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A Call for America's Law Professors to Oppose Court-Packing

Bruce Ledewitz

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A Call for America's Law Professors to Oppose Court-Packing

Bruce Ledewitz*

Abstract

A Court-packing proposal is imminent. Mainstream Democratic Party Presidential Candidates are already supporting it. The number of Justices on the Supreme Court has been set at nine since 1869, but this is merely a statutory requirement. As soon as Democrats regain control of the Presidency and the Congress, Court-packing will be on the agenda, either expressly or under the guise of Court-reform. Now is the time for the American legal academy to join together to oppose this threat. Court-packing would threaten democracy, destroy the rule of law and undermine judicial independence. It is a pointless and unnecessary reaction born of frustration and nihilism. It can be defeated, but only if America's law professors act now.

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I. INTRODUCTION: THE GATHERING STORM

As soon as the Democrats obtain a majority in Congress and win the Presidency, which could happen as early as 2020, they will likely consider a plan to increase the total number of Justices on the Supreme Court. As of 2019, five out of the nine Justices on the Supreme Court are considered ideologically conservative.¹ This five-Justice majority currently controlling the Court is led by Chief Justice John Roberts and includes Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh. These Justices are relatively young and ideologically consistent and will still hold majority control of the Court if political power in the other two branches of government shifts to the Democrats.

Many Democrats believe that the Republicans achieved this majority through unfair and improper tactics, such as stonewalling the nomination of Judge Merrick Garland in 2016² and eliminating the filibuster in the Senate.³ Conservatives have also been accused of allowing groups like the Federalist Society and the Heritage Foundation to organize the ideological vetting of Supreme Court nominees to ensure ideological consistency and youth.⁴

The Constitution does not prescribe the number of Justices on the Supreme Court—the nine-Justice limit was set by statute and has not been changed since 1869.⁵ During the 2016 election, there were many indications that Senate Republicans were willing to decrease the number of Justices rather than confirm any nominee appointed by presidential candidate Hillary Clinton if she won the election.⁶ So, the thinking goes, why could the Democrats not increase the number?

The purpose of this essay is to illustrate the grievous harms that a successful Court-packing plan would bring and to propose that the legal academy

1. See Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html>.

2. Ron Elving, *What Happened with Merrick Garland in 2016 and Why it Matters Now*, NPR (June 28, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

3. Russell Berman, *Republicans Abandon the Filibuster to Save Neil Gorsuch*, THE ATLANTIC (Apr. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/04/republicans-nuke-the-filibuster-to-save-neil-gorsuch/522156/>.

4. Lawrence Baum & Neal Devins, *How the Federalist Society became the de facto selector of Republican Supreme Court justices*, SLATE (Jan. 31, 2017, 10:12 AM), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html>.

5. The Judiciary Act of 1869 set the number of Justices at nine, including the Chief Justice. See Judiciary Act of 1869, ch. 22, 16 Stat. 44 (1869).

6. See David A. Graham, *What Happens if Republicans Refuse to Replace Justice Scalia?*, THE ATLANTIC (Nov. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081/> [<https://perma.cc/6495-AP2K>].

take immediate steps to collectively oppose Court-packing. Court-packing plans proposed by the Democrats would threaten democracy by contributing to the decline of tolerance and forbearance, destroy the rule of law, and undermine judicial independence. Furthermore, court-packing would prove ineffective in the long term, unnecessary and further the unsettling trend of nihilism overtaking the political process.⁷ Where else but to America's law professors should the people look for leadership at this moment of crisis? If the legal academy takes affirmative steps to oppose court-packing, it would uphold the ideals necessary to preserve the underpinnings of our democracy and the autonomy of the judicial branch. It would be the finest hour of the legal academy.

II. WHATEVER IT IS CALLED, IT IS COURT-PACKING

When FDR introduced his Court-packing plan in 1937, he described it in terms of efficiency.⁸ The plan was to offer retirement at full pay to every Justice over seventy and to appoint an "assistant" with full voting rights for any Justice who did not retire, allowing a maximum of fifteen Justices to concurrently serve on the Court at any given time.⁹

However, it was obvious that FDR's plan was less about judicial efficiency than about his ability to appoint Justices who would be more compliant with his policies.¹⁰ He wanted a Court that would uphold New Deal statutes and economic regulatory measures from the States.¹¹ After adamant opposition, FDR's court-packing plan ultimately failed.¹²

Today, supporters of a modern Court-packing plan are less coy with regard to its true purpose. Many Democratic supporters state that their plan to add seats on the Court would effectively counteract what they describe as

7. See Bruce Ledewitz, *Has Nihilism Politicized the Supreme Court Nomination Process?*, 32 *BYU J. PUB. L.* 1, 1–2 (2017).

8. *Roosevelt announces "court-packing" plan*, HISTORY, <https://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan> (last visited June 14, 2019).

9. A Recommendation to Reorganize the Judicial Branch of the Federal Government, H.R. Doc. No. 75-142, at 9 (1937); see also LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* 3–9 (1967) (discussing President Roosevelt's special message read to Congress on February 5, 1937, which proposed legislation granting the President power to appoint additional judges to all federal courts, including the Supreme Court, whenever there were sitting judges age seventy or older who refused to retire).

10. Victor N. Baltera, *Book Review: Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*, By Noah Feldman, 94 *MASS. L. REV.* 113, 113 (2012).

