COURT PACKING IS A CHIMERA

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INTRODUCTION

The dream of the 1930s is alive in Washington. Democrats see Republicans hemorrhaging voters as Trump struggles with the economy and the pandemic and are salivating at the prospect of retaking not only the White House, but also the Senate. Of course, you should never sell a bearskin until you've caught the bear. But even a blowout victory can't get Democrats the prize they really want, a Supreme Court majority. So, in back-to-the-future fashion, many progressives are pushing the idea of court packing. After all, in politics, rules are made to be broken.

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I. WHAT IS COURT PACKING?

Typically, "court packing" means adding additional justices to a court, in order to change its ideological balance.[1] The term originated with FDR's plan to break the Supreme Court's intransigent opposition to the New Deal by adding Justices who supported it. However, the practice arguably began under Lincoln, when Congress allowed him to add a tenth Justice, in order to shift the ideological center of the Court. In any case, while FDR's court packing proposal failed, the Supreme Court relaxed its opposition to the New Deal, so FDR ultimately got at least part of what he wanted.

For decades, progressives have fantasized about packing the Supreme Court, in order to protect the precedents they cherish, purge the precedents they despise, and provide new precedents advancing progressive policies. But their proposals were largely confined to law review articles and other forms of political fanfiction. While court packing is theoretically possible, it's also vanishingly unlikely, so most Democrats ignored them.

Until now. Suddenly, Republicans have a solid majority on the Supreme Court. Democrats are desperate to recapture the institution, which has delivered them so many key victories, albeit never as many as they would have liked. But the odds of Democrats reclaiming a majority of the existing seats in the regular course are distressingly low, so they have at least begun to consider court packing as their only option. As Pascal famously observed, a chance of success, no matter how slim, is always better than certain failure.

But if wishes were horses, beggars would ride. When progressives dream about packing the Court, they ignore the looming hurdles. Democrats would not only have to win the presidency and a majority in the Senate, but also summon the political will to attack the Supreme Court, which remains far more popular than Congress or any president. It won't happen. After all, FDR failed to pack the Court, despite his overwhelming mandate and huge majority in Congress. Contemporary Democrats with a narrower mandate and smaller majority will be cautious, and pursue sure victories, rather than wild possibilities. The first rule of politics is "take what you can get." Court packing isn't really on the table.

And that's not all. Court packing is doomed to fail progressives, because it's a political solution to an ideological problem. That is to say, even if progressives acquire the political power necessary to successfully

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[1] Recently, some progressives have tried to redefine "court packing" as "using unfair political tactics to change the ideological balance of the courts," with little success.

pack the Supreme Court, it would still be a failure, because it wouldn't achieve their real goal, which is to change what the political majority believes the Constitution requires.

II. THE HISTORY OF COURT PACKING

Of course, as its progressive advocates never tire of observing, court packing is not only perfectly constitutional, but also consistent with historical practice, albeit not particularly recent practice. While Article III of the Constitution requires a Supreme Court, it doesn't specify its size. Accordingly, the Constitution permits Congress to authorize any whole number of Justices, and to change the number of Justices at any time. However, because Article III states that Supreme Court Justices "shall hold their Offices during good Behaviour," they have life tenure and can't be removed from office, short of impeachment.[2] So, if Congress reduced the size of the Supreme Court, it would take effect only when a Justice resigned or died.

Anyway, Congress has changed the size of the Supreme Court many times. Originally, the Court had six Justices, under the Judiciary Act of 1789. The Judiciary Act of 1801 reduced the number of Justices to five, in order to prevent Jefferson from replacing a Justice, but the Repeal Act of 1802 increased the number of Justices back to six. In 1807, Congress added another Justice, so there were seven. And in 1837, Congress increased the size of the Court again, to nine Justices. As previously mentioned, in 1863, Congress "packed" the Court by adding another Justice, in order to enable Lincoln to make an appointment. But in 1866, it "unpacked" the Court, reducing the number of Justices back down to seven. Finally, in 1869, Congress increased the number of Justices to nine, where it has stayed ever since.

III. THE POLITICS OF COURT PACKING

So, progressive advocates of court packing are right, as far as it goes. If Congress wants to pack the Supreme Court, there's nothing in the text or history of the Constitution to stop it. Congress has carte blanche to increase the number of Justices and can confirm any Justice

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2 U.S. CONST. art. III, § 1. While some scholars and commentators have made creative arguments that Congress could impose statutory term limits on Supreme Court Justices, political reality is not on their side. *See, e.g.*, Gabe Roth, *Supreme Court Term Limits Do Not Require a Constitutional Amendment*, USA TODAY (Sept. 24, 2020, 4:35 PM), https://www.usatoday.com/story/opinion/2020/09/24/supreme-court-justices-give-them-term-limits-instead-life-tenure-column/3503999001 [https://perma.cc/ZR3T-NG76].

the President nominates. If a political party controls both Congress and the White House, it can theoretically add as many Justices as it likes.

But only if it has the votes. After all, just because something works in theory is no guarantee it will work in practice. When it comes to politics, the law is only where sausage starts getting made. The rest of the legislative process depends on norms, traditions, and bargaining, not to mention the unsavory bits that add their own special spice.

Just because the Democrats can pack the Court, doesn't mean they will. Sure, changing the size of the Supreme Court—maybe even packing it—used to be in bounds, or even normal. But times have changed. The size of the Supreme Court hasn't changed in 150 years. And the last time someone tried to pack the court, it didn't go well. Institutional norms are sticky and tend to get stickier the longer they last.

Of course, at least some of the institutional norms affecting the Supreme Court have changed in recent years, despite their stickiness. In particular, nominations have become increasingly political, and confirmation has become increasingly contentious. Congress has eliminated the cloture requirement. And at this point, no one seriously believes that any of the decorum surrounding nominations are anything more than window dressing. Nominations are politics, nothing more. If you can push it through, great, nothing else matters.

IV. THE REALITY OF COURT PACKING

Anyone with an ounce of sense knows the Democrats won't actually pack the Supreme Court. For one thing, they probably won't have the votes. But for another, it's pointless. And it's always been pointless. Or rather, it's pointless by definition.

I will put it bluntly. If you can actually pack the Supreme Court, you don't need to do it. You've already won. Even a credible threat to pack the Court is probably enough to deliver most of what you want. As Finley Peter Dunne famously observed, "[N]o matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."[3]

Historians debate whether FDR's threat to pack the Supreme Court triggered "a switch in time that saved nine." Some argue it forced marginal Justices to change their votes, in order to forestall court packing. Others argue marginal Justices just changed their minds, independent of FDR's court packing threat.

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3 FINLEY PETER DUNNE, *The Supreme Court's Decisions*, *in* MR. DOOLEY'S OPINIONS 21, 26 (1901).

Does it matter? FDR got what he wanted, more or less. The Supreme Court accepted his expansive vision of federal authority to regulate the national economy. And it continues to accept that vision, with vanishingly few exceptions. If that's losing, give me more.

So, if you want the Supreme Court to change course, you have a smorgasbord of options. You can appoint new Justices when vacancies open, you can create vacancies by impeaching Justices, you can add additional Justices, or you can just threaten to add additional Justices, in order to encourage the existing Justices to change their tune.[4] While bluffing may be an unsatisfying method of achieving constitutional change, beggars can't be choosers. A bad option is better than none.

V. THE IDEOLOGY OF COURT PACKING

Ironically, as a legal and constitutional matter, court packing isn't just fine; it's irrelevant. Can Congress increase the size of the Supreme Court in order to enable the President to appoint additional Justices and change the ideological balance of the Court? Of course it can. Would court packing violate the text of the Constitution, or some deep constitutional principle? Of course not.

The "problem" with court packing, such as it is, isn't court packing itself, but its motivation. No one actually cares about the size of a court. They only care about whether their side has a majority. Court packing is great, if it will give you control, and terrible, if it won't. Or rather, the debate over court packing is merely a palimpsest for an ideological dispute. But that isn't a legal or constitutional problem; it's a political problem.

It's hardly news that the United States has offloaded many of its most ideologically contentious policy decisions onto the Supreme Court. Rather than ask whether a political majority supports a policy change, we ask whether it implicates a constitutional right. And rather than ask whether a political majority supports a government action, we ask whether it is authorized by the Constitution.

Obviously, Congress could resolve many of these disputes just as well as the Supreme Court, if not better. But time and again, it doesn't. Why not? Despite appearances, politicians hate controversy. Or rather, they hate controversies that might cost them relevant voters. They boldly go where no voter has cared before but are timid about deciding questions that people actually understand and care about.

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4 *See* Charles Fried, *I Was Reagan's Solicitor General. Here's What Biden Should Do with the Court.*, N.Y. TIMES (Oct. 19, 2020), http://www.nytimes.com/2020/10/19/opinion/biden-supreme-court.html [https://perma.cc/XZ63-YHF6].

VI. THE QUIDDITY OF CONSTITUTIONAL LAW

The Supreme Court has the unique and peculiar power to insulate policy decisions from criticism, by cloaking them in constitutionalism. For better or worse, most Americans have a deep and abiding belief in the legitimacy of the Constitution, whatever they happen to think it says.[5] And they have accepted that the Supreme Court decides what the Constitution means, whether or not they like it. Nobody agrees with all of the Court's decisions, but most people approve of it anyway. Among American political institutions, the Supreme Court has a unique ability to legitimize unpopular decisions.

Why? Because the Supreme Court denatures ideology into "constitutional law." By reframing political conflicts as legal questions, the Court can provide a final resolution to otherwise irreconcilable ideological disputes between political factions. After all, constitutional law has always been—and can only ever be—politics by other means. Sometimes, political battles must be fought to the bitter end. But often, they are better ended than won, even if neither party is entirely satisfied with the results. Dissatisfaction with the outcome of a settled debate tends to dissipate, while resentments tend to fester in a prolonged disagreement. The Supreme Court succeeds by strategically disappointing the faction that would eventually have lost anyway, heading off the conflict before it intensifies.

Of course, it's always the exceptions that prove the rule. Some ideological disputes are too profound for the Supreme Court to neutralize. Today, the paradigmatic constitutional dilemma is the abortion debate. But gun control isn't far behind. The Court couldn't resolve either dispute, because the losing party refused to accept its decision. And there are so many historical analogues: *Dred Scott*[6], *Plessy*,[7] *Lochner*.[8]

In any case, the fundamental purpose of the Supreme Court is to resolve political disagreements by dressing them up as legal disputes. As Justice John Marshall famously observed, "It is emphatically the province and duty of the judicial department to say what the law is." Or rather, the Court has claimed for itself the right to decide whether any particular question is a "legal" question, reserved for itself to answer, or

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5 *See, e.g.*, *Area Man Passionate Defender of What He Imagines Constitution to Be*, ONION (Nov. 14, 2009, 8:02 AM), http://www.theonion.com/area-man-passionate-defender-of-what-he-imagines-consti-1819571149 [https://perma.cc/G6QJ-CVL4].

6 Scott v. Sanford, 60 U.S. 393 (1857).

7 Plessy v. Ferguson, 163 U.S. 537 (1896).

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

a "political" question it is entitled to ignore. If you can't tell the difference before the Court weighs in, you're in good company.

Anyway, the Court uses the Constitution to justify its decisions and preclude objections to them. Or rather, it uses constitutional rhetoric, as the text of the Constitution itself is largely irrelevant, when it matters at all. Unsurprisingly, the Court's "constitutional" arguments are inevitably circular. It reaches its conclusions because they are compelled by the Constitution, even if only a bare majority of Justices agree about what the Constitution compels, and the Constitution compels whatever a bare majority of Justices say it does. How convenient. The Constitution follows the Court.

VII. CONSTITUTIONAL ICONOCLASM

None of this is news. Everyone knew the Supreme Court was an anti-democratic institution when the Constitution was ratified, and it's done a gangbusters job of proving them right. Over and over again, the Court has rejected the popular will, as expressed by the elected branches, in the name of the Constitution it has appointed itself to protect and interpret. And its steadily increasing importance is a testimony to its success. Ideologues of all stripes love the Court, at least when they control it, because it offers unparalleled leverage, enabling results the regular political process could never deliver. For better or worse, everyone loves the Constitution, or at least what they imagine the Constitution to be. As a consequence, they also love the idea of the Court, even when they dislike its actual conclusions, because it claims to speak for the Constitution.

Among other things, the purpose of legal realism was to dispel—or at least discourage—the popular constitutional faith that enabled the Supreme Court to both claim and reify its pivotal role in defining the terms of ideological debate in American politics. At least in theory, it convinced the law professors, despite their tendency to fawn over the Justices. But despite the best efforts of the realists, the power and prestige of the Supreme Court waxes greater than ever before. A new wave of realists argues that the only way to deal with the problem posed by the Court is to divest it of its power and return constitutional decision making to the elected branches of government. Court packing is but a chimera, because it merely reflects an attempt to seize control of the Court, while preserving its institutional power. Granted, it at least threatens to undermine the Court's legitimacy, but does so indirectly, its own venality and hypocrisy laying it open to the same criticisms it levies against the Court. Even if it eventually succeeds in delegitimizing the Court, it will only be an accidental byproduct of its true goals, which

are every bit as counter-majoritarian as the Court itself. Accordingly, some critics now argue that the Court itself should be the target, offering an assortment of ways in which the elected branches could divest the Court of its power, from jurisdiction stripping to term limits, and more.[9] They argue that the Court itself is the problem, and the only solution is to take the Constitution out of the Court's hands and return it to the people. On their telling, counter-majoritarianism is vastly overrated. Legitimacy means democracy, for better or worse.

CONCLUSION: A FAINT-HEARTED REFORMER

Fair enough. But color me skeptical. Majoritarianism sounds great, until you come to realize that the marginal voter is a hateful idiot. And most of the rest of them are, too. As with so many other things, democracy is best tempered with prudence. Taken to its extreme, democracy is little more than a cruel joke. As Justice Holmes wryly observed, "[I]f my fellow citizens want to go to Hell I will help them. It's my job."[10] Or rather, as H.L. Mencken put it, "Democracy is the theory that the common people know what they want, and deserve to get it good and hard."[11]

After all, at the end of the day, criticism of the Supreme Court is really just thinly veiled criticism of democracy itself. We chose to create the Supreme Court, we chose to give it the power it currently enjoys, and we chose to make it the oracle of our constitutional faith. The Court doesn't just create the Constitution out of thin air, but reflects the popular conception of the Constitution, albeit through a glass, darkly.

Thankfully, all of the proposals to pack or reform the Supreme Court will surely come to naught. They remain the pipe dreams of academics and pundits, in search of an audience. While I am no constitutional scholar, I know enough to realize that the plausibility of a proposal is inversely proportional to its cleverness. Enough talk of court packing and Supreme Court reform. Real political power renders them irrelevant. The only thing that matters is winning.

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9 *See, e.g.*, ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 167–84 (2012); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, N.Y.U. L. REV. (forthcoming Dec. 2020).

10 Letter from Oliver Wendell Holmes, Just., U.S. Sup. Ct., to Harold J. Laski (Mar. 4, 1920) (reprinted in 1 HOLMES-LASKI LETTERS 249 (Mark DeWolfe Howe ed. 1953).

11 H.L. MENCKEN, THE VINTAGE MENCKEN 232 (Alistair Cooke ed., Vintage Books 5th ed. 1958).