IS THE SUPREME COURT STILL LEGITIMATE?

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I. INTRODUCTION

Legitimacy is a complex and puzzling concept. But we have an intuitive sense that *illegitimate* means something more than erroneous or incorrect. The term signifies off-the-wall, absolutely without foundation, and perhaps even illegal. So when an institution or organization lacks legitimacy, that institution may no longer be worthy of respect or obedience.

Given this intuition, it is striking how many commentators, including some prominent constitutional scholars and a former Attorney General, have recently questioned the legitimacy of the United States Supreme Court.[1] Indeed, some critics suggest that the situation is so bad as to warrant extreme measures. Although commentators have ventured various solutions (including impeaching Justices),[2] critics have most commonly called for "packing" the Court with

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[1] *See, e.g.*, Erwin Chemerinsky, *With Kavanaugh confirmation battle, the Supreme Court's legitimacy is in question*, THE SACRAMENTO BEE (Oct. 5, 2018), https://www.sacbee.com/opinion/california-forum/article219317565.html ("The bitter fight over the confirmation of Brett Kavanaugh surely will tarnish the legitimacy of the U.S. Supreme Court…. But the cloud over the court's legitimacy is larger than that. With a Justice Kavanaugh, a majority of the justices will have been appointed by Republican presidents because Senate Republicans refused to even hold hearings on Merrick Garland….Rightly Democrats will always regard this as a stolen seat on the Supreme Court."); Garrett Epps, *The Post-Kennedy Supreme Court Is Already Here*, THE ATLANTIC (June 30, 2018), https://www.theatlantic.com/ideas/archive/2018/06/the-post-kennedy-supreme-court-is-already-here/564176/ ("Whoever sits in Kennedy's seat, the institution will never recover from the wounds to its legitimacy inflicted by its new party masters in the last two years."); Justin Wise, *Holder: Supreme Court's legitimacy can be questioned after Kavanaugh confirmation*, THE HILL (Oct. 8, 2018), https://thehill.com/homenews/administration/410356-holder-supreme-courts-legitimacy-can-be-questioned-after-kavanaugh (noting that, soon after the confirmation of Justice Kavanaugh, former Obama Attorney General Eric Holder tweeted, "'With the confirmation of Kavanaugh and the process which led to it, (and the treatment of Merrick Garland), the legitimacy of the Supreme Court can justifiably be questioned. The Court must now prove—through its work—that it is worthy of the nation's trust.'"); *see also* Amelia Thomson-DeVeaux & Oliver Roeder, *Is The Supreme Court Facing A Legitimacy Crisis?*, FIVETHIRTYEIGHT: POLITICS (Oct. 1, 2018), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis; Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html. Justice Kagan herself wondered whether the public would continue to view the Supreme Court as "legitimate," absent a swing Justice. Daniel Politi, *Justice Kagan Fears Supreme Court Could Lose Legitimacy Without a Swing Justice*, SLATE (Oct. 6, 2018), https://slate.com/news-and-politics/2018/10/justice-elena-kagan-fears-supreme-court-could-lose-legitimacy-without-a-swing-justice.html (the Justice stated: "'This is a really divided time, and part of the court's strength and part of the court's legitimacy depends on people not seeing the court in the way that people see the rest of the governing structures of this country.'").

[2] *See* Ronald J. Krotoszynski Jr., *The Case for Impeaching Kavanaugh*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/opinion/kavanaugh-impeachment.html (urging House Democrats to investigate the sexual assault allegations against Brett Kavanaugh and

additional members.[3] But what do these critics mean by these charges? What, in their view, has undermined the Supreme Court's legitimacy, and would these suggested "solutions" restore, or further undermine, its status?

Enter Richard Fallon's *Law and Legitimacy in the Supreme Court*.[4] Few manuscripts come upon the legal scene at a more essential time. With characteristic analytical clarity, Fallon dissects the term "legitimacy" and gives us a vocabulary and framework for thinking about claims of illegitimacy. Fallon divides legitimacy into three categories: sociological legitimacy, legal legitimacy, and moral legitimacy. Sociological legitimacy depends on an external perspective: does the public view the legal system and its institutions as worthy of respect and obedience? By contrast, legal and moral legitimacy depend on an internal perspective. Thus, a Supreme Court decision is legally and morally legitimate if the Justices use interpretive methods that are generally accepted within the legal culture.[5]

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whether he committed perjury during his confirmation hearings, although also stating that "Congress must take care to maintain the constitutional convention that … [f]ederal judges, including members of the Supreme Court, should not be impeached based on their judicial rulings or philosophy"). There have also been calls to rethink life tenure (typically, by constitutional amendment), or even disobey Supreme Court decisions. *See, e.g.*, Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE BLOG (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court ("to remedy the Republican Party's hijacking of the Court," one possibility would be a constitutional amendment providing for eighteen-year terms); Mark Joseph Stern, *How Liberals Could Declare War on Brett Kavanaugh's Supreme Court*, SLATE (Oct. 4, 2018), https://slate.com/news-and-politics/2018/10/brett-kavanaugh-confirmation-constitutional-crisis.html (suggesting that there could be "massive liberal resistance" to the Supreme Court, including defiance of court orders).

[3] *See, e.g.*, Klarman, *Why Democrats Should Pack the Supreme Court*, *supra* note 2 (advocating "expanding the size of the Court once Democrats regain control of Congress and the presidency… Democrats cannot undo Trump's illegitimate appointments to the Supreme Court in the same way that they can repeal voter ID laws or undo Republican political gerrymandering. Supreme Court appointments carry lifetime tenure, and the only constitutional way to offset them is by creating new Court vacancies to be filled by Democrats."); Dahlia Lithwick, *A Political Scientist Explains Why Democrats Must Pack the Courts to Restore Democracy*, SLATE (Oct. 24, 2018), https://slate.com/news-and-politics/2018/10/why-the-democrats-need-to-pack-the-courts.html (discussing one political scientist's proposal to add four Justices to the Court, and noting that the proposal is supported by Harvard Law Professors Laurence Tribe and Mark Tushnet); Clare Malone, *Why A Fringe Idea About The Supreme Court Is Taking Over The Left*, FIVETHIRTYEIGHT (Dec. 3, 2018), https://fivethirtyeight.com/features/why-a-fringe-idea-about-the-supreme-court-is-taking-over-the-left/ (noting "an urgent strain of thought in some liberal circles: The court is broken and it needs fixing. The solution? For some, it's court-packing" and anticipating that 2020 Democratic presidential candidates will need to address the issue); Gregg Re, *Liberal profs launch campaign to pack Supreme Court after Kavanaugh confirmation*, FOX NEWS (Oct. 16, 2018), https://www.foxnews.com/politics/liberal-profs-launch-campaign-to-pack-supreme-court-after-kavanaugh-confirmation (agreeing that support for court packing is strong among prominent law professors); Charlie Savage, *On the Left, Eyeing More Radical Ways to Fight Kavanaugh*, N.Y. TIMES (Oct. 7, 2018), https://www.nytimes.com/2018/10/07/us/politics/ democrats-kavanaugh-supreme-court.html (noting proposals to "expand[] the number of justices on the court to pack it with liberals").

[4] RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018).

[5] *See id.* at 35-36 ("If the Constitution is law that legally binds the Supreme Court, and if it is also minimally morally legitimate, then whether the Justices have behaved morally legitimately must necessarily depend on whether the Justices have acted legally correctly or illegitimately.").

The heart of Fallon's analysis—and the central contribution of the book—is his evaluation of Supreme Court decisionmaking. That is, Fallon focuses on the internal perspective. From this vantage point, Fallon offers us novel and exciting ways to think about both constitutional interpretation and judicial decisionmaking.[6] But Fallon says very little about the external (sociological) legitimacy of the Supreme Court. He appears to assume that the Supreme Court's external legitimacy depends on its internal performance. That is, Supreme Court decisions will be seen as legitimate by the public, as long as its decisions stay within some bounds of legal and moral reasonableness.

This internal perspective pervades constitutional theory. Scholars have long debated the proper approach to constitutional interpretation—seeking to identify an interpretive method that is appropriate, given our constitutional history and values, and the scheme of separated powers that shapes the role of the federal judiciary. Presumably, that is because public acceptance of the Court and its decisions seems to be a given. As Fallon remarks in his February 2018 work, "[i]n this country we accept judicial review by the Supreme Court as an article of constitutional faith."[7] If the Court's external (sociological) legitimacy is uncontested, then theorists have sensibly focused on the real fight: the internal legitimacy of its judicial decisions.

But things seem to have changed. The current complaints about a lack of "legitimacy" do not focus on a specific Supreme Court decision or an approach to interpretation.[8] Instead, critics emphasize a preliminary issue: how the Justices came to be placed on the Court. Thus, Justice Gorsuch sits in the seat that was "stolen" from Merrick Garland.[9] The confirmation process for Justice Kavanaugh was said to be problematic in myriad respects: Republicans

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[6] In the book review, I will provide a far more detailed explanation. Here, in a nutshell, is the central contribution: Rather than offer another interpretative method, Fallon steps back and gives us a formula for evaluating the legal and moral legitimacy of various existing approaches to constitutional interpretation. In Fallon's view, a Justice's approach can be legitimate, as long as she applies it consistently across cases, but not dogmatically, and thus is open to modifying her views if a compelling case arises.

[7] FALLON, *supra* note 4, at 1.

[8] To be sure, commentators are concerned about *future* Supreme Court decisions. Scholars worry about how the newly-constituted Court may rule on matters like affirmative action, abortion, and gerrymandering. But the questions about the Court's "legitimacy" were raised even before the most recent Justice Kavanaugh took a seat on the bench, much less joined an opinion. Moreover, although these commentators are concerned about a conservative shift on the Court, it is not clear that they would view such a shift as *illegitimate*, absent the apparent defects in the appointment and confirmation process.

[9] *See* Chemerinsky, *With Kavanaugh confirmation battle, the Supreme Court's legitimacy is in question*, *supra* note 1 ("Senate Republicans refused to even hold hearings on Merrick Garland…. Rightly Democrats will always regard this as a stolen seat on the Supreme Court…. Even then, Republicans were able to put Neil Gorsuch in Scalia's seat only by changing longstanding Senate rules and abolishing the filibuster for nominations."); Klarman, *Why Democrats Should Pack the Supreme Court*, *supra* note 2 ("Senate Majority Leader Mitch McConnell straight-out stole the seat vacated by the death of Justice Antonin Scalia early in 2016, a seat that should have been filled by President Barack Obama's nominee (Merrick Garland)"); Savage, *supra* note 3 ("[M]any on the left … consider Justice Neil M. Gorsuch to be occupying a stolen seat.").

withheld information about the nominee's service in the White House[10] and failed to investigate charges of sexual assault;[11] and the nominee himself offered openly partisan testimony in responding to the latter allegations.[12] Moreover, some commentators suggest that several Justices (Kavanaugh, Gorsuch, Alito, and Thomas) are less legitimate, because they were placed on the bench by a president and/or confirmed by senators who did not represent a majority of the populace.[13] This appears to be a new kind of critique: Defects in the appointment and confirmation process have undermined the sociological legitimacy of the Supreme Court.[14]

If these attacks on the Court seem unconventional, so are the proposed solutions. As noted, the most popular "fix" is court packing. Commentators argue that as soon as Democrats control the House, Senate, and presidency, they should pack the Supreme Court by adding two (or more) Justices.[15] Such

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[10] *See* Kim Wehle, *GOP's maneuvering during the Kavanaugh confirmation hearings will seriously damage the Supreme Court's legitimacy*, NBC NEWS (Sept. 6, 2018), https://www.nbcnews.com/think/opinion/gop-s-maneuvering-during-kavanaugh-confirmation-hearings-will-seriously-damage-ncna907216.

[11] *See* Dahlia Lithwick, *A Political Scientist Explains Why Democrats Must Pack the Courts to Restore Democracy*, SLATE (Oct. 24, 2018), https://slate.com/news-and-politics/2018/10/why-the-democrats-need-to-pack-the-courts.html ("Democrats were beside themselves that Brett Kavanaugh was confirmed to the Supreme Court without a meaningful investigation of sexual assault claims against him.").

[12] *Brett Kavanaugh's Opening Statement: Full Transcript*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/26/us/politics/read-brett-kavanaughs-complete-opening-statement.html ("This whole two-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record, revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups…. And as we all know in the United States political system of the early 2000s, what goes around comes around.").

[13] *See* Klarman, *Why Democrats Should Pack the Supreme Court*, *supra* note 2 ("As has been frequently noted, recently appointed Justices Neil Gorsuch and Brett Kavanaugh were nominated to the Court by a president who lost the popular vote by nearly three million votes, and were then confirmed by a majority of senators who represented minorities of the American population."); Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018) ("[W]e're on the verge of having a five-member majority who figure to radically rewrite our nation's laws. And four of them will have been narrowly approved by senators representing minority will."). Tomasky relies on recent work by political scientist Kevin McMahon (although that work is far more measured and nuanced than the declarations of commentators). *See* Kevin J. McMahon, *Will the Supreme Court Still "Seldom Stray Very Far"?: Regime Politics in a Polarized America*, 93 CHICAGO-KENT L. REV. 343, 343-44 (2018) ("the Supreme Court now includes three Justices [Gorsuch, Alito, and Thomas] who were confirmed by a majority of senators who had received fewer votes than those in opposition, with the newest Justice appointed by a minority President"). Notably, this complaint is not simply an indictment of Senate procedure or a breakdown in norms. It is an attack the U.S. constitutional scheme itself: the Electoral College and the Senate. I am still contemplating the implications of this aspect of the attack on the Supreme Court's legitimacy. (Interestingly, as far as I have been able to discern, these commentators do not add that Justices Breyer and Ginsburg were also nominated by a President—Bill Clinton—who did not win a majority of the popular vote. Perhaps they view that situation as distinguishable, because there was a third-party candidate in 1992.)

[14] For a possible historical analog, see *infra* notes 37-45 and accompanying text (discussing events from 1801 and 1802). There may be other historical precursors as well.

[15] *See supra* note 3 and accompanying text.

packing, the argument goes, would "fix" the wrongdoing of Senate Republicans and restore the former balance on the Court. Moreover, court packing would (it seems) ameliorate the "representation" issue as well, given that Democratic Senators currently represent a larger percentage of the national population.[16]

Such suggestions are breathtaking. There has long been a strong bipartisan norm against "packing" the Supreme Court—that is, modifying the Court's size in order to place like-minded individuals on the bench.[17] Indeed, at least until recently, scholars agreed that, even as compared to other court-curbing measures, "'[c]ourt packing' [was] especially out of bounds."[18] Although some scholars assume that this norm predated President Franklin Roosevelt's 1937 Court packing plan, that is doubtful; after all, Roosevelt's plan had considerable support and came close to passage.[19] I have argued that the convention against court packing gained steam in the 1950s—largely as a result of political rhetoric.[20] Politicians of both parties attacked any judicial reform they disliked by equating it with "the now infamous 'Court-packing plan.'"[21] In short, "court packing" became a "pejorative term" in our constitutional culture.[22]

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[16] *Cf.* Lawrence Weschler, *How the US Supreme Court Lost Its Legitimacy*, THE NATION (Sept. 17, 2018), https://www.thenation.com/article/how-the-us-supreme-court-lost-its-legitimacy/ (emphasizing that, when Senator McConnell refused to hold hearings on Merrick Garland in 2016, "the 54 Republicans in the Senate had collectively received 20 million fewer votes than their 46 Democratic colleagues" in part because "California's senators represent 37,254,518").

[17] *See* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505-17 (2018); *see also id.* at 473-505 (there are also strong bipartisan norms against terminating Article III judges outside the impeachment process and defying federal court orders).

[18] David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34 (2014); *see* Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69, 74 (Matthew D. Adler & Kenneth Einer Himma eds., 2009) (urging that, although "the Constitution poses no obstacle … to Court packing," "we have very good reasons to think that Court packing is something that Congress and the President *just cannot do*."); Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1063-64 (2014) ("[W]e have a constitutional custom, or constitutional common law, under which court packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine…. We have decided to fight over who gets to sit in one of the nine seats, and to conduct a no-holds-barred contest over nominations to the Supreme Court, but not to tinker with the Supreme Court's structure itself.").

[19] *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 135, 137-54 (1995); ("[D]espite all the antagonism, it still seemed highly likely in the last week of March 1937 that FDR's proposal would be adopted"); Grove, *Judicial Independence*, *supra* note 17, at 508-10. *But see* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 224-26 (1994) (doubting that the bill could have overcome a Senate filibuster). Roosevelt's 1937 plan has received a great deal of attention in the literature. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE 217-29 (2009); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010); *see also* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-83 (2017) (exploring how political actors invoked history in debates over the Court packing plan).

[20] *See* Grove, *Judicial Independence*, *supra* note 17, at 505-17.

[21] 114 CON. REC. 11,740 (1968) (statement of Sen. Joseph Tydings, D-Md.).

[22] *A Proposal to Divide the Fifth Circuit: Hearing Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 95th Cong. 107-08 (1977) (statement of Rep. Charles Wiggins, R-Cal.) (describing "court packing" as "a perjorative [sic] term").

Now that rhetoric has begun to change. Although progressive supporters of court packing recognize that they are pushing against an entrenched norm, they argue that such "norm breaking" is justified by the Republicans' own norm violations, particularly the "stolen" Supreme Court seat.[23] Such "constitutional hardball" deserves a response in kind.[24]

II. JUDICIAL INDEPENDENCE AND POLITICAL RESTRAINT

Building on Fallon's important work, this Essay explores these recent questions about the Supreme Court's legitimacy. I argue that both the critiques and the suggested solutions underscore the Janus-faced nature of the Supreme Court's constitutional role. The Constitution creates a Supreme Court that is both shaped by politics and yet designed to be independent of politics. Article II provides that the Justices shall be nominated by the President and confirmed by the Senate.[25] This scheme injects politics into the selection of Justices. Moreover, the Constitution gives Congress considerable authority over the Court's budget, jurisdiction, and size. At the same time, Article III creates an independent federal judiciary—one whose members enjoy tenure and salary protections.[26] This judiciary, led by the Supreme Court, is supposed to check the remainder of the government, including the politicians that put the judges in place.[27]

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[23] *See* Klarman, *Why Democrats Should Pack the Supreme Court*, *supra* note 2 ("Republicans will scream bloody murder at the mere mention of "court-packing," accusing Democrats of an unprecedented assault on our democratic institutions and traditions. Given Republican behavior of recent decades, such protests would be risible."). It is not clear whether the Republicans' conduct in 2016 was a violation of an established norm. For an illuminating discussion of the difficulty of identifying relevant precedents in the context of judicial appointments, see Josh Chafetz, *The Supreme Court, 2016 Term—Essay: Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017).

[24] *Cf.* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004). In a recent article, Joseph Fishkin and David Pozen argue that, as a general matter, Republicans have played "hardball" to a greater degree that Democrats. *See* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 918 (2018). But they suggest that there is less of a discrepancy between the parties with respect to judicial nominations. *See id.* at 929, 933-34 (noting that "the balance is more even" with respect to "Senate obstruction of circuit court nominations" and also observing that "the 1987 Senate campaign against Judge Robert Bork's Supreme Court nomination was an important example of constitutional hardball; many observers, especially conservatives, viewed it at the time as an unprecedented escalation of the political battles over judicial appointments").

[25] *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the supreme Court, and all other Officers of the United States").

[26] *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[27] The concept of "judicial independence" is itself a challenging term, so let me pause to unpack it. For purposes of this Essay, I focus on two aspects of independence. First, "decisional independence" exists when judges feel free to issue a ruling for either litigant, without fear of sanctions. "Decisional independence" thus focuses on a judge's self-conception of her role. By contrast, and second, "perceived independence" depends on the public's perception of the judiciary. The public should view judges as capable of making decisions, free of partisan

The Court's sociological legitimacy, in my view, depends on striking a reasonable balance between these two conflicting pressures. But I do not believe the Court is alone (or even primarily) responsible for that achieving balance. Instead, the Court's legitimacy depends largely on the conduct—and, more specifically, the restraint and forbearance—of political actors.

A. A Delicate Balance

The political history of the federal judiciary illustrates the tenuous balance between political control and independence. Throughout our history, a dominant political faction has used its Article I and Article II authority to mold the federal judiciary, while also counting on the Article III independence of the courts to ensure that the resulting decisions will be accepted as "legitimate." Thus, in the late nineteenth century, pro-business conservatives nominated judges who supported property rights and favored national (uniform) regulation of business.[28] Indeed, the members of the Supreme Court were selected almost entirely based on "their devotion to party principles and 'soundness' on the major economic questions of the day."[29] In the mid-to-late twentieth century, social progressives attempted to use the judiciary to advance progressive goals, such as racial civil rights.[30] In discussing one judicial candidate, for example, President Lyndon Johnson instructed his aide to "[c]heck to be sure [the potential nominee] is all right on the Civil Rights question. I'll approve him if he is."[31]

The sociological legitimacy of the resulting judiciary, however, depends on an assumption that it is in fact independent—even of the faction that

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considerations; in other words, the public should believe that judges have decisional independence. To borrow from a recent statement by Chief Justice Roberts, the public should believe that judges are not simply "Trump judges" or "Obama judges." Mark Sherman, *Roberts, Trump spar in extraordinary scrap over judges*, ASSOCIATED PRESS (Nov. 21, 2018), https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84 ("after a query by The Associated Press, [Chief Justice Roberts] spoke up for the independence of the federal judiciary and rejected the notion that judges are loyal to the presidents who appoint them" and stated: "'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.'"). Such perceived independence is, I believe, crucial to the Court's sociological legitimacy.

[28] *See* RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900, at 7 (2000); FRIEDMAN, *supra* note 19, at 159–60.

[29] BENSEL, *supra* note 28, at 7.

[30] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 119–20, 271 (2007).

[31] SHELDON GOLDMAN, PICKING FEDERAL JUDGES 170 (1997); *see also* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES 91 (1999) (noting that, according to one advisor, President Johnson "viewed the [Supreme] Court as a means both of perpetuating his social reforms and of upholding various legislative compromises he had reached on controversial issues ranging from aid for parochial schools to consumer, health, and environmental legislation"); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138, 146–55, 158 (Ronald Kahn & Ken I. Kersch eds., 2006) (asserting that the "modern judicial liberalism" of the Warren and Burger Courts "can be traced to the self-conscious efforts of Democratic Party officeholders in the 1960s," because the Kennedy and Johnson Administrations sought to appoint judges who would favor civil rights and other progressive causes).

empowered it. Otherwise, why allow courts to decide issues (as opposed to, say, administrative agencies)? That is where Article III comes in. The tenure and salary protections help ensure that judges need not march lockstep with a dominant political regime. For example, the Warren Court's decisions on issues like school prayer and busing were extremely unpopular, even with many social progressives.[32]

A dominant regime may accept such decisions both because it is pleased with the general trend of judicial rulings, and because such "losses" may make its "wins" seem more sociologically legitimate. But why would a competing political party respect the decisions of a judiciary put in place by "the other side"? Notably, the answer to this question underscores that the independence of the federal judiciary rests on a good deal more than Article III. Such independence also depends on political incentives and the practices, structures, and norms of our constitutional culture.

Scholars have offered assorted reasons to explain political deference to an "unfriendly" judiciary. Any official may wish to delegate certain controversial issues to the federal courts and thereby avoid the political fallout from voting on those issues herself.[33] Moreover, in a politically competitive system, each party has an incentive to respect the judiciary, on the assumption that its own side can "remake" the federal courts in its image—and then rely on the courts to control its political opponents when it is out of power.[34]

There are other safeguards in our constitutional system—again, beyond the tenure and salary language of Article III—that help ensure the independence of the federal judiciary. As I have documented, political supporters of the judiciary have repeatedly used the "veto gates" of the Article I lawmaking process to block court-curbing legislation.[35] Thus, even when the pro-business

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[32] *See* Alison Gash & Angelo Gonzales, *School Prayer*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 68–70, 77 (Nathaniel Persily et al. eds., 2008) (showing that over 70% of the public disagreed with the Court's school prayer decisions in the late 1970s and early 1980s); Michael Murakami, *Desegregation*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra*, at 18, 34–35 (showing that over 80% of the public disagreed with the Court's busing decisions at that time).

[33] *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) (asserting that "prominent elected officials consciously invite the judiciary to resolve" controversial issues); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005) ("The establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.").

[34] *See* J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722, 741-42 (1994); Matthew C. Stephenson, *"When the Devil Turns . . . ": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 63-64, 71-73 (2003) ("[I]ndependent judicial review allows parties to minimize the risks associated with political competition. Respecting judicial independence may require the party that currently controls the government to sacrifice some policy objectives, but it also means that when that party is out of power, its opponent faces similar limitations.").

[35] *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 888-916 (2011). Notably, this political support exists, in part because of the Article II appointments scheme. The Justices are selected by a political faction that has sufficient political

conservatives of the nineteenth century and social progressives of the twentieth century were no longer dominant, they still retained sufficient political power in Congress to block efforts to strip federal jurisdiction or otherwise curb the courts. Since the mid-twentieth century, the federal courts have also been protected by certain bipartisan norms (conventions) of judicial independence: political actors of all stripes have accepted that judges may not be removed outside the impeachment process; that federal court orders must be obeyed; and (as noted) that no one should "pack" the Supreme Court.[36]

B. When Norms Break Down

It is hard to overstate the importance of these structural safeguards, political incentives, and bipartisan norms. These practices and norms give federal judges considerable breathing room to issue decisions they believe to be correct. But this political restraint depends on a common assumption that all sides will continue to "play by the rules."

Sometimes, it seems that one side "cheats." An example of such (apparent) cheating occurred early in our history. The election of 1800 was a bitter partisan struggle between the Federalist Party and the Jeffersonian Republican Party.[37] After the Jeffersonians prevailed (but before Thomas Jefferson and the new members of Congress took their seats), the outgoing Federalist Congress enacted a sweeping reform of the federal judiciary—dramatically expanding the size and jurisdiction of the federal courts.[38] The 1801 Act also reduced the future size of the Supreme Court from six to five members—in large part to prevent Jefferson from filling the next vacancy.[39]

The Jeffersonians (accurately)[40] perceived this reform as a partisan move by a defeated political party to maintain control over the Third Branch. So the Jeffersonians fought back. In 1802, the new Congress repealed the 1801 Act—thereby returning the Supreme Court to six members, reducing federal jurisdiction to previous levels, and (most dramatically) firing *all* of the recently-installed Article III judges.[41] To ensure that the Supreme Court could not strike down the 1802 repeal, the Jeffersonians also barred the Court from sitting for

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power to control the presidency and the Senate for at least a period of time. Such a strong political faction has consistently had at least enough support in the House, Senate, or presidency to block most court-curbing measures.

[36] *See* Grove, *Judicial Independence*, *supra* note 17, at 467-517.

[37] *See* JOHN FERLING, ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800 143–56 (2004); GERALD LEONARD, THE INVENTION OF PARTY POLITICS 2, 31–32 (Thomas A. Green & Hendrik Hartog eds., 2002) (noting the opposing views of the more nationalist Federalists and the pro–states' rights Jeffersonians).

[38] *See* Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 32 (1965).

[39] *See* § 3, 2 Stat. at 89; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 189 (Beard Books 1999) (1922).

[40] During the debates over the 1801 Act, the Federalists did not conceal their partisan motivations for enlarging the federal judiciary. Senator William Bingham, for example, underscored that "'the Importance of filling'" the judiciary "'with *federal* characters must be obvious.'" Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 509 (1961) (emphasis added).

[41] *See* Repeal Act, ch. 8, §§ 1, 3, 2 Stat. 132, 132 (1802).

fourteenth months.[42] When the Court was finally back in session, it quietly acquiesced in the repeal.[43] The Federalist Party, for its part, never returned fire; in fact, the party soon dissolved.[44]

The current political moment seems in some respects reminiscent of this earlier episode. The Jeffersonians were not concerned about a past Supreme Court decision or approach to interpretation.[45] Instead, they believed that the Federalist Congress had broken the "rules of the game" in constituting the federal judiciary. In other words, the Federalists cheated in 1801, thus justifying the brutal response in 1802. Progressives today likewise suggest that the Republicans "cheated" in refusing to hold hearings on Merrick Garland, and in rushing through the confirmation of Justice Kavanaugh. And such norm breaking warrants a response in kind. Even court packing.

The political events of 1801 and 1802 should give pause to those who are tempted to embrace court packing or other responses in kind. In contrast to that earlier period, neither political party is likely to obtain a firm grip on power; we live in an era of divided government. So if Democrats "strike back" in response to Republican tactics of recent years, there is likely to be continued escalation, not acquiescence. We also live with a very different federal judiciary. It is not clear how the Supreme Court would react to such tactics, nor it is apparent that we as a society would wish for a Court that (like the Marshall Court) upheld virtually every federal government action.[46]

At a deeper level, this historical episode reminds us that the sociological legitimacy of the Supreme Court (and the federal judiciary more broadly) depends enormously on the behavior of political officials. The Jeffersonians viewed the 1801 judiciary as illegitimate—not because of what those judges did but because the Federalists blatantly used the courts to fulfill partisan goals. And the Jeffersonians' responses (firing Article III judges by abolishing courts, barring Supreme Court review for over a year) seem shocking to us today, because they are so far afield from modern political actors' approach to the judiciary. Subsequent officials opted not to treat the 1802 repeal as a valid precedent.[47] In sum, the federal judiciary, led by the Supreme Court, has

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[42] *See* Judiciary Act of 1802, ch. 31, §§ 1, 3, 2 Stat. 156, 157 (omitting the August 1802 session).
[43] *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).
[44] See RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840 x (1969) (urging that the Jeffersonians "at last succeeded [in destroying the Federalist Party] when they were able to brand the Federalists as disloyal during and after the War of 1812"); LEONARD, *supra* note 37, at 35 (observing that the "Federalist party [was] all but defunct after the [War of 1812]").
[45] Like current progressives, the Jeffersonians may have worried about *future* decisions from a Court led by Chief Justice John Marshall. *See supra* note 8. But their primary concern was the conduct of the Federalists in Congress and President John Adams.
[46] The Marshall Court did not invalidate any federal action after *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803). Today, countless federal actions (involving the census, sanctuary cities, transgender individuals in the military, and the rescission of the Deferred Action for Childhood Arrivals program) are currently under challenge in court.
[47] Notably, that took a while. *See* Grove, *Judicial Independence*, *supra* note 17, at 473-88 (showing that, until the early twentieth century, many political actors assumed it was permissible to terminate Article III judges by abolishing courts).

managed the tenuous constitutional balance between political influence and independence, in large part because of the forbearance of political actors.

This final point has important implications for thinking about not only Supreme Court legitimacy but also law school pedagogy. In law schools, we spend a good deal of time discussing the proper role of the judge. We spend far less, if any, time examining how a lawmaker (or president) should carry out her constitutional responsibilities. As Vicki Jackson has recently suggested, such court-centrism ought to change; today, we need a "general account of the normative expectations of elected representatives in a constitutional democracy."[48] Such an account seems particularly crucial in the context of the judicial appointments process. The best way to protect judicial legitimacy going forward may be an increased emphasis on the proper role of a lawmaker.

[48] Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1722 (2016) (proposing to develop a normative account of "the aspirations and responsibilities of a 'conscientious' or 'pro-constitutional' legislator in the U.S. constitutional democracy").