11. Franklin D. Roosevelt, *A 'Fireside Chat' Discussing the Plan for Reorganization of the Judiciary*, in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 122, 131 (Samuel I. Rosenman ed., 1941) [hereinafter *Fireside Chat*]. In FDR's radio address, he argued that the current Justices' opposition to his New Deal statutes required that "we must take action to save the Constitution from the Court and the Court from itself." *Id.* at 126.

12. See John Yoo, *Franklin Roosevelt and Presidential Power*, 21 *CHAP. L. REV.* 205, 219 (2018) ("Despite his electoral success, FDR's court-packing plan—the first domestic initiative of his second term—suffered a humiliating defeat.").

unprecedented Republican norm violations in judicial selections.¹³ For example, when reports indicated that former Attorney General Eric Holder endorsed Court-packing in an unrecorded session of the Yale Law National Security Group in 2019, a spokesman for Holder confirmed the story and added: “[G]iven the unfairness, unprecedented obstruction, and disregard of historical precedent by Mitch McConnell and Senate Republicans, when Democrats retake the majority, they should consider expanding the Supreme Court to restore adherence to previously accepted norms for judicial nominations.”¹⁴

Several Democratic candidates running for president, including Senators Elizabeth Warren, Kirsten Gillibrand, and Kamala Harris, have expressed a willingness to consider potential Court-packing proposals.¹⁵ In fact, Senator Harris recently addressed the conservative majority in the Supreme Court, stating: “We are on the verge of a crisis of confidence in the Supreme Court . . . We have to take this challenge head on, and everything is on the table to do that.”¹⁶

As political opposition stiffens against Court-packing, however, we can expect the Democrats to package “Court-packing” as “Court-reforming.”¹⁷ These reforms will largely just be Court-packing in another guise. For example, Beto O’Rourke’s 5-5-10 “Court-reforming” proposal suggests that the Republican and Democratic parties would each appoint five Justices, and those five Justices themselves would pick ten additional members of the Court.¹⁸ This type of plan, if formally passed, would render the Supreme Court something similar to a labor arbitration entity.¹⁹

13. See Burgess Everett & Marianne Levine, *2020 Dems warm to expanding Supreme Court*, POLITICO (Mar. 18, 2019), <https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625> (explaining that Democratic senators and White House hopefuls, such as Kamala Harris, Elizabeth Warren, and Kristen Gillibrand, have expressed interest in expanding the Supreme Court as payback for Republican aggression during the Obama presidency).

14. Sam Stein, *Eric Holder Says Next Democratic President Should Consider Court Packing*, DAILY BEAST (Mar. 7, 2019, 7:20 PM), <https://www.thedailybeast.com/eric-holder-says-next-democratic-president-should-consider-court-packing>.

15. 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/>; Kevin Daley, *Court-Packing Emerges As Litmus Test in 2020 Democratic Primary*, DAILY CALLER (Mar. 18, 2019, 10:05 PM), <https://dailycaller.com/2019/03/18/2020-democrats-court-packing/>.

16. See *id.*

17. See, e.g., Eric Levitz, *Democrats Don’t Want to ‘Pack the Supreme Court’—They Want to Reform It*, N.Y. MAG. (Mar. 19, 2019), <http://nymag.com/intelligencer/2019/03/democrats-court-packing-2020-warren-harris-orourke-want-to-reform-the-supreme-court.html>.

18. See Liam Quinn, *Beto O’Rourke pitches drastic overhaul of Supreme Court*, FOX NEWS (Mar. 15, 2019), <https://www.foxnews.com/politics/beto-orourke-says-drastic-supreme-court-changes-worth-considering-during-early-2020-campaign-stop>.

19. Arbitrators selected by one side are known as “party arbitrators” and are “expected to represent the interests of the selecting party.” See Kathryn Miller, David Stacy & Meghan Martinez,

Whatever terms the particular proposed Court reform contains, the impetus to change the number of Justices on the Supreme Court emerges from the desire to undo a conservative majority on the Court.²⁰ If Judge Garland had been confirmed in 2016, the Court would instead be composed of a 5-4 liberal majority, and any proposals to change the number of Supreme Court Justices would surely not have been made from members of the Democratic party.²¹ Thus, whatever Democrats choose to call it, these proposals are, in both purpose and form, Court-packing.

III. COURT-PACKING WOULD THREATEN DEMOCRACY

Democracies can end. Elections can be cancelled; opponents can be jailed; the military can take over. It has happened elsewhere.²² It can happen here.

Harvard University political scientists Steven Levitsky and Daniel Ziblatt recently published *How Democracies Die*, a book analyzing this reality.²³ But unlike most Americans who see the threat to this country's democracy as coming from their political opponents, Levitsky and Ziblatt understand how democracies break down systemically.²⁴ *How Democracies Die* notes that democracy depends on the willingness of politicians to practice tolerance and forbearance.²⁵ Tolerance is the understanding that one's opponents will, from time to time, gain power and enact policies that may be offensive to one's own ideologies.²⁶ Politicians must therefore practice forbearance to refrain from using every possible legal tool to thwart each rule or policy the opposition enacts. *How Democracies Die* teaches that democracy essentially requires that politicians live with "bad" policies until they have the chance to reverse them through the voting process.

Presentation at the Colorado Bar Association: Issues in Arbitration of Employment Cases (Apr. 22, 2015), <http://www.mlgroupcc.com/wp-content/uploads/2015/04/Issues-in-Arbitration-of-Employment-Cases.pdf>. Do we want the Supreme Court to be described in this way?

20. See, e.g., Caitlin Huey-Burns, *Why some Democrats want to see more Supreme Court justices on the court*, CBS NEWS (Mar. 26, 2019, 3:59 PM), <https://www.cbsnews.com/news/supreme-court-justices-why-democrats-are-looking-to-completely-overhaul-the-supreme-court/> ("The reason this is an issue can be summed up in four words: Gore, Garland, Gorsuch and Kavanaugh," says Todd Tucker, a fellow at the Roosevelt Institute. "The Garland episode was kind of the last straw . . . that's certainly why the temperature went through the roof.").

21. See Everett & Levine, *supra* note 13 ("Democrats say that after Republicans blocked Supreme Court nominee Merrick Garland and other lower court judges during President Barack Obama's final term only to quickly fill those vacancies once President Donald Trump was in office, the party needs an equally bruising response.").

22. Joshua Muravchik, *This is what the beginning of the end of democracy looks like*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/posteverything/wp/2017/04/19/this-is-what-the-beginning-of-the-end-of-democracy-looks-like/?utm_term=.1ac5e81c8c4b (highlighting the decline of democracies in eastern Europe and Northern Africa in the last two decades).

23. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

24. *Id.* at 102.

25. The authors' literal terms are "mutual toleration and institutional forbearance." *Id.* at 125.

26. *Id.* at 212 ("Treating rivals as legitimate contenders for power.").

The authors demonstrate in some detail what the reader undoubtedly intuitively—that America has witnessed a dramatic decline in tolerance and forbearance since the 1990's. Levitsky and Ziblatt largely blame the Republican party for initiating this decline and consider the presidency of Donald Trump to be a dramatic escalation of the breakdown of bipartisanship. They note, however, that it will not be President Trump who ultimately ends American democracy, but some later figure.

Today we can see the connection between the decline of tolerance and forbearance and the potential end of democracy very clearly. For some Republicans, the willingness of Democrats to trample what they consider traditional customs and rights—from restricting the use of the filibuster in the Senate to persecuting businesses and institutions that oppose same-sex marriage—led them to call the 2016 election the “Flight 93 Election.” The idea was, charge the cockpit or you die.²⁷

Though this concept was originally used by Republicans in 2016, the Democrats will likely regard the 2020 election similarly.²⁸ If Donald Trump is re-elected, and especially if he is re-elected despite losing the national vote again, many Democrats may believe that our country's democratic ideals are disregarded anyway, so what difference do elections make? This line of thinking is how democracies can ultimately die.

Court-packing is just the sort of norm-trampling that forbearance forbids. Although the number of Justices on the Court *can* be changed by statute, the number has remained unchanged since 1869.²⁹

After years of Supreme Court opposition to New Deal legislation, and government regulation of the economy generally, FDR proposed expanding the number of Justices on the Court after his landslide reelection in 1936.³⁰ Part of the reason that FDR's proposed Court-packing plan ultimately failed was “the switch in time that saved nine”—Justice Owen Roberts' vote in *West Coast Hotel v. Parrish*, which upheld Washington's minimum wage law.³¹ The Court's opinion in *West Coast Hotel* was one of the first to align with

27. Michael Anton, *The Flight 93 Election*, CLAREMONT INST. (Sept. 5, 2016), <https://www.claremont.org/crb/basicpage/the-flight-93-election/> (writing under the pseudonym Publius Decius Mus).

28. See Mackenzie Nichols, *Jeff Daniels Says 'It's the End of Democracy' if Trump Gets Re-Elected*, VARIETY (May 21, 2019), <https://variety.com/2019/tv/news/jeff-daniels-msnbc-video-trump-gop-end-of-democracy-1203222285/#!>.

29. *The Court as an Institution*, SUPREME COURT, <https://www.supremecourt.gov/about/institution.aspx> (last visited July 14, 2019).

30. See William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L. J. 673, 673 (1985).

31. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). The “switch in time to save nine” catchphrase was widely used in Washington to recount the failure of FDR's plan. See Leuchtenburg, *supra* note 30, at 673.

FDR's New Deal initiatives,³² and it came only three weeks after FDR's national radio address in which he discussed adding Justices to the Court. The Court's decision in *West Coast Hotel* eliminated the need to enact FDR's plan, though the Court-packing proposal had faced opposition even before the *West Coast Hotel* case was decided. That expected opposition is why FDR had not introduced the plan candidly, as a way of changing the outcomes of cases with a new majority of more malleable Justices.

Ultimately, the 1937 plan failed because FDR could not convince his own party, nor the country, to make this radical change.³³ Those that opposed Court-packing intuited that changing judicial outcomes by changing the number of Justices would alter the fundamental nature of judicial review under the Constitution.³⁴ Adding Justices to the Supreme Court to achieve outcomes more favorable to one party would undermine the rule of law and weaken judicial independence. Although the Democratic majority in Congress had the power to approve the plan and their policies at the time would have benefited from the change, Court-packing was quickly abandoned.³⁵

The failure of the Court-packing plan is the kind of event that Bruce Ackerman, a professor at Yale Law School, might regard as an informal, but effective amendment of the Constitution. Ackerman has spent thirty years analyzing and redefining what it means to amend the Constitution.³⁶ In Ackerman's view, "We the People" can engage in a binding, sovereign act of higher lawmaking under certain historical conditions as an alternative to the formal amendment process set forth in Article V.³⁷ "The People" have done so throughout several key eras of political, social, and economic reform in the United States including changing the nature of federalism in Reconstruction, expanding the power of Congress in the New Deal, and expanding individual liberty in the Civil Rights revolution.

Even if one does not accept the full parameters of Ackerman's view, the rejection of FDR's plan in 1937 has since been regarded as effectively taking Court-packing off the political table permanently.³⁸ The number of Justices

32. See L.A. Powe, Jr., *Two Great Leaders*, 57 N.Y. L. SCH. L. REV. 465, 476–77 (2013) ("Over the next seven weeks the Court upheld the National Labor Relations Act and the unemployment compensation provisions of the Social Security Act[.]").

33. See Leuchtenburg, *supra* note 30, at 676–77.

34. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L. J. 255, 280–83 (2017).

35. See, e.g., Leuchtenburg, *supra* note 30, at 676–77.

36. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 288–90 (1991); see generally BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2014).

37. See generally *WE THE PEOPLE: FOUNDATIONS*, *supra* note 36, at 288–90.

38. See, e.g., Bradley & Siegel, *supra* note 34, at 307–11. In 1981, Theodore Olson, the head of the Office of Legal Counsel for the Attorney General, noted that "[h]istory suggests that the people are extremely wary of any frontal assault on the Court" and that FDR's "experience in 1937" was "instructive." *Id.*; see also Megan McArdle, *Some things should never be resurrected. Court-packing is one of them.*, WASH. POST (Mar. 12, 2019), <https://www.washingtonpost.com/opinions/some-things-should-never-be-resurrected-court-packing-is-one-of-them/2019/03/12/743b6dba-4511-11e9->

on the Supreme Court has remained static through numerous eras of political turmoil, and the willingness of members of some Democrats to seriously consider a Court-packing plan today demonstrates how far America has gone toward democratic breakdown.

Although a mere proposal is worrisome, the formal enactment of a Court-packing plan would radically alter the country's decision-making process. As of 2019, the Supreme Court still stands as a barrier to some of the worst threats to the country's fundamental democratic principles. Most recently, despite Justice Clarence Thomas's dangerous suggestion that the constitutional protections against defamation actions be weakened, the Court's majority has not accepted this view.³⁹

However, if changing the number of Justices on the Supreme Court becomes a viable option for Congress at any given time, barriers to government excess will no longer remain.⁴⁰ Each time a different political party takes control of Congress, the structure of the Supreme Court could again be fundamentally changed. Every election would essentially be a "Flight 93 Election."⁴¹

Supporters of the Democrats' current Court-packing proposal argue that that the Republicans have already "packed" the Court by stonewalling Judge Garland's nomination, ideologically vetting Supreme Court nominees to ensure party loyalty, and by hints during the 2016 election that the Republican-led Senate would refuse to confirm any Supreme Court nominee submitted by Hillary Clinton, had she been elected.⁴² For the Democrats, a Court-packing initiative is a response to these provocations. Unfortunately, it is also a decrease in tolerance and forbearance.⁴³

How Democracies Die does not refer to any instances where the breakdown of a democracy was peacefully reversed.⁴⁴ Once tolerance and forbearance fall out of use, the book claims, each new political outrage is justified as

90f0-0ccfeec87a61_story.html?utm_term=.cdedc81dc674.

39. *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial of certiorari) (suggesting that stricter punishments for libel would not violate the First Amendment right to free speech).

40. See Brett Kavanaugh's opening statement to Senate Judiciary Committee, CNN (Sept. 4, 2018), <https://www.cnn.com/2018/09/04/politics/kavanaugh-supreme-court-opening-statement/index.html> ("[T]he Supreme Court is the last line of defense for the separation of powers, and the rights and liberties guaranteed by the Constitution.").

41. See *supra* notes 23–27 and accompanying text.

42. See, e.g., Sam Berger, *Opinion: Conservatives are already packing the courts. Democrats must respond to this power grab.*, USA TODAY (May 7, 2019, 10:42 AM), <https://www.usatoday.com/story/opinion/2019/05/07/conservatives-packing-courts-democrats-must-respond-column/3564022002/>.

43. See *infra* notes 44–45 and accompanying text.

44. See LEVITSKY & ZIBLATT, *supra* note 23.

a response to a prior outrage that was initiated by the other side.⁴⁵

The only way for the slide to stop is for political leadership to declare that it will not respond. You can only recover forbearance by practicing it. That is what the Democrats need to do now to save American democracy. What difference will it make who last controlled the Supreme Court when democracy is just a memory?

IV. COURT-PACKING WOULD DESTROY THE RULE OF LAW

Mitch McConnell asserts that appointing judges is the best way to have a “permanent impact.”⁴⁶ Members of the Democratic party who hope to succeed in “packing” the Supreme Court hold the same belief. If only that party could appoint their members onto the Court, they could get what they want.

We are so used to thinking in these ways that it is a shock to realize that, given traditional notions of the nature of judicial review, they make absolutely no sense. Judges are not, or at least they have not been in the past, reliable votes on issues, as if judges were exactly the same as elected officials who should be voted out of office if they fail to deliver on campaign promises. Judges are supposed to exercise judgment in each case.

The reality that Justices can be unpredictable is not new. Even aside from classic examples like Justice William Brennan, whose appointment President Dwight D. Eisenhower considered a mistake,⁴⁷ Justices Harry Blackmun, Anthony Kennedy, Sandra Day O’Connor, and David Souter did not always deliver results that the Presidents who appointed them would have endorsed.⁴⁸ Most recently, constitutional jurisprudence has not consistently resulted in conservative outcomes despite the fact that Republican Presidents have appointed the majority of the current Supreme Court.⁴⁹ To a lesser extent,

45. *Id.* at 164 (“President Obama’s efforts to further circumvent Congress triggered further escalation.”).

46. See Reis Thebault & Kayla Epstein, *McConnell says he would help Trump fill a Supreme Court vacancy in 2020—after blocking Obama in 2016*, WASH. POST (May 29, 2019), https://www.washingtonpost.com/politics/2019/05/29/mcconnell-says-he-would-fill-supreme-court-vacancy/?noredirect=on&utm_term=.0e068404f899 (recounting McConnell’s statement that confirming Justices is the best way to have a “long-lasting positive impact” on the country).

47. “Mistake” here refers to the fact that President Eisenhower criticized votes that Justice Brennan cast, but never actually uttered the word “mistake” in describing the Justice. See Theo Lippman Jr., *Anecdotes are dangerous to biographers and truth Mistakes: When essential little stories are distorted, vast damage is done*, BALT. SUN (Sept. 7, 1997), <https://www.baltimoresun.com/news/bs-xpm-1997-09-07-1997250003-story.html>. Stephen Wermiel, a constitutional scholar and professor, has suggested that there was no real mistake as such, because President Eisenhower was not looking for any particular legal approach, but was instead selected for other reasons. See Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower’s Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515, 515–16 (1994).

48. See Ronald L. Feinman, *These 9 Justices Failed to Vote the Way Their Party Expected*, HIST. NEWS NETWORK: COLUMBIAN C. OF ARTS & SCI. (Oct. 14, 2018), <https://historynewsnetwork.org/article/170179>.

49. Jacqueline Thomsen, *Conservative justices surprise court waters with swing votes*, THE HILL (July 2, 2019, 6:00 AM), <https://thehill.com/regulation/court-battles/451262-conservative-justices-surprise-court-watchers-with-swing-votes> (“While the additions of Justices Neil Gorsuch and Brett

Justice Stephen Breyer and, of course, Chief Justice Roberts also fit this pattern.⁵⁰

Justice John Harlan, who also delivered some unpredictable results during his tenure on the Court, wrote that due process is a “rational continuum.”⁵¹ Justices should be seeking that rationality in their opinions, not just to decide a single case, but to further the arc of the law over time. It never occurred to Justice Harlan that he owed anyone anything other than his best judgment.⁵²

Given all this, what makes both McConnell and the Democrats who support Court-packing think that additional Justices on the Court will prove more reliable than previous appointees?

Republicans currently pushing to appoint as many federal judges as they can, claim that their focus is not to garner conservative results, but to appoint judges who believe that originalism is the proper method of constitutional interpretation.⁵³

However, this claim is questionable considering that conservative Justices fail to consistently uphold their commitment to originalism.⁵⁴ When the interests of the Republican coalition are at stake, originalism has been abandoned, as the recent *Trinity Lutheran Church* case showed, in which the Court held that the Free Exercise Clause required that churches be afforded equal access to government programs and benefits.⁵⁵ Similarly, conservative Justice Samuel Alito’s opposition to unions has nothing much to do with originalism.⁵⁶

What politicians and political insiders too often hope for in a Supreme Court appointee is not a rational judicial philosophy or method of interpretation, but rather a strong loyalty to their own political coalition’s interests. And

Kavanaugh—both appointed by President Trump—have shifted the high court to the right, the newest members and Chief Justice John Roberts surprised court watchers by occasionally forging unlikely alliances with their liberal counterparts on the bench.”)

50. *See id.*

51. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

52. *Id.* (Harlan, J., dissenting).

53. *See* Hugh Hewitt, *Federal Court Bench Gaining ‘Originalists’*, HARTFORD COURANT (May 27, 2018, 6:00 AM), <https://www.courant.com/opinion/op-ed/hc-op-hewitt-trump-courts-20180525-story.html> (noting that all of President Trump’s federal court appointees have largely been categorized as Scalia-era “originalists”).

54. *See* Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. Rev. 727, 729 (2019) (noting that “originalist” judges are not consistent in their interpretations and, as such, are only opportunistically originalist).

55. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017).

56. *See* *Janus v. Am. Fed’n of State, Cty., and Mun. Emps, Council 31*, 138 S. Ct. 2448, 2460 (2018) (holding that Illinois’ agency-fee statute, which required non-members of public-sector unions to pay a percentage of full union dues, violated the free speech rights of non-members by compelling them to subsidize private speech on matters of public concern).

when Justices do not deliver, they are accused of betrayal.⁵⁷

Democrats who push for Court-packing are practicing just this sort of result expectation. A Justice nominated by a Democratic President would never decide that cases like *Roe*⁵⁸ or *Obergefell*⁵⁹ were terrible mistakes and should be overruled. Democrats proposing Court-reform do not offer any sort of judicial approach, but rather only have an agenda. That agenda is a discrete series of judicial outcomes that its Justices will be expected to deliver.

All of this destroys the rule of law. According to the theory of Court-packing, we are not ruled by law, but by men and we must put our men—and women—on the Supreme Court in order to get the decisions we want.

V. COURT-PACKING WOULD INCREASE POLITICAL NIHILISM

Political nihilism adopts the view that there is no truth—only dueling judicial positions.⁶⁰ It denies the possibility that, over time, rational engagement can lead to persuasion, and rejects the notion that the Constitution can be interpreted in a coherent way.⁶¹ Nihilists believe that a rational continuum of jurisprudence is neither possible nor desirable, and view every judicial opinion or judgment as a disguise for the will to exert or attain power.⁶² Today, democracy's values are being threatened by nihilistic political agendas. Court-packing, an initiative concerned only with favorable political results, is one such agenda.

Nihilism represents a radical change in American thought, and it is not one that supports constitutional democracy. Justice William Douglas wrote in *Zorach* that our institutions presuppose a Supreme Being.⁶³ They do not, in the narrow sense of religious belief in a supernatural realm. But our institutions do presuppose that the universe has an order, that history has a shape and that people are capable of rationality. To paraphrase Dr. Martin Luther King, Jr., we presuppose that the universe bends toward justice.

57. See e.g., Josh Gerstein, *Conservatives Steamed at Chief Justice Roberts' Betrayal*, POLITICO (June 25, 2016), <https://www.politico.com/story/2015/06/gop-conservatives-angry-supreme-court-chief-john-roberts-obamacare-119431>. The betrayal charge is often dressed up in constitutional garb. See David French, *The Temptation of John Roberts*, NAT'L REV. (Mar. 4, 2019), <https://www.nationalreview.com/2019/03/the-temptation-of-john-roberts/>.

58. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the Constitution protects a pregnant woman's right to choose whether to have an abortion).

59. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (extending the fundamental right to marry to same-sex couples).

60. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 3–5 (1984) (“As a theory of knowledge, nihilism claims that it is impossible to say anything true about the world. No one can properly claim to describe the world accurately: Anything anyone says is as likely to be wrong as it is to be right, and anything is as likely to be right or wrong as anything else. If one takes nihilism seriously, it is impossible, or in any event fruitless, to describe the world; all possible descriptions are equally invalid because we cannot be sure that any description is reliable.”).

61. *Id.* at 52–54.

62. *Id.*

63. *Zorach v. Clausen*, 343 U.S. 306, 313 (1952).

This belief supports democracy. American society believes that, over time, the majority is more likely to be right about what justice requires than is any smaller faction. Not only is the majority *more likely* to be right, but likely to *eventually be right*.⁶⁴

Judicial review is not inconsistent with this understanding. Rather, it is a reinforcement of it. Through judicial review, “the people” are to be reminded of what justice requires, and, as Justice Harlan believed, they will adopt the wisdom of the Court’s decisions, or those decisions would pass away.⁶⁵

This concept is not a denigration of rights—it is the basis from which they are formed. The Framers themselves told us to enforce rights that they had overlooked.⁶⁶ We might well understand our rights better than the Framers could, and this reinforces the notion that a commitment to originalism is a mistake. Ultimately, the rule of law presupposes a rational reality that can be discerned.

This belief structure is also why democracies work.⁶⁷ In theory, political parties in democratic societies should believe that any power acquired by an opposing side is a temporary setback, and that rationality will prevail, not by power or manipulation, but by the persuasiveness of one’s ideas. The idea is that society—“the people”—cannot be fooled forever, so political tolerance and forbearance make sense. This belief likewise enables parties to accept that they might be wrong and might be able to learn from their opponents.

However, in a nihilistic universe indifferent to these ideals, there is only a clash of wills. Under this theory, each individual in society seeks to prevail in every aspect of life and can do so only through power in some form. What lies at the heart of politics in nihilism is not persuasion, but struggle.

Unfortunately, the view of the universe as indifferent and chaotic is the understanding of many Americans today, even in the legal academy.⁶⁸ Nihilistic thinking is the reason that the adoption of a Court-packing plan has become a credible possibility. Should court-packing come to fruition, nihilism

64. See, e.g., ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 5051 (2001) (explaining that governmental units in a democratic system derive authority from majority rule); JON ELSTER, INTRODUCTION TO CONSTITUTIONALISM AND DEMOCRACY 1 (Jon Elster & Rune Slagstad eds., 1988) (arguing that democracy is “simple majority rule, based on the principle ‘One person, one vote.’”).

65. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.”).

66. “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

67. See LEVITSKY & ZIBLATT, *supra* note 23, at 213.

68. See generally Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115–16 (2016) (noting that in *Planned Parenthood v. Casey* and *Lee v. Weismann* the Supreme Court ultimately agreed that normative judgments are just human constructions and thus brought Nihilism to the legal academy).

would increase its grip on American political discourse. That would ensure the eventual death of democracy.

VI. COURT-PACKING WOULD UNDERMINE JUDICIAL INDEPENDENCE

Perhaps worst of all, Court-packing undermines judicial independence. Last November, after President Trump attacked a decision by Federal District Judge Jon Tigar as having been rendered by an “Obama Judge,” Chief Justice Roberts responded to an inquiry by the AP with a short, but clear rebuke: “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.”⁶⁹ Surprisingly, there was only tepid support for Roberts’ rebuttal. Senate Minority Leader Chuck Schumer’s response to Roberts’ statement essentially agreed with President Trump.⁷⁰ While lauding Roberts for defending “an independent judiciary,” Schumer criticized “partisan decisions” by Roberts and referred to him as a “Republican[],” which had clearly been President Trump’s point—that judicial decisions follow party lines.⁷¹

Chief Justice Roberts garnered even less support from the Republicans. Josh Blackman, a professor at South Texas College of Law, pointed out that Roberts’ response “will backfire,” noting that the President is always able to have the last word—a prediction that was vindicated when President Trump later reiterated his attack on “Obama Judges.”⁷²

Further, on the day of Roberts’ statement, Randy E. Barnett, a professor of legal theory at Georgetown University, stated in a now-deleted tweet: “If you don’t think presidents of each party (try to) select judges with differing judicial philosophies, you haven’t been paying attention. Roosevelt surely did. And he wasn’t the first nor the last. The argumentation on this one is truly bizarre.”⁷³

This claim again suggests that there is no law, only dueling judicial philosophies. If that were indeed true, there would be no reason to honor any decisions made by judges who have not been formally elected. If the outcome of all legal issues depends upon the party affiliation of the person who nominated the judge, then we might as well let the President decide the issue instead of nominating another to do it for him. If judges for some reason are

69. Mark Sherman, *Roberts, Trump spar in extraordinary scrap over judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84>.

70. Douglas Ernst, *Schumer rips Chief Justice Roberts’ ‘political’ rulings while praising response to Trump*, WASH. TIMES (Nov. 23, 2018), <https://www.washington-times.com/news/2018/nov/23/chuck-schumer-rips-chief-justice-roberts-as-politi/>.

71. *Id.*

72. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge’*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

73. @RandyEBarnett, TWITTER (Nov. 21, 2018) (deleted).

still entrusted with important decisions, under this notion they should decide in accordance with the view of the politicians who put them on the bench. How long before the law in America is essentially decided by politically motivated government officials, as is the case in countries like China?⁷⁴

VII. COURT-PACKING WOULD PROVE INEFFECTIVE
AND IS UNNECESSARY

Democrats are angry at the way that the Republicans have seized control of the Supreme Court.⁷⁵ Indeed, this conservative majority is likely to cause significant changes. Democrats fear that the current conservative Court could eventually overturn *Roe* and *Obergefell*, among other landmark decisions.⁷⁶

Regardless, Court-packing is not the answer.

It is easy to see that Court-packing is ineffective as a long-term strategy to uphold a wise and compassionate constitutional tradition. Take abortion, for example. If the current Court overrules *Roe* in 2020, then the Democratic party—once it is able to hold power in Congress and the Presidency—will enact a Court-packing plan to add enough Democratic appointees on the Supreme Court to reinstate *Roe*. Conversely, the Republicans will eventually use their own power to reverse that reversal of that reversal the next time they win control of the Presidency and Congress. This endless cycle is pointless, as well as destructive.

It appears that the politicians and political insiders who support a modern Court-packing plan are not considering the long-term consequences. In the hopes of protecting decisions like *Roe*, they are apparently willing to “pack” the Court despite the risk of eventually losing control of the Presidency and Congress to the Republicans once more.

The Democrats are wrong to think this way. The Republicans would eventually be in a position to add seats of their own. The political wheel will turn.

Most importantly, however, there is no reason for the Democrats to take this risk. Court-packing is unnecessary, and the Supreme Court is not the threat that people imagine it to be.

74. See Jacob Harding, *Corruption or Guanxi? Differentiating Between the Legitimate, Unethical, and Corrupt Activities of Chinese Government Officials*, 31 UCLA Pac. Basin L. J. 127, 129 (2014) (noting that China's court structure provides party officials with the power to influence judges).

75. See Everett & Levine, *supra* note 13.

76. See, e.g., Emily Erdos, Fiona Redmond & Natalie Rowhorn, *What Happens If the Trumpified Supremes Overturn Roe and Obergefell*, AM. PROSPECT (June 29, 2018), <https://prospect.org/article/what-happens-if-trumpified-supremes-overturn-roe-and-obergefell> (providing two charts showing the legal status of abortion and same-sex marriage in each of the fifty states and the District of Columbia if the Court reverses *Roe* or *Obergefell*).

The Constitution renders Congress, not the Supreme Court, the most important governmental entity.⁷⁷ If the Democrats regain control of Congress—and the Presidency to forestall vetoes—there is not much that a determined majority in those branches cannot accomplish. Congress can strengthen unions, identify dark money in politics, and protect same-sex marriage through the Full Faith and Credit Clause.⁷⁸ To a certain extent, abortion rights can also be legislated nationally. Losing control of the Supreme Court is more a hindrance rather than a brake.

Congress also retains the power to exercise and/or control many other democratic rights. Chief Justice Roberts recently noted for the Court that Congress has authority to deal with gerrymandering in federal elections, for example.⁷⁹ Congress has the authority to enforce both the Fifteenth Amendment—the right to vote—and the Fourteenth Amendment—the rights to equal protection and due process.⁸⁰ Though there are limits on Congress’ authority to go beyond what the Supreme Court says the Constitution requires, the Court is not going to win a direct confrontation with a Congress attempting to prevent voter disenfranchisement and suppression, for example.

Moreover, the Court has already previously failed to impose its will on the country. During the early twentieth century, in an era now known as the *Lochner*⁸¹ era, the Supreme Court used its power to make law, rather than interpret it.⁸² The *Lochner* era ended with the failure of FDR’s Court-packing plan, and there is no indication that the current conservative majority in the Court has any interest in repeating that era of judicial error.

There is a reason why a Court majority does not usually move the country. Cases like *Roe* and *Obergefell* removed trends from politics—abortion liberalization and recognition of same-sex marriage—that were already well underway. Overturning those cases only returns those issues to the political process.⁸³ That political process is often much more robust in its protections than

77. See *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (discussing “concern of encroachment and aggrandizement” by the legislative branch that has “animated our separation-of-powers jurisprudence”); see also *id.* at 421 (Scalia, J., dissenting) (observing that, because congressional delegation of lawmaking power increases power of coordinate branch of national government, “the need for delegation would have to be important enough to induce Congress to aggrandize its primary competitor for political power”).

78. See U.S. CONST. art. IV, § 1 (stating that each state within the United States must respect the “public acts, records, and judicial proceedings of every other state.”). Same sex marriage could effectively be legislated by Congress simply by providing that the States must recognize same-sex marriages validly performed in another State. Then, citizens of a State that refused to permit same-sex marriages to be entered into would simply need to travel to a different State to become married. Their home State would then be forced to recognize the validity of the marriage.

79. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

80. See, e.g., Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2365-66 (2003).

81. *Lochner v. New York*, 198 U.S. 45 (1905).

82. See generally Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 1 (1991).

83. See, e.g., David Crary & Carla K. Johnson, *Overturning Roe v. Wade wouldn’t turn back the*

anything a Court can do to defend the vulnerable. Thus, returning some of these issues to the people may well be more protective of rights than is the current judicial status quo.

VIII. CONCLUSION: THE FINEST HOUR OF THE LEGAL ACADEMY

Court-packing is a misguided idea—for the reasons already stated, for reasons that others will point out, and for the still unpredictable consequences likely to follow such a radical change. Law professors know this better than anyone.

Given all of this, what should law professors do about Court-packing? There are three options.

First, we could do nothing, but instead wait and see. After all, Court-packing is not on the immediate horizon. It cannot happen until the Democrats control both the Presidency and Congress. Why get agitated about something that may not occur?

This sounds reasonable, but support for Court-packing will grow dramatically as soon as the new, more conservative Supreme Court makes a ruling that angers the Democratic Party base.⁸⁴ And that is inevitable, notwithstanding Chief Justice Roberts' apparent misgivings.

Imagine the reaction to the overruling, or substantial restriction of *Roe*. That reaction would be overwhelming. Given the way social media leads to panic,⁸⁵ the current, relatively quiet, period is the time to tackle the issue of Court-packing, if it is to be seriously discussed at all.

The second option is to stay out of the fray regardless of what happens. After all, law professors are not an influential group as a whole. When large numbers of law professors do become active, as in the instance of opposition to the nomination of Judge Brett Kavanaugh, the efforts are dismissed as just another liberal interest group.⁸⁶ Law professors are not monolithic anyway. Nor are we effective politicians.

clock to 1973, ASSOCIATED PRESS (May 27, 2019).

84. See David A. Graham, *The Democrats Discover the Supreme Court*, THE ATLANTIC (June 4, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/buttigieg-supreme-court-plan-and-democratic-party/590905/> (highlighting that Presidential candidate Pete Buttigieg's supreme court reform plan comes in light of many states passing recent abortion limitations).

85. See Node Smith, *Social Media May Be Turning Bad News into Mass Hysteria*, NDNR (July 19, 2018), <https://ndnr.com/naturopathic-news/social-media-may-be-turning-bad-news-into-mass-hysteria/>.

86. See Susan Svrluga, *'Unfathomable': More than 2,400 law professors sign letter opposing Kavanaugh's confirmation*, WASH. POST (Oct. 4, 2018), <https://www.washingtonpost.com/education/2018/10/04/unprecedented-unfathomable-more-than-law-professors-sign-letter-after-kavanaugh-hearing/>.

But Court-packing is different. *Marbury v. Madison*⁸⁷ placed the enforcement of Constitutional values in the hands of lawyers in ordinary cases. Law professors are the natural leaders and intellects of that lawyerly role. The achievement of American constitutionalism is the rule of law rather than power. Lawyers are the chosen protectors of that achievement. I do not know to what extent we continue to believe that law is anything but power, but this would be the right time to find out.

In other words, we law professors do have a professional interest in, and professional knowledge about, the issue of Court-packing. On this issue, we should be monolithic in opposition and I hope we will be. And, precisely because law professors are often liberal leaning⁸⁸, a broad statement of law professor opposition to a position associated with progressives would gain tremendous attention.

So, now is the time for the leadership of the legal academy to draft a statement of opposition to Court-packing. I could see the deans of America's law schools getting involved as well.

Thus, the third option is that we act now and decisively.

The issue of Court-packing will be decided by Congress. It is not the kind of issue that "We the People" will understand right away. I am sure that the members of the political branches will appreciate the dangers that Court-packing represents. That is why they will need cover, intellectual, moral and political cover, when angry voices begin to press the issue. We law professors can provide just such justification for opposition to Court-packing, as law professors have on this issue in the past and on other issues in the present.⁸⁹ But the legal academy needs to act collectively and immediately, when our voices will be the preeminent voices on the issue, to rescue American constitutional democracy from dangerous Court-packing proposals.

87. 5 U.S. 137 (1803).

88. See Neil Gross, *Professors are overwhelmingly liberal. Do universities need to change hiring practices?*, L.A. TIMES (May 20, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-gross-academia-conservatives-hiring-20160520-snap-story.html>.

89. See William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court – and Lost*, SMITHSONIAN MAG. (May 2005), <https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/> (noting that the testimony of Erwin Griswold, then a professor at Harvard Law School, was influential to the failure of Presidential Franklin Delano Roosevelt's failed court packing proposals); Charles Creitz, *Alan Dershowitz: Trump 'perfectly entitled to invoke executive privilege'*, FOX NEWS (June 19, 2019), <https://www.foxnews.com/politics/alan-dershowitz-trump-hope-hicks>.