INTRODUCTION

The Court-Packing Controversy

Should Democrats add justices to the Supreme Court if given the chance, whether in 2021 or afterward? Or would Democratic court packing destroy the Court as an apolitical judicial institution? During the summer of 2019, a pending Supreme Court gun-rights case thrust the court-packing issue to the forefront of political and constitutional debate, where it is likely to remain for several years, regardless of the Court’s decision.1

A New York City regulation banned licensed handgun owners from transporting their weapons anywhere other than a shooting range within the city. Even if a gun was unloaded and locked in a storage case, the owner could not take it to a second home or shooting range outside the city. A gun owners’ association and three city residents sued, challenging the constitutionality of the regulation under the Second Amendment. The Second Circuit Court of Appeals upheld the regulation, and the gun owners sought to appeal to the U.S. Supreme Court. In January 2019, the Court granted review in the case, New York State Rifle & Pistol Association, Inc. v. City of New York, New York.2 At the time, the case portended the Court’s first major statement regarding gun rights since 2008 and 2010, when it concluded in two cases that the Second Amendment protects an individual’s right to own firearms against unreasonable federal, state, and local regulations.3

After the Court accepted review, New York City eliminated its regulation prohibiting the transport of licensed handguns. Moreover, the State of New York enacted a statute that will prevent cities and other localities from adopting any similar bans on licensed handgun transportation. In light of these
changes in the law, the city asked the Court to dismiss the case as moot. There is no longer a live case or dispute for the Court to decide, the city argued. The changes in the law gave the gun owners “everything they have sought in this lawsuit.”

The gun owners disagreed. They had not received everything they sought. Their response, filed with the Court, requested a judicial decision: The current Supreme Court should elaborate gun rights protected under the Second Amendment, they urged. The case then took an unusual turn. On August 12, 2019, Democratic Senator Sheldon Whitehouse of Rhode Island and four other Democratic senators filed a friends of the court (amici curiae) brief asking the Court to dismiss the case for mootness, as requested by New York City. But this was no run-of-the-mill legal brief. It argued that the gun owners and the powerful National Rifle Association want the Court to decide the Second Amendment issues because the Court’s five conservative justices are their partners in a political “project” to expand gun rights and “thwart gun-safety regulations.” Politics should not determine the Court’s decision making, the senators’ brief proclaimed. But the conservative justices consistently issue conservative decisions: “With bare partisan majorities, the Court has influenced sensitive areas like voting rights, partisan gerrymandering, dark money, union power, regulation of pollution, corporate liability, and access to federal court, particularly regarding civil rights and discrimination in the workplace. Every single time, the corporate and Republican political interests prevailed.” Indeed, as the brief underscored, polls show that a majority of the public believes politics rather than law currently shapes the Court’s decisions. The brief concluded with a remarkable challenge: “The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be ‘restructured in order to reduce the influence of politics.’ Particularly on the urgent issue of gun control, a nation desperately needs it to heal.” To spell this out, these U.S. senators forewarned of potential political reprisal: If the conservative justices do not stop pushing a conservative political agenda with their judicial decisions, then the Democrats—with public support—will change the structure and makeup of the Court whenever the Democrats gain the opportunity.

The senators, in short, threatened court packing. If the Democrats win control of both congressional branches and the presidency in 2021 or subsequently, they could pass a statute adding new justices to the Court. The Court has numbered nine justices for the past 150 years, but the Constitution does not fix the number. In fact, before 1869, Congress had enacted statutes changing the Court’s size seven times, often for political reasons. During one politically volatile decade, Congress increased the Court to ten seats, dropped
it to seven, then settled on nine. If the Roberts Court sufficiently angers the public and Democrats gain the political power, what would stop the Democrats from expanding the Court and appointing new justices? The Democrats would need to add four more justices, increasing the Court to thirteen, to shift the balance of power. A Democratic president would nominate four progressives, who would be confirmed by the Democratic-controlled Senate. The progressives would then hold a seven-to-six majority on the Court, the first progressive or liberal majority in decades, even though the Democrats have won the popular vote in seven out of the last eight presidential elections.\(^8\)

As extraordinary as the senators’ brief was, the response from Senator Mitch McConnell of Kentucky, the Republican majority leader, was even more surprising. He did not bother filing a brief or other official legal document in the case. On August 29, 2019, he sent a letter to the Court, signed by all of his Republican senate colleagues. The Democrats’ threat to pack the Court outraged McConnell. The Court, he wrote, must remain “independent” of politics. The justices must follow the rule of law: “Americans cannot trust that their constitutional rights are secure if they know that Democrats will try to browbeat this Court into ruling against those rights.” The justices should know that the Republicans “will brook no threats” to the Court’s neutrality.\(^9\)

So there it is. The Democrats accuse the conservative justices of deciding one case after another in accord with the Republican political agenda. If the justices do not stop and instead follow the law, then the Democrats will have no choice but to pack the Court. In response, the Republican senators in effect said to the Court, “Don’t worry, we’ve got your back.”\(^10\) Progressive political commentators echoed the Democratic call for court packing, provoking backlash from conservative commentators. More significant, during the 2019 presidential campaign season (leading up to the 2020 election), at least two Democratic hopefuls, Senator Elizabeth Warren and Senator Kamala Harris (who would become vice president-elect), supported the possibility of court packing. And former Attorney General Eric Holder recommended that Democrats “should consider expanding the Supreme Court.”\(^11\) Yet other Democrats then campaigning for the presidential nomination (as well as some progressive commentators) remained more circumspect. They acknowledged that something must be done about the Court, but please: no court packing. Pete Buttigieg and Beto O’Rourke supported adding justices but only in a way that would supposedly “depoliticize” the Court, while Senator Bernie Sanders suggested that the current justices could be demoted to lower federal courts. Most important, the eventual Democratic president-elect, Joe Biden, opposed court packing (more on that at the end of this chapter).\(^12\)
When it comes to Supreme Court decision making, both sides—Republicans and Democrats—subscribe to a law-politics dichotomy: the idea that law and politics must remain separate and independent. The justices must decide cases by neutrally applying the rule of law. Politics is a disease that threatens the health of the judicial process. If politics infects Supreme Court decision making, then Court decisions are tainted. In an interview given soon after McConnell sent his letter, Chief Justice John Roberts reiterated the law-politics dichotomy: “We will continue to decide cases according to the Constitution and laws without fear or favor. That’s necessary to avoid the politicization of the Court.” His message was unambiguous: Politics corrupts adjudication, and the justices will have none of it.\(^\text{13}\)

The most common criticism of court packing is that it will undermine the law-politics dichotomy. Republicans and Democrats alike profess to worry that court packing will destroy the legitimacy of the Supreme Court as a judicial institution. The Court must be kept clean of politics so that its decisions are based on the rule of law.\(^\text{14}\) And nowadays, some Democrats worry that if they seize an opportunity to pack the Court, the Republicans will respond tit-for-tat, repacking the Court with new conservative justices when they get the opportunity. Once the Court is politicized, there will be no going back.\(^\text{15}\)

The law-politics dichotomy, though, is a myth, propagated over the years for professional and political reasons. Contrary to this myth, law and politics dynamically interact in Supreme Court decision making. Law is neither the handmaiden of politics nor mere window-dressing, hiding political machinations. But law should never be understood as being separate and independent from politics, at least in Supreme Court decision making. In most cases, the justices sincerely interpret the relevant legal texts—the Constitution, statutes, executive orders, and so on—but interpretation is never mechanical. No algorithmic method reveals the correct meaning of the text.\(^\text{16}\) Constitutional interpretation, in particular, is never merely two plus two equals four. Instead, the justices’ political ideologies always influence their interpretations of the Constitution and other texts, so law and politics always intertwine in the adjudicative process. If politics writ large is the purposeful and overt pursuit of political goals—think of members of Congress trying to enact a statute—then Supreme Court decision making is typically politics writ small. Politics shapes the justices’ interpretive conclusions even though the justices focus on the law. Politics writ small inheres in legal interpretation—or, to put it conversely, legal interpretation is politics writ small. Unsurprisingly, then, the justices’ legal interpretations and judicial conclusions ordinarily coincide with their political preferences.
If the Court decides cases pursuant to a law-politics dynamic—and the law-politics dichotomy is a myth—then the primary criticism of court packing vanishes. If Supreme Court decision making is not and never has been apolitical, then court packing cannot undermine the legitimacy of the Supreme Court as an apolitical institution. Court packing cannot infect the Court with politics because the law-politics dynamic is already (and always) inherent in legal interpretation and Supreme Court adjudication. Whether or not Democrats pack the Court, Supreme Court decision making will continue to be simultaneously partly legal and partly political.

Once we put aside the specious concern about preserving a law-politics dichotomy, then we can consider the crucial normative question: Should the Democrats add justices to the Court if they have the opportunity? The unequivocal answer: Yes. Pack the Court!

History reveals that Congress has repeatedly changed the number of justices based largely on political grounds—seven times by express statute. The Court has fluctuated between a minimum of six and a maximum of ten seats. Nothing in the Constitution precludes Congress from enacting statutes changing the Court’s size. Most recently, for more than a year from February 2016 to April 2017, McConnell and a Republican-controlled Senate Judiciary Committee de facto reduced the Court to eight justices when they refused to open confirmation hearings for Democratic President Barack Obama’s nominee Merrick Garland (nominated to fill the seat of the deceased Justice Antonin Scalia). After the Republican Donald Trump was elected president, McConnell and the Republicans returned the Court to its nine-justice size by confirming President Trump’s substitute nominee, Neil Gorsuch.17

If history does not preclude Democratic court packing, the politics of the Roberts Court cements the need for it. Despite claiming to follow the rule of law, the Roberts Court has consistently decided cases in accord with a conservative political agenda. Corporations and the wealthy usually win; the poor might not even get into court.18 Employers win; unions and employees lose.19 Whites win; people of color lose.20 Men win; women lose.21 Christians win; non-Christians lose.22 Republicans with entrenched political power win; Democratic voters lose.23 Gun owners win; everybody else loses.24

Political science empirical studies underscore the political tilt of the Court. Ever since the conservative Clarence Thomas replaced the liberal Thurgood Marshall in 1991, conservative blocs of justices have controlled the Rehnquist and Roberts Courts.25 On the Rehnquist Court, the bloc of Chief Justice William Rehnquist and Justices Scalia, Thomas, Sandra Day O’Connor, and Anthony Kennedy consistently voted together to issue conservative decisions.26 On the early Roberts Court—Roberts became Chief Justice in 2005—the
bloc of Chief Justice Roberts and Justices Scalia, Thomas, Kennedy, and Samuel Alito likewise voted together and reached conservative conclusions. With the conservatives Neil Gorsuch and Brett Kavanaugh recently replacing the conservative Scalia and the moderately conservative Kennedy, respectively, the current Roberts Court is likely to become even more conservative; the addition of Amy Coney Barrett after Ruth Bader Ginsburg’s death cemented a six-justice conservative bloc. The early Roberts Court already ranked as the most pro-business Supreme Court since World War II. The five conservatives ranked among the top ten justices most favorable to business from the 1946 through the 2011 terms. Alito and Roberts stood first and second on the list. In free-expression cases, the conservative justices supported the First Amendment claims of conservative speakers far more strongly than those of progressive speakers. Progressive justices also showed an in-group bias toward progressive speakers, but not as strong as that of the conservative justices. And as one might expect, the conservative justices shaped the Court’s docket in accord with their political concerns. For instance, a study focusing on the period from May 19, 2009, to August 15, 2012, concluded that the U.S. Chamber of Commerce, representing business, filed more amicus briefs supporting petitions for certiorari (requesting Supreme Court review) than any other organization. The chamber had the second-highest success rate. Compared with a similar study conducted five years earlier—partially during the Rehnquist Court years—the new study underscored that the top sixteen filers of certiorari-stage amicus briefs are now “more conservative, anti-regulatory, and pro-business” than the previous top sixteen, which already were strongly pro-business. The findings also showed that these briefs influence the justices’ decisions when shaping the Court’s docket. A pro-business Court responds positively to pro-business petitioners.

If the Democrats were to gain control of both houses of Congress and the presidency in 2021 or later, they would undoubtedly begin enacting statutes implementing a progressive agenda. They might pass laws creating universal health care, strengthening environmental protections and fighting climate change, combatting structural and unconscious racism, protecting public health from pandemics (such as the novel coronavirus), restricting gun ownership, restoring and fortifying voting rights, and protecting documented and undocumented immigrants. The Roberts Court, with its current personnel, could invoke and construct constitutional barriers that would threaten all of these laws. In the fall of 2019, conservative political commentators began laying the seeds for such a judicial backlash, arguing that Elizabeth Warren’s progressive agenda, for example, showed “open contempt for legal and constitutional boundaries.” But with control of both houses of Congress
and the presidency, the Democrats could also enact a statute adding justices to the Supreme Court. And even the Roberts Court might find it difficult to find such a law unconstitutional, given the long history of congressional adjustments to the Court’s size.

This book presents a historical, analytical, and political argument justifying court packing in general, and Democratic court packing more specifically whenever the Democrats gain sufficient control over the national government. Chapter 2 traces the numerous changes that Congress made to the size of the Court over the nation’s first century. The chapter begins by explaining the constitutional provision establishing a Supreme Court and its lack of guidance regarding the Court’s size. It then concentrates on political disputes that engendered congressional enactments changing the number of justices. Key time periods were the early national years, particularly when the election of 1800 transferred political power from the Federalist administration of John Adams to the Republican administration of Thomas Jefferson, and the Civil War and Reconstruction era. From 1861 to 1869, politically driven Congresses changed the number of authorized Supreme Court seats from nine to ten to seven to nine.

Chapter 3, also historical, focuses on the most famous attempt at court packing: President Franklin D. Roosevelt’s court-packing plan of 1937. During the 1930s, the nation’s form of democratic government transformed. The United States had long been a republican democracy, emphasizing the virtuous pursuit of the common good. But because of a variety of economic, social, and cultural forces, pluralist democracy supplanted republican democracy. As manifested in FDR’s New Deal, pluralist democratic government emphasized a process open to a diversity of values and interests. Widespread political participation became paramount. Throughout much of the 1930s, however, conservative justices on the Court resisted this transition and continued to apply republican democratic principles, which led the Court to invalidate multiple New Deal statutes. In 1936, FDR was reelected in a landslide. With this popular affirmation of the New Deal, he introduced a court-packing plan that would have increased the size of the Court from nine to a maximum of fifteen justices. If the Court insisted on blocking the New Deal, he would change the structure and makeup of the Court. While Congress debated FDR’s court-packing plan, the Court shifted its position, accepting pluralist democracy and upholding all types of New Deal legislation.

Chapter 4 follows the history of the law-politics dichotomy itself. The chapter emphasizes three key periods in the development of the dichotomy. The first is the early national period. Judicial and legislative functions initially overlapped; law and politics were not sharply separated. A legislature, for in-
stance, might review a court decision. But during the 1790s and early 1800s, judicial and legislative functions became more distinct, with courts starting to carve out a realm of law ostensibly separate and independent from politics. The second key period was after the Civil War, when university-based law schools first emerged. To justify a position in the postbellum universities, law schools needed to teach and study a pure science of law, distinguished from other university disciplines such as history, sociology, economics, and political science (or government). The third key period was the 1930s and 1940s, after the Court accepted the nation’s transition from republican to pluralist democracy. With that transition, the Court needed to wrestle with its own function or role when exercising judicial review, adjudicating the constitutionality of legislative and executive actions. Ultimately, the historical development of the law-politics dichotomy underscores that political and professional forces engendered and sustained the dichotomy. Lawyers, judges, and law professors trace, justify, and protect a realm of power—legal-judicial power—by distinguishing that realm from politics. Supposedly, within the legal-judicial realm, only legal professionals are trained and equipped with sufficient knowledge to understand and resolve legal issues and disputes.

Chapter 5 analytically critiques the law-politics dichotomy. While legal scholars (and other legal professionals) tend to insist that the Court decides cases apolitically pursuant to the rule of law, some (though not all) political scientists argue the opposite: that Supreme Court decision making is purely political. Justices vote according to their political ideologies; legal principles and doctrines are irrelevant. Drawing on both legal and political science scholarship, the chapter aims for a middle ground: Neither pure law nor pure politics determines Supreme Court votes and decisions. Both disciplines, law and political science, are partly correct: Law and politics together dynamically shape Supreme Court adjudication. This analysis exposes the law-politics dichotomy as a myth. In Supreme Court decision making, law and politics cannot be separate and independent. Delving deeply into legal interpretation, the chapter explains how a law-politics dynamic animates Supreme Court adjudication. Always. Politics cannot be banished from the Court’s interpretation and application of legal texts, whether the Constitution, a statute, or otherwise. But despite the importance of politics, a distinction between politics writ small and politics writ large underscores that, in most cases, the justices sincerely interpret and apply the relevant legal texts. While this chapter focuses on legal interpretation and Supreme Court decision making, it has important implications for court packing. Namely, if the law-politics dichotomy is a myth and the Court always decides pursuant to a law-politics dynamic, then court packing cannot undermine the legal purity of the Court. The Court was
never a pristine legal-judicial institution in the first place; it was never bereft of political influence.

Chapter 6 further explores the implications of the law-politics dynamic. Ironically, recognizing the law-politics dynamic is unlikely to change Supreme Court decision making in any significant manner. The justices will continue doing as they have always done: They will sincerely interpret and apply legal texts as they decide cases. And in doing so, they will continue deciding pursuant to politics writ small, at least in most cases, (and politics writ large in the rare case). For this reason, the justices’ sincere legal judgments will almost always correspond with their political ideologies. When the conservative Justice Alito disagreed with the progressive Justice Ginsburg on the interpretation of the First Amendment free-speech clause, to take one example, neither justice was lying or being disingenuous. Most likely, they both sincerely interpreted the constitutional text, but they did so from distinct political horizons. They could each attempt to persuade the other of the correct interpretation, but they were unlikely to do so—partly because no mechanical method can prove the right answer, and partly because their opposed political ideologies informed their respective interpretive judgments.\footnote{\textsuperscript{33}}

Chapter 6 next explains the implications of the law-politics dynamic for politicians, commentators, and citizens, all of whom should dismiss the claims of justices and would-be justices (Supreme Court nominees) to be apolitical in applying the rule of law. Laypeople should realize that the Court paradoxically justifies and increases its political power by denying its political power. The justices are empowered to decide cases in accord with their political views partly because they maintain that they are rigidly following the law. Originalism, a favored interpretive method of many conservative jurists and scholars, is discussed as an example. Originalism ostensibly uncovers a fixed and objective (and therefore apolitical) meaning for the Constitution by requiring the justices to discover the original public meaning of the constitutional text. But, of course, originalism, no more than any other interpretive approach, does not cleanse politics from Supreme Court adjudication. Instead, originalism facilitates conservative conclusions by conservative justices—a predictable outcome once one recognizes that politics writ small is inherent to the Court’s decision making.

Given the extent to which law and politics intertwine in Supreme Court interpretation and adjudication, presidents unsurprisingly choose, and Congresses typically confirm (or reject), Supreme Court nominees based heavily on political considerations, despite the usual insistence by all involved that politics must be irrelevant to the Court’s business. Contrary to conservative claims that Democrats politicized and ruined the appointment process in
1987 when they refused to confirm Robert Bork, presidents starting with George Washington have seen Congress shoot down their nominees for political reasons. Throughout American history, nearly one-fourth of the Supreme Court nominees have failed. The list of those seriously challenged at least partly on political grounds includes John Rutledge (a key constitutional framer), Louis Brandeis, Felix Frankfurter, John Marshall Harlan II, Thurgood Marshall, and Abe Fortas. (All of these individuals ultimately served at least some time on the Court, though Rutledge served less than a year on a recess appointment.) Chapter 6 concludes by briefly exploring the ramifications of the law-politics dynamic for legal scholars.

Chapter 7 explores one final important implication of the law-politics dynamic: While consistently emphasizing that they neutrally follow the rule of law, the conservative Roberts Court justices have issued numerous conservative judicial decisions. Focusing primarily (though not exclusively) on constitutional cases, the chapter demonstrates that the conservative justices protect an undemocratic society in which wealthy white Christian men predominate and hold power. The cases are organized into the following categories: the Court’s denigration of democratic government; the Court’s protection of wealth and the economic marketplace; the Court’s failure to protect women; the Court’s protection of whites and disregard for people of color; and the Court’s protection of mainstream Christianity but not non-Christian religions. Of course, since politics is always part of Supreme Court decision making, these conservative decisions are predictable—when a conservative bloc of justices controls the Court. Given this, the best remedy for the Court’s conservatism is court packing. If given an opportunity, Democrats should add as many justices as necessary to create a progressive majority. While the first six chapters articulate a historical and analytical argument justifying court packing in general, Chapter 7 presents a political argument, based on the Roberts Court decisions, justifying Democratic court packing in particular. And undoubtedly the determination to pack the Court will be made politically; no specific set of criteria must be satisfied. The Court’s failure to protect and strengthen democracy will certainly loom large in political calculations, but it will ultimately be the corpus of the Roberts Court’s decisions that will determine the public and political sentiment. Chapter 7 concludes with a section analyzing counterexamples: the Roberts Court’s seemingly liberal or progressive decisions that an opponent of court packing might emphasize. Based on this handful of decisions, the opponent of court packing might declare that the Court is not conservative enough to justify Democratic court packing. But, as will be demonstrated, most of these decisions contain substantial conservative elements.
Chapter 8, the Conclusion, summarizes the book’s historical, analytical, and political argument and recommends that Democrats pack the Court whenever they gain the opportunity, whether in 2021 or later. Rather than viewing history as establishing a norm against court packing, as some have suggested, we should understand history as showing the Court engaged in a type of dialogue with Congress, the president, and the public about the scope of judicial power. If and when the Democrats electorally sweep Congress and the presidency, the Court will be pressured to respect Democratic political power. Perhaps John Roberts and other conservative justices will shift in a progressive direction, but given the current polarization in American politics, such a shift seems improbable. As the chapter discusses, the Roberts Court’s conservatives and their legal-constitutional doctrines are likely to derail progressive Democratic enactments and policies. Almost certainly, the Democrats will need to add progressive justices to the Court to avoid lengthy pitched legal-political battles against the conservative justices. Finally, Chapter 8 considers one last objection to court packing. Even if this book’s argument is valid—that is, that not only is court packing in general justifiable, but that Democratic court packing is justified in our current circumstances—what if court packing will nonetheless undