chisholm v. Georgia* in 1793, which allowed citizens of another state to sue the state of Georgia.[137] The Georgia legislature passed a bill in response that made anyone fearful to actually enforce the Court's orders; the bill said anyone who tried to enforce the Court's orders would "suffer

127. Charles B. Degges, *Sentiment Arises for High Court Reforms*, OAKLAND TRIB. (Cal.), June 23, 1957, at 72.
128. Roscoe Drummond, *Attack on Integration Decision Recalls FDR's Court-Packing*, SOUTH BEND TRIB. (Ind.) Mar. 19, 1956, at 6.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 22–28 (Dec. 8, 2021) (using legitimacy, judicial independence, and democracy as the three primary measures by which any Supreme Court reform proposals should be evaluated).
134. *Id.* (stating that one understanding of the problem of legitimacy is that "the federal judiciary has no military or other way to coerce people to comply; the judiciary must rely on others to adhere to its decisions.").
135. *Why Didn't the University Nullify Autherine*, MONTGOMERY ADVERTISER (Ala.), Mar. 8, 1956, at 4 (discussing the pressure on the University of Alabama at the time to refuse to comply with court orders and questioning why the University did, in fact, cooperate with court orders).
136. *Id.* (discussing the options to avoid the decision in *Brown v. Board of Education* from constitutional amendment to simple defiance).
137. *Id.* (discussing the history of southern defiance of the Supreme Court).

death without the benefit of clergy, by being hanged."[138] Subsequently, "Other states joined and five years later the 11th Amendment was adopted, 'reversing' Washington."[139] The article also informed the public that defiance had been a successful strategy again in 1859 when "Wisconsin defied the Supreme Court in a case involving an abolitionist convicted under the Fugitive Slave Act of 1850."[140] The abolitionist had been convicted in federal court but was in state custody.[141] The Wisconsin Supreme Court "freed the abolitionist . . . and got by with it despite a U.S. Supreme Court decision that Wisconsin had no authority to thus defy federal law."[142] The Supreme Court's decision did not matter because "Wisconsin contemptuously refused to accept the court writ."[143] With less respect for the Court, the public demonstrated a keen interest in lawlessness.

Another strand of the public discussion blamed the *Brown* decision on Roosevelt's court packing (understood as the politicization of the Court), and therefore branded *Brown* as an illegitimate decision of an improperly seated Court. In a speech to the Tennessee Federation for Constitutional Government, Senator Thurmond even contrasted the Court before Roosevelt's attack—a Court with "the integrity and the legal ability to uphold the greatest government document ever written"—with the Court after the era of court-packing—a Court following "a trend of flouting of the law and the Constitution."[144] According to Thurmond, the Court had become a body that "regarded the whole body of law as an unchartered sea, and piloted our Ship of State in a reckless and haphazard manner. Their ears have been deaf to all reason, except that offered by the clamor of minority groups."[145] Desegregation and *Brown*, according to Thurmond, resulted from "judicial domination."[146]

Roosevelt, according to the criticisms, normalized a political Court and made the Court simply "nine highly controversial political appointees."[147] These men rejected "long-standing precedent which had been accepted by judicial minds far superior to theirs."[148] Commentators blamed the *Brown* decision on the fact that since Roosevelt's "famous 'court-packing' attempt in the 1930's, positions on the Supreme

138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Senator Thurmond Warns of Growing Judicial Domination*, NASHVILLE BANNER, June 19, 1956, at 8.
145. *Id.*
146. *Id.*
147. *Everybody's Fight*, *supra* note 120, at 2.
148. *Id.* One regular attack made on the *Brown* decision was that it relied on sociological evidence rather than legal precedent. *Id.*

Court have been, for the most part, political plums to be awarded on the basis of party service rather than on the basis of established judicial ability."[149]

Thus, in the era of desegregation, critics of *Brown* claimed that the problem was not "from the [C]ourt as an institution but from the human being within it."[150] This was because while Roosevelt's "'court packing' scheme was defeated," he "did have the chance to appoint men to the Supreme Court whose views corresponded to his own."[151] The Supreme Court had been, according to Senator Eastland, chairman of the Senate Judiciary Committee, "indoctrinated and brainwashed by Left-wing pressure groups."[152] The change was not in law but "only . . . in the composition in the U.S. Supreme Court."[153] *Brown*, by these accounts, did not deserve the respect of the country because it was a decision given by a "leftist-liberal, politically constituted Supreme Court."[154]

Moreover, the pattern of legitimacy challenges was contagious, expanding into the state supreme courts to challenge integration efforts. For example, in Alabama in 1956, state-level court packing and segregation were at the center of the Alabama governor's race.[155] Incumbent Governor Jim Folsom opposed segregation. When the Alabama legislature passed a resolution "which declared the Supreme Court school segregation decision null and void," Folsom famously "refused to sign and branded [the bill] as 'hog-wash'"[156] Folsom's opponent was State Representative Charlie McKay Jr., who was the author and sponsor of that resolution.[157] The risk to Folsom was not insignificant; some candidates for reelection lost their campaigns after they refused to sign onto the "Southern Manifesto."[158]

As the race heated up, a campaign of political advertisements alleged that Governor Jim Folsom used court packing as a part of his effort to end segregation in Alabama.[159] The advertisements alleged that with the intent of enforcing de-segregation, Folsom "handpicked

149. *Id.*
150. David Lawrence, *Senate's Liberals Trying to Force Conformity View*, ROCK ISLAND ARGUS (Ill.), Mar. 8, 1956, at 4.
151. *Id.*
152. David Lawrence, *Right of Eastland to Criticize Court Upheld*, LANCASTER NEW ERA (Pa.), Mar. 6, 1956, at 14.
153. *Everybody's Fight*, *supra* note 120, at 2.
154. *Id.*
155. Ray Jenkins, *Heated Russell Commission Race Tops Issues for Expected Record Vote Tuesday*, COLUMBUS LEDGER (Ga.), Apr. 27, 1956, at 11 (discussing the governor's race and the key issues of segregation and the allegation of court packing).
156. *Folsom Court Packing Could Crack Segregation in Alabama and the South*, OPELIKA DAILY NEWS (Ala.), Apr. 25, 1956, at 2.
157. Jenkins, *supra* note 155, at 11.
158. *Straws in the Wind*, *supra* note 115, at 4.
159. *Folsom Court Packing Could Crack Segregation in Alabama and the South*, *supra* note 156, at 2.

candidates to the Alabama Supreme Court and the Court of Appeals."[160] The advertising campaign was the product of a statewide committee, run by W.W. Malone of Athens, named "The Committee Against Court Packing."[161]

Moving beyond the attacks on legitimacy and corollary threats of non-compliance, the desegregation-era debates over the Court matched the patterns of Roosevelt's other criticisms of the Supreme Court.

First, the Roosevelt-era idea of an overactive Court that went beyond its own role echoed through the desegregation response.[162] After *Brown v. Board of Education*, lawmakers spoke out against the Court and alleged that justices had been "influenced by 'pressure groups.'"[163] Commentators argued that when the Court outlawed public school segregation, it was "making laws rather than interpreting them."[164] Alternatively, others felt that the Court's decision in *Brown* meant "that this country no longer has a government of laws but a government of men."[165] It was a Court that had "assumed powers" rather than being given them by the Constitution.[166] And that meant that what was at stake in fighting *Brown* was not only segregation, but also "constitutional government."[167]

Second, critics of the *Brown* decision amplified the Roosevelt-era arguments about the Court as an anti-democratic, unelected body. The public justified their rejection of *Brown* because "the people of this country are completely subject to the whims of nine highly controversial political appointees."[168]

These patterns demonstrate how the post-*Brown* turmoil was prolonged and exacerbated by the changes in the public attitude to the Court after 1937. Additionally, the 1937 court packing attempt provided a dual route of attack on the legitimacy of the Court after *Brown*: (1) an attack on the newly politicized Court as illegitimate and therefore creating invalid decisions and (2) a pattern for another round of court packing attempts, ironically validated by Roosevelt's many appointments, which had made his court packing bill unnecessary. The 1937 attack on the Court also provided a step-by-step set of instructions for the post-*Brown* attacks on the Court, as well as attacks on lawmakers who supported integration.

160. *Id.*
161. Jenkins, *supra* note 155, at 11.
162. Marlow, *supra* note 117, at 4 (discussing the contemporary criticisms of the Court).
163. David Lawrence, *Intolerance of 'Liberal' Displayed*, La Crosse Trib. (Wis.), Mar. 7, 1956, at 4.
164. Marlow, *supra* note 117, at 4 (discussing the contemporary criticisms of the Court and the proposals for reform but declaring them unlikely to be successful).
165. *Everybody's Fight*, *supra* note 120, at 2.
166. *Id.*
167. *Id.*
168. *Id.*

VI. ROOSEVELT, BROWN, AND THE MODERN PUSH FOR COURT PACKING AND REFORM

This Part begins by summarizing the modern debates over court packing from the Obama Administration to the present, with emphasis on the public perception of court packing and the dynamics of politics, more than the scholarly debates.[169] Then, the discussion proceeds by reflecting on how Roosevelt's attempts to change the Court impacted responses to the Court over a decade-and-a-half later and what that may mean for modern changes to the Supreme Court.

A. From Obama to Trump to Biden: A New Debate on Court Packing

The U.S. Supreme Court has become starkly more controversial during the three most recent presidential terms.[170] Simultaneously, the nomination and appointment process "[has] generated especially bitter partisan conflict" during the three most recent appointments.[171] It

169. Though scholars have extensively debated Supreme Court reform in recent years, this Article narrows in on the public perspective and the public experience of these debates. For more in-depth discussion of scholarly reactions and proposals for reform, see 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); 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); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 165 (2019) (discussing alternative proposals to support the legitimacy of the Court); Stephen M. Feldman, *Court Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFF. L. REV. 1519 (2020) (arguing that court packing is unlikely to weaken the Court's popular support); 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"); 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).

170. Charles Gardner Geyh, *Judicial Independence at Twilight*, 71 CASE W. RSRV. L. REV. 1045, 1047 (2021) ("Judicial politics has recently morphed from a board game to a full contact sport."). The recent Presidential Commission concluded that there was "broad bipartisan agreement that the confirmation process has come under severe strain from partisan conflict." PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, *supra* note 133, at 16.

Commentators and lawmakers agree as to the increased conflict but disagree as to the reason why. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, *supra* note 133, at 12–13.

171. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, *supra* note 133, at 15. Notably, one witness before the Commission described the situation as "decades of political circus." *Id.*

may even be trapped within a cycle of escalation.[172] As a result, within the appointments process "votes have divided increasingly along party lines,"[173] and there is every reason to believe that the trend of conflict will "persist, if not intensify."[174]

In 2013, Republicans accused President Obama of court packing, simply because he was in a position to make three appointments to fill vacancies on the D.C. Circuit, which is particularly influential due to its role in hearing administrative cases.[175] Senator John Cornyn argued that Obama's attempts to fill the vacancies were "an attempt to simply pack the court in order to tilt that court ideologically in a way that favors the big government agenda of the Obama administration."[176] At the same time, frustrated with recent Supreme Court rulings, conservatives offered plans for changing the Court's structure "so that its decisions might fit more closely to existing popular opinion."[177] Proposals included having justices elected rather than appointed, setting a retirement age, or giving Congress a method of vetoing Supreme Court holdings.[178]

Conservative frustration became even more apparent when the Senate refused to consider Obama's nominee, Merrick Garland, to fill the late Justice Scalia's seat on the Court. In fact, on the day of Scalia's death, Republican Majority Leader, Senator Mitch McConnell, indicated that Republican senators would refuse to consider Garland or any other Obama nominee.[179] In response, President Obama warned that not considering a nominee would indicate that the process was broken "beyond repair."[180]

During the 2016 election, discussion of Supreme Court appointments played a significant role. The Republican candidate, Donald Trump, publicly vowed allegiance to the Second Amendment and even released a list of potential nominees. [181] The Democratic candidate, Hilary Clinton, was no less partisan in her declarations.[182]

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172. *Id.* (describing witness testimony on how the two parties react to each other and the trap of the prisoner's dilemma).
173. *Id.* at 16.
174. *Id.* at 15.
175. Eric Zorn, *Pack of Lies: Phony 'Court Packing' Accusation Could Backfire on the Republicans*, CHI. TRIB., Nov. 6, 2013, at 1-25.
176. *Id.*
177. Eli Schwartz, *supra* note 51, at 11.
178. *Id.*
179. 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/PGP6-NBJ3].
180. 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/64NJ-7AX2].
181. Benjamin Pomerance, *Justices Denied: The Peculiar History of Rejected United States Supreme Court Nominees*, 80 ALB. L. REV. 627, 627–28 (2017).
182. *Id.*

Nominees to the Court face increasingly politicized questions and may also provide partisan answers.[183] The culmination of this history is unfortunate: "the appointments process is high-stakes, explosively partisan, and often nasty."[184] When Republicans moved forward with Trump's last nominee as quickly as possible, the New York Times described it as the "nuclear" option.[185]

By 2020, Smithsonian Magazine would write a history of the "stolen" seats on the Supreme Court.[186] In October of 2020, then-presidential candidate Joseph Biden announced his intention to create a commission to study the issue of reforming the Supreme Court.[187] The composition of the Supreme Court became an issue of regular public discussion.

On April 14, 2021, now-President Biden carried out his campaign promise, issuing an executive order that created the Presidential Commission on the Supreme Court of the United States.[188] The order directed the Commission to specifically consider "the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system."[189] The order also tasked the Commission with analyzing "the principal arguments for and against particular proposals to reform the Supreme Court."[190] The Commission concluded its work in 2021 but was unable to produce concrete recommendations because the participating scholars could not agree on the nature of the necessary reforms or even how to interpret the recent years of political conflict over the Supreme Court.[191]

If anything, the public perception of the Supreme Court worsened after its decision in *Dobbs v. Jackson Women's Health Organization*,

183. Epps & Sitaraman, *supra* note 169, at 150 (describing Kavanaugh's testimony as "nakedly partisan" by many accounts).

184. 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)).

185. Glenn Thrush, *Senate Republicans Go "Nuclear" to Speed Up Trump Confirmations*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/ us/politics/senate-republicans-nuclear-option.html [https://perma.cc/F8WY-VPZT].

186. Erick Trickey, *The History of 'Stolen' Supreme Court Seats*, SMITHSONIAN MAG. (Sept. 25, 2020), https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/ [https://perma.cc/2PM9-A4JG]. *See also* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, *supra* note 133, at 15 (July 20, 2021) (noting that some argue that Scalia and Ginsburg's seats were "'stolen' by Republicans from Democrats").

187. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, *supra* note 133, at 12.

188. Exec. Order No. 14,023, 86 Fed. Reg. 19569 (Apr. 14, 2021).

189. *Id.*

190. *Id.*

191. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, *supra* note 133, at 13. The Commission itself did not "come to a conclusion about whether the Court has suffered a loss or crisis of legitimacy." *Id.*

which overturned *Roe v. Wade*.[192] Public criticism of the Supreme Court is stark. One recent article described the Court's 2022 decisions as "reactionary indulgence" and "pummeling the wall separating church and state" while "not afraid to tell easily disprovable falsehoods to achieve this goal."[193] A recent poll found that a majority of Americans disapprove of the Supreme Court—this was a problem before the *Dobbs* decision, and it has only grown worse since *Dobbs*.[194]

The problem of legitimacy also is on the minds of Supreme Court justices. After the *Dobbs* decision, Justice Sonia Sotomayor spoke to lawyers in California saying, "When the court does upend precedent, in situations in which the public may view it as active in political arenas, there's going to be some question about the court's legitimacy."[195] Similarly, Justice Elena Kagan also said, "The court shouldn't be wandering around just inserting itself into every hot button issue in America, and it especially . . . shouldn't be doing that in a way that reflects one ideology or one set of political views over another."[196] Discussions about legitimacy are unsurprising given that the *Dobbs* decision was effectively, in the words of NPR's Nina Totenberg, "the legal equivalent of a nuclear bomb."[197]

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192. Madison Goldbeck, *Marquette Law School Poll Shows 60% Disapprove of the Supreme Court*, WTJM-TV MILWAUKEE (Sept. 21, 2022), https://www.tmj4.com/news/local-news/marquette-law-school-poll-shows-60-disapprove-of-the-u-s-supreme-court [https://perma.cc/PYF7-8NAS].

193. Ian Millhiser, *10 Ways to Fix a Broken Supreme Court*, VOX (July 2, 2022), https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping [https://perma.cc/5HTK-T9JH].

194. Public approval ratings of the Court have been at an all-time low since 2021. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, *supra* note 133, at 19–20. The situation does has worsened rather than improved in 2022. Polls from Marquette Law School found that the public approval of the court is further down as of July, 2022 after the *Dobbs* decision and remained at a 60% disapproval rating through September, 2022. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/6R2N-WML6]. *See also* Norman Elsen & Sasha Matsuki, *Term Limits—A Way to Tackle the Supreme Court's Crisis of Legitimacy*, BROOKINGS INST. (Sep. 26, 2022), https://www.brookings.edu/blog/fixgov/2022/09/ 26/term-limits-a-way-to-tackle-the-supreme-courts-crisis-of-legitimacy/ [https://perma.cc/U8G8-MELM] (describing the decision in Dobbs as "exacerbat[ing] already crashing public trust"); *One Way to Repair the Supreme Court*, WASH. POST (Sept. 17, 2022), https://www.washingtonpost.com/opinions/ 2022/09/17/roberts-kagan-supreme-court-term-limits/ [https://perma.cc/Z87Y-4YHQ] ("Polls show Americans' faith in the court collapsing after the justices' decision overturning Roe v. Wade in June.")

195. Matt Ford, *The Supreme Court's Public Legitimacy Crisis Has Arrived*, NEW REPUBLIC (Sept. 26, 2022), https://newrepublic.com/article/167846/supreme-court-legitimacy-crisis-dobbs [https://perma.cc/3G2N-WKPY].

196. *Id.*

197. Domenico Montanaro, *6 Political Questions After the Supreme Court Overturned Roe v. Wade*, NPR (June 26, 2022, 8:52 PM), https://www.npr.org/2022/06/26/

This crisis of legitimacy also now aligns with a historic poll finding that a slight majority of Americans favor court packing.[198] In particular, this legitimacy crisis has fueled renewed calls for court packing from Democrats.[199]

B. The Modern Push to Pack the Court: An Alternately Partisan Plan

The plan to pack the Court is bipartisan in the worst of ways, with both parties alternatively calling for packing the Court. Congress has changed the size of the Court several times but never with the sole purpose of addressing the legitimacy of the Court as a part of a democracy.[200]

1107591849/roe-6-political-questions-supreme-court [https://perma.cc/VTD8-FM8R].

198. A recent poll conducted by Marquette Law School found that 51% are in favor of expanding the size of the U.S. Supreme Court). Charles Franklin, *Marquette Law School National Supreme Court Poll* (Sept. 21, 2022), https://law.marquette.edu/poll/2022/09/21/detailed-results-of-the-marquette-law-school-supreme-court-poll-september-7-14-2022/ [https://perma.cc/D9XM-HZZG] (select the tab entitled, "Marquette Law School National Supreme Court Poll, September 7-14, 2022, Toplines"; then scroll to "D8").

199. Julia Mueller, *House Democrats Tout Bill to Add Four Seats to Supreme Court*, THE HILL (July 18, 2022, 4:42 PM), https://thehill.com/homenews/house/3564588-house-democrats-offer-bill-to-add-four-seats-to-supreme-court/ [https://perma.cc/4J3K-PJ6T] (describing statements by eight House Democrats calling for legislation to add four seats to the Supreme Court after the *Dobbs* decision). *Cf.* Lisa Hagen, *Could Democrats Impeach Supreme Court Justices for Lying in the Wake of Roe?*, U.S. NEWS (June 29, 2022, 5:15 PM), https://www.usnews.com/news/politics/articles/2022-06-29/could-democrats-impeach-supreme-court-justices-for-lying-in-the-wake-of-roe [https://perma.cc/9ABA-7PP3] (describing that some democrats called for the impeachment of Supreme Court justices who joined the majority in *Dobbs* after stating in their confirmation hearings that they would not overturn court precedent).

200. F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 647 (2009) (writing on the considerations that should influence the size of the Supreme Court, while recognizing that there is no "best size"); *see also* Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 550 (2018) (arguing that Congress should enact laws to create an eight-seat Court that is evenly split between liberal and conservative justices to improve judicial efficacy and bipartisan decision-making).

Congress has faced various concerns—like the increasing caseload—when deciding to change the size of the Court. There have also been indications that these changes were motivated by partisan goals. *See, e.g.,* David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 229 (1998) (arguing that a Republican Congress enlarged the Court in 1807 as a partisan matter). For example, in 1858, William Seward proclaimed in a speech to the Senate "We shall reorganize the [C]ourt"—drawing criticism that the push to restructure the Supreme Court was "not because it fails to execute the law, according to its convictions of right, but because it does not conform its solemn judgments to the behests of a political party." *The First Great Blow*, *supra* note 92, at 1. Similarly, in 1863, Congress added a tenth justice to the bench in an

Recent partisan conflicts over judicial appointments "directly motivate some of the current calls for Supreme Court reform."[201]

In 2017, Steven Calabresi, the board chairman of the conservative Federalist Society's Board of Directors, coauthored a letter to Congress proposing legislation to double the number of judgeships on federal circuit courts and add 185 judgeships on the district courts, with the goal of packing them with conservatives.[202]

For Democrats, the pressure towards court packing began after the Senate refused to hold confirmation proceedings for nominee Merrick Garland in 2016.[203] Leaving an empty seat was regarded by some Democrats as a Republican effort to pack the Court because it reduced the size of the Court, seemingly for political gain, during the end of President Obama's term.[204]

Since then, the idea of court packing has remained in the political and public discourse.[205] Presidential candidates spoke about the issue

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attempt to attack the longstanding reign of Justice Taney against the backdrop of contentious Civil War politics. *See, e.g.*, *The Closing Hours of Congress*, N.Y. TIMES, Mar. 4, 1863, at 1 (describing the change in the number of justices as "add[ing] one to the number which will speedily remove the control of the Supreme Court from the Taney school"). Finally, with respect to Roosevelt's 1937 attempt to "reorganize" the Court, Chief Justice Rehnquist wrote that the President's motivation was to "'pack' the Court all at once, in such a way that New Deal social legislation would no longer be threatened." William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 593 (2004).

201. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 133, at 14.

202. Linda Greenhouse, *A Conservative Plan to Weaponize the Federal Courts*, N.Y. TIMES (Nov. 23, 2017), https://www.nytimes.com/2017/11/23/opinion/ conservatives-weaponize-federal-courts.html [https://perma.cc/7SCY-7KZ3] (discussing Calabresi's proposal to Congress). The role of the Federalist Society is also significant in the connected matter of overturning *Roe v. Wade*. *See* Jonaki Mehta & Courtney Dorning, *One Man's Outsized Role in Shaping the Supreme Court and Overturning Roe*, NPR (June 30, 2022, 5:00 AM), https://www.npr.org/2022/06/30/1108351562/roe-abortion-supreme-court-scotus-law [https://perma.cc/J8ZK-S8TK] (discussing the role of Federalist leader Leonard Leo in working to get *Roe* overturned).

203. Levy, *supra* note 205, 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").

204. *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.").

205. *See, e.g.*, Aaron Blake, *Pack the Supreme Court? Why We May Be Getting Closer*, WASH. POST (Oct. 9, 2018, 6:00 AM), https://www.washingtonpost.com/politics/2018/10/09/pack-supreme-court-why-we-may-be-getting-closer [https://perma.cc/MAT3-XNSJ]; 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/VT5G-6MJH]; Ian Samuel, *Kavanaugh Will Be on the US Supreme Court for Life. Here's How We Fight Back*, THE GUARDIAN (Oct. 9, 2018, 4:00 PM), https://www.theguardian.

in 2019 and 2020.[206] During a 2020 presidential debate, then-President Trump asked Democratic nominee Joseph Biden whether he supported court packing; Biden refused to answer at that time[207] but later said in a 60 Minutes interview "it's not about court packing."[208] Similarly, in the 2020 Vice Presidential Debate, Mike Pence asked Kamala Harris whether a Biden Administration would pursue court packing but

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com/commentisfree/2018/oct/09/kavanaugh-us-supreme-court-fight-back-court-packing [https://perma.cc/9MXX-8Z58]; David Faris, *Democrats Must Consider Court-Packing When They Regain Power. It's the Only Way to Save Democracy*, WASH. POST (July 10, 2018, 6:00 AM), https://wapo.st/2L3hHOC [https://perma.cc/PGS2-U4TV].

Max Burns, *Republicans are Ready to Pack the Courts*, THE HILL (May 12, 2022, 9:30 AM), https://thehill.com/opinion/judiciary/3485807-republicans-are-ready-to-pack-the-courts/ [https://perma.cc/P4LR-RJXB] (discussing Republicans' successful efforts to pack state courts). *See also* Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1145–54 (2020) (examining the history of court packing at the state level, and arguing that it has been attempted and done "successfully" several times).

206. *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/NF72-LTKM] (describing that a number of presidential candidates acknowledged their openness to expanding the court if elected); *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/KRB5-43B8] (discussing the openness of some presidential candidates, including Sen. Gillibrand and Mayor Buttigieg, to the idea of adding seats to the Supreme Court); 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/6K37-XZWF] (discussing statements of Democratic Senators Harris, Warren, and Gillibrand that "they would not rule out expanding the Supreme Court if elected president"); Jordain Carney & Rachel Frazin, *Court-Packing Becomes New Litmus Test on Left*, THE HILL (Mar. 19, 2019, 6:00 AM), https://thehill.com/homenews/senate/434630-court-packing-becomes-new-litmus-test-on-left [https://perma.cc/7LKH-ZYWL] (discussing candidate support for or willingness to consider court packing); Michael Scherer, *'Court Packing' Ideas Get Attention from Democrats*, WASH. POST (Mar. 11, 2019, 6:00 AM), https://wapo.st/2J4MXxf [https://perma.cc/G5C5-B3JD] (noting the increased viability of court packing, as measured by political interest); 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/8CUY-XU64] (discussing renewed interest in court packing after Ginsburg's death); Michael McGough, *Democrats Need to Drop Talk of Court Packing*, CENTRE DAILY TIMES (State College, Pa.), Mar. 27, 2019 at A6 (concluding that court packing "has attracted the interest if not necessarily the endorsement of some Democratic presidential hopefuls" and quoting candidate Beto O'Rourke's views on court packing).

207. 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/RFG6-M5MJ].

208. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 133, at 12.

Harris would not answer.[209] However, in other contexts, Harris said she was open to the idea.[210]

A number of senators and representatives have spoken about the issue of court packing recently. For example, Senator Ed Markey has supported court packing, and Representative Alexandria Ocasio-Cortez has said that "all options" should be "on the table."[211] Elizabeth Warren agreed that changing the size of the Court was an acceptable option,[212] and later became a co-sponsor of the first modern attempt to change the size of the Court.[213] On April 15, 2021, Democrats introduced the 2021 Judiciary Act, to increase the size of the Court from nine to thirteen seats.[214] Discussions about court packing continued in the press through 2021.[215]

In 2022—even before the Court's controversial decision in *Dobbs*—court packing continued to be a part of the public conversation.[216]

209. *2020 Vice Presidential Debate* CNN, https://www.cnn.com/videos/politics/2020/10/08/pence-harris-court-packing-dbx-2020.cnn [https://perma.cc/YEQ3-UWHX].
210. Everett & Levine, *supra* note 206.
211. Jeff Jacoby, *Biden Is Right to Be Leery of Packing the Supreme Court*, BOS. GLOBE, Oct. 27, 2020, at A11.
212. *See* Quinta Jurecic & Susan Hennessey, *The Reckless Race to Confirm Amy Coney Barrett Justifies Court Packing*, THE ATL. (Oct. 4, 2020, 3:50 PM), https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607 [https://perma.cc/Z6XW-SGXV]; Emma Green, *Biden and Harris Need an Answer on Court Packing*, THE ATL. (Oct. 8, 2020), https://www.theatlantic.com/politics/archive/2020/10/biden-harris-court-packing-vice-presidential-debate/616656 [https://perma.cc/59M7-HE28].
213. Elizabeth Warren, *Expand the Supreme Court*, BOS. GLOBE (Dec. 15, 2021, 10:00 AM), https://www.bostonglobe.com/2021/12/15/opinion/expand-supreme-court/ [https://perma.cc/3Y26-HFYA].
214. H.R. 25894, 117th Cong. (as referred to Comm. on the Judiciary, Apr. 15, 2021); Alison Durkee, *Sen. Warren Backs Expanding Supreme Court. Here's Where the Effort Stands Now*, FORBES (Dec. 15, 2021, 8:12 AM), https://www.forbes.com/sites/alisondurkee/2021/12/15/sen-warren-backs-expanding-supreme-court-heres-where-the-effort-stands-now/ [https://perma.cc/TRC7-P22P] (discussing Warren's backing and the push to expand). *See also* Krishnadev Calamur & Nina Totenberg, *Democrats Unveil Long-Shot Plan to Expand Size of Supreme Court from 9 to 13*, NPR (Apr. 15, 2021, 3:04 PM), https://www.npr.org/2021/04/15/987723528/democrats-unveil-long-shot-plan-to-expand-size-of-supreme-court-from-9-to-13 [https://perma.cc/K8Z2-3K6D] (describing the democrat proposal to expand the number of seats on the Supreme Court from nine to thirteen).
215. Thomas B. Griffith & David F. Levi, *The Supreme Court Isn't Broken. Even If It Were, Adding Justices Would Be a Bad Idea.*, WASH. POST (Dec. 12, 2021, 3:12 PM), https://www.washingtonpost.com/opinions/2021/12/12/term-limits-court-packing-for-supreme-court-bad-ideas/ [https://perma.cc/62WN-DL4T]; *The Supreme Court Should Be Reformed. But Court Packing is a Terrible Idea*, WASH. POST (Dec. 14, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/ 2021/12/14/supreme-court-packing-terrible-idea/ [https://perma.cc/8224-FFH6].
216. *See, e.g.,* Leon Fink, *Court Packing Isn't the Only Way to Reform the Supreme* Court, WASH. POST (Jan. 6, 2022, 6:00 AM) https://www.washingtonpost.com/ outlook/2022/01/06/court-packing-isnt-only-way-reform-supreme-court/ [https://perma.cc/H26C-VUG4] (writing in January about the options for reform); Scott S.

Some believe that President Trump engaged in "relentless court-packing," resulting in "profound challenges to the legitimacy of the judiciary."[217] Representative Mondaire Jones said, "The nightmare of GOP court-packing is already upon us. That's how they got this far-right 6-3 majority in the first place."[218] Some interpret recent history a little differently: "Republicans won control of the Court playing by the rules. The rules are bad."[219] Meanwhile, during this era, court packing allegedly occurred in state courts.[220] And Senator Mike Lee raised the issue again in Ketanji Brown Jackson's confirmation hearings for the Supreme Court.[221]

In July of 2022, just after the Supreme Court released the *Dobbs* decision, court packing debates flared. Democrats considered options to undercut the conservative majority in the wake of *Dobbs*.[222] Republi-

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Boddery & Benjamin R. Pontz, *Don't Pack the Court. Allow the Number of Justices to Float*, POLITICO MAG. (Jan. 15, 2022, 7:00 AM) https://www.politico.com/news/magazine/2022/01/15/supreme-court-reform-justices-527111[https://perma.cc/G574-GAHR] (suggesting other options for Supreme Court reform beyond simply increasing the size of the Court); David Daley, *Republications Have Hijacked the U.S. Supreme Court. It's Time to Expand It*, THE GUARDIAN (June 27, 2022, 2:35 PM), https://www.theguardian.com/commentisfree/2022/jun/27/us-supreme-court-abortion-roe-v-wade-justices-expansion [https://perma.cc/GLA3-CG8P]; Giulia Carbonaro, *Can Democrats Expand the Supreme Court and How Likely Is It?*, NEWSWEEK (June 29, 2022, 10:01 AM), https://www.newsweek.com/can-democrats-expand-supreme-court-how-likely-it-1720256 [https://perma.cc/N9SZ-JS6B].

217. E.J. Dionne, Jr., *The Trump-Appointed Judge Delivers the Goods for Her Patron*, WASH. POST (Sep. 18, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/ 2022/09/18/aileen-cannon-trump-special-master-ruling/ [https://perma.cc/4MT7-MCAN].

218. Mueller, *supra* note 199. Meanwhile, court packing has allegedly occurred in state level courts. Joe Bolkcom, *Oppose Iowa GOP Court Packing Efforts*, THE GAZETTE (Sept. 24, 2022, 6:00 AM), https://www.thegazette.com/guest-columnists/oppose-iowa-gop-court-packing-efforts/ [https://perma.cc/KAM6-P83C] (arguing that recent changes to policies and procedures resulted in court packing in Iowa); *see also* Levy, *supra* note 205, at 1121 (examining the history of court packing at the state level, and arguing that it has been done regularly and "successfully").

219. Jonathan Chait, *Democrats Must Reform the Supreme Court to Save It*, N.Y. MAG. (June 30, 2022), https://nymag.com/intelligencer/article/democrats-reform-the-supreme-court-pack-roe-epa.html [https://perma.cc/2PRG-99T9].

220. Bolkcom, *supra* note 218; *Temporary Judges Serve Long Terms*, QUAD-CITY TIMES (Chicago), Mar. 11, 1996, at 6A (describing how temporary, non-elected judges can serve decades by appointment, a process that also looks like court packing).

221. Jonathan Bernstein, *Threats to Pack the Supreme Court Won't Go Away*, BLOOMBERG (Mar. 24, 2022, 6:30 AM), https://news.bloomberglaw.com/us-law-week/threats-to-pack-supreme-court-wont-go-away-jonathan-bernstein [https://perma.cc/2BZC-NPZA].

222. Joseph Fishkin & William E. Forbath, *The Supreme Court Wasn't Always the Final Arbiter of the Constitution*, WASH. POST (Aug. 2, 2022, 6:00 AM), https://www.washingtonpost.com/made-by-history/2022/08/02/supreme-court-wasnt-always-final-arbiter-constitution [https://perma.cc/DL4S-MWR9] (discussing the options apart from changing the size of the Supreme Court, but still addressing the conservative control of the court).

cans, on the other hand, feared that *Dobbs* would garner enough public outrage that lawmakers would act to change the size of the Court.[223] Senator Warren renewed her support for expanding the Court.[224] Meanwhile, President Biden remained opposed to expansion.[225]

Finally, there is every reason to believe that public perceptions of court packing could be critical for future elections across the board—from state to federal, representatives to presidents. For example, Republicans gained seventy-one seats after Roosevelt's 1938 court packing attempt, and some hypothesize that this increase was "largely as a result of [Roosevelt's] 'court-packing' scheme."[226] Recent campaigns indicate that candidates will face questions about court packing while running for office.[227] Consequently, candidates have begun to capitalize on the public spirit, making court packing or judicial independence a part of their campaign platform.[228]

Public frustration with the Court matters in the context of court packing because some evidence suggests the Court's legitimacy is more threatened by a conflict between the policy views (values) of the public and the Court. Badas, *supra* note 13, at 377.

223. Kimberly Robinson & Andrew Satter, *Biden's Thorny Options for Changing the Supreme Court*, BLOOMBERG (Dec. 7, 2021, 8:33 AM), https://news.bloomberglaw.com/us-law-week/the-law-and-lore-behind-packing-u-s-supreme-court-quicktake [https://perma.cc/SD7D-LNMW] (describing the debates over court packing and Biden's reluctance to pursue the "radical" option).

224. Ivana Saric, *Warren Calls for Supreme Court Expansion After Roe Overturned*, AXIOS (June 26, 2022), https://www.axios.com/2022/06/26/warren-supreme-court-abortion [https://perma.cc/8SAU-JLVX].

225. Diana, Glebova, *Biden Remains Opposed to Court-Packing Despite Roe Reversal, White House Confirms*, NAT'L REVIEW (June 27, 2022, 8:40 AM), https://www.nationalreview.com/news/biden-remains-opposed-to-court-packing-despite-roe-reversal-white-house-confirms/ [https://perma.cc/P29P-3WZP].

226. Robert J. Donovan, *GOP Expected to Gain 35 to 50 House Seats*, L.A. TIMES, May 30, 1966, at 19.

227. C. Boyden Gray, *Biden Owes Us an Answer on Court-Packing*, THE HILL (Oct. 18, 2020, 9:30 AM), https://thehill.com/opinion/judiciary/521560-biden-owes-us-an-answer-on-court-packing/ [https://perma.cc/N6GY-UWGZ] (expressing frustration at Biden's less clear responses when questioned on court packing); Carl Golden, *Just Give Us an Answer, Joe*, TIMES RECORDER, Oct. 16, 2020, at A6 (Zanesville, Oh.) (expressing frustration with Biden for not answering questions on court packing).

228. For example, Democratic nominee for Senate in North Carolina, Cheri Beasley, has included the concept of judicial impartiality as a key part of her campaign. Dan Merica & Michael Warren, *North Carolina Democrats Hope Former Judge Can Halt Senate Losing Streak in Pro-GOP Environment*, CNN (Sept. 23, 2022, 10:02 PM), https://www.cnn.com/2022/09/23/politics/cheri-beasley-ted-budd-north-carolina/index.html [https://perma.cc/V8FY-KBWQ]; Elizabeth Kim, *Pack the Supreme Court? NY's 10th Congressional District Candidates Say It's a Must in Wake of Roe, Gun Rulings*, GOTHAMIST (June 30, 2022), https://gothamist.com/news/pack-the-supreme-court-nys-10th-district-candidates-say-its-a-must-in-wake-of-roe-gun-rulings?br=1 [https://perma.cc/BVM2-KCJL] (discussing pro-packing views of some candidates); *see also* Burgess Everett & Sarah Ferris, *Supreme Court's Roe Reversal Reshapes Democrats' Battle to Keep Congress*, POLITICO (June 24, 2022, 2:36 PM), https://www.politico.com/news/2022/06/24/

C. The Presidential Commission and the Stakes of Supreme Court Reform

The Presidential Commission on the Supreme Court of the United States concluded that "[t]he highly polarized politics of the current era threaten to transform this already high stakes process [of Supreme Court appointment and tenure] into one that is badly broken."[229] The Commission acknowledged that the conflict "reflects a great and more stable ideological divide between the two major political parties."[230]

The Commission heard evidence suggesting overall public trust in the Court has been resilient, despite fluctuating public opinion; however, the Commission commented that "whether public trust in the Court will continue to be durable remains to be seen."[231] Regardless of this statement, the Commission declined to support any particular proposals for the future of the Supreme Court.[232] The Commission also noted that the Court's public approval ratings reached an all-time low in 2021, with 49% of the public disapproving.[233] The situation did not improve in 2022. Polls conducted by Marquette University demonstrated that the public approval of the Court was trending downward, dropping precipitously in July 2022 after the *Dobbs* decision, and remaining at a 60% disapproval rating through September 2022.[234]

The Brookings Institution described the decision in *Dobbs* as "exacerbat[ing] already crashing public trust."[235] By some accounts, public calls for court packing have intensified as a result of *Dobbs*.[236]

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abortion-ruling-reshapes-democrats-battle-to-keep-congress-00042287 [https://perma.cc/Y7TY-CFKQ] (discussing the role of abortion rights in influencing voters, particularly in swing states).

229. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 133, at 18.

230. *Id.*

231. *Id.* at 19.

232. For a discussion of the report and the failure to reach a consensus on proposals, see Charlie Savage, *'Court Packing' Issue Divides Commission Appointed by Biden*, N.Y. TIMES (Dec. 7, 2021), https://www.nytimes.com/2021/ 12/07/us/politics/supreme-court-packing-expansion.html) [https://perma.cc/3TE2-5Z6H].

233. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 133, at 19–20. *See also* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/YMB5-MFMM] (describing the downward trend in public confidence in the Supreme Court).

234. Goldbeck, *supra* note 194; *see Marquette Law School National Supreme Court Poll*, *supra* note 196, at D8.

235. Norman Elsen & Sasha Matsuki, *Term Limits—A Way to Tackle the Supreme Court's Crisis of Legitimacy*, BROOKINGS INST. (Sept. 26, 2022), https://www.brookings.edu/blog/fixgov/2022/09/26/term-limits-a-way-to-tackle-the-supreme-courts-crisis-of-legitimacy/ [https://perma.cc/HN9N-NYZS]. *See also One Way to Repair the Supreme Court*, supra note 194 ("Polls show Americans' faith in the [C]ourt collapsing after the justices' decision overturning *Roe v. Wade* in June.").

236. Dennis Romboy, *Would the Supreme Court Become a Political Body if it Were Expanded?*, DESERET NEWS (July 14, 2022, 7:38 PM), https://www.deseret.com/utah/2022/7/14/23216674/would-supreme-court-become-political-if-

The Marquette poll asked another more fascinating question to respondents across the country and found that 51% of respondents were in favor (either strongly or somewhat) of expanding the size of the U.S. Supreme Court.[237] Notably, just after the Supreme Court released the *Dobbs* decision, eight House Democrats held a press conference suggesting adding four justices to the Supreme Court—enough to overturn the *Dobbs* majority.[238] Specifically, they sought to revive the 2021 Judiciary Act, which if passed, would have expanded the Court from nine to thirteen justices.[239]

Public criticism of the Supreme Court was stark in 2022. One recent article described the Court as "A right-wing political party, with the support of only a minority of Americans, controls the federal courts."[240] This problem of injustice amplifies "in view of the frequent attempts to dress up political problems in legal garb and place them before the court."[241] This is the situation that has brought the Supreme Court to a crisis of legitimacy and resulted in calls for reformation.

D. Roosevelt's Legacy and the Supreme Court Today

This may be the moment for Supreme Court reform. There is, in the words of a Los Angeles Times editorial, "a crisis of public confidence."[242] Scandals have plagued the Court in recent months; as one reporter observed, "Every week seems to bring a new round of reporting about Supreme Court Justices' ethics lapses and apparent conflicts of interest."[243] After summarizing a long list of recently revealed lapses including unreported gifts, lavish trips, and sketchy connections to counsel before the Court, one columnist described it as nothing less than the "Supreme Court's ethical rot."[244]

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expanded-court-packing-democrats-mike-lee-abortion [https://perma.cc/KM75-78XX]. Before *Dobbs* was decided, a Bloomberg editorial suggested that *Roe v. Wade* would be just the issue to put court packing back on the table as a realistic plan. Noah Feldman, *The Wild Card that Could Put Court Packing Back on the Table,* FREDERICK NEWS-POST (Oct. 22, 2021), https://www.fredericknewspost.com/opinion/columns/the-wild-card-that-could-put-court-packing-back-on-the-table/article_d4448d97-37a0-5a03-84c0-aeb6c61e60cf.html [https://perma.cc/X4MZ-7F6U].

237. *Marquette Law School National Supreme Court Poll*, *supra* note 198.
238. Mueller, *supra* note 199.
239. *Id.*
240. Fishkin & Forbath, *supra* note 222.
241. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 20 (2002) (discussing the importance of being able to judge judges).
242. *A Code of Conduct for Justices*, L.A. TIMES, Feb. 21, 2023, at A10.
243. Kimberly Atkins Stohr, *The Need for Supreme Court Ethics Reform Transcends Party Lines*, BOS. GLOBE, July 13, 2023 at A10.
244. Will Bunch, *Reclaiming the Moral High Ground*, PHILA. DAILY NEWS, May 9, 2023, at A14.

There is ample evidence of a problem of transparency and avoiding the appearance, if not the reality, of bribery and corruption. Those terms, while strong, are appropriate in this context. The Supreme Court is a court of law, not a legislative body, meaning that lavish trips and gifts cannot rightly be understood as lobbying. There is no lobby where there is no legislation. Trying to sway a judge by means of something other than the facts or the law is an attempt to corrupt the judicial process.

But, the problem of ethics is not fully independent from the other issues often raised in the context of reform, such as term limits or mandatory retirement ages. Most importantly, the public is beginning to see that "the permanency of the position has only shielded the justices from accountability."[245]

The politicization of the Supreme Court and the modern crisis of legitimacy have generated extensive calls for reform. Recently, the Senate Judiciary Committee heard testimony on Supreme Court ethics and approved legislation to set new ethics standards for the Court.[246] With votes falling along party lines,[247] however, it is unclear what the future of this legislation will be.

Even if a code of ethics passes, such legislation is unlikely to resolve the greater problem of public confidence in the Court. The critical task becomes restoring the Court's legitimacy and shoring up the foundations of the American republic. We should not shy away from reform simply because of the threat of court packing. As one columnist wrote in 1937, "Court-packing goes out. Court reform remains. That is as it should be. There is a difference between the two as wide as space."[248]

The historical and sociological patterns of court packing discussed in this Article provide insights into how court reform should proceed. First, legitimacy, at its heart, is a problem of non-compliance for the Court. Softer definitions of legitimacy do not sufficiently address the problem. The post-*Brown* segregation history shows us how the public responds to the Court when legitimacy has been compromised, particularly on an issue where there is a substantial geographical divide in public opinion. Local courts and lawmakers can collaborate effectively to resist and undermine decisions of the Supreme Court. Reforms to the Supreme Court must begin with acknowledging that the non-compliance problem is the heart of the legitimacy crisis.

As a corollary, we should reject any strategy for reform that would not directly respond to the legitimacy crisis. The lesson from history

245. Stohr, *supra* note 243, at A10.
246. Mary Clare Jalonick, *Senate Panel Approves New Supreme Court Ethics Rules*, CHI. TRIB., July 21, 2023, at 5.
247. *Id.*
248. *Now For Court Reform, supra* note 60, at 4.

is that any strategy that de-legitimizes the Court will impact implementation of the Court's future verdicts, potentially slowing it across decades, particularly if the issue is one in which there is a substantial public investment.

Second, responding to the legitimacy crisis, reform proposals should focus on the heart of the public frustration with the Court, the lack of judicial independence. Thus, proposals for reform should provide a way to strengthen the Court's ability to be an independent, nonpartisan body. This means focusing on expertise and judgment, rather than reforms like an eight member Court, with four Democrats and four Republicans. Chief Justice Roberts recently said:

> We do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.[249]

The problem with Chief Justice Robert's statement is that the public does not believe him.

Third, prior to or concurrently with other reforms, the Court should avoid actions that appear improperly political. Justices should err on the side of caution and recuse themselves if there is any potential connection to a petitioner or respondent. Spouses of justices should recognize that their own political activities will reflect directly on the impartiality of the Court.

VII. CONCLUSION

Scholars regularly debate the intricacies of the history of court packing and the arguments for or against it. In the end, however, our opinions are not the important ones. The public experience and the public discourse will form the basis of the American reaction to future Supreme Court rulings, especially those of particular importance to the public, including issues of gun control, family, property, and environmental law.

Changes in the public attitude toward the Court after 1937 both lengthened and heightened the post-*Brown* turmoil. Any politicized change to the Supreme Court now will logically set up the Court's future decisions for the same treatment. One party may have the political will to pack the Court, but in doing so, they would simultaneously provide a step-by-step set of instructions for attacks on the Court when the next controversial decision comes down. Any reform of the Court must be a stabilizing force rather than a political one, so that the Court can do the hard work needed in the coming decades to reinforce

249. *In Rare Rebuke, Chief Justice Roberts Slams Trump for Comment About 'Obama Judge,'* NBC NEWS (Nov. 21, 2018), https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-trump-comment-about-obama-n939016 [https://perma.cc/EH9J-FAN5].

the security and stability of American democracy. The goal should be a Court whose decision in a case like *Brown* would be greeted by the public with openness rather than hostility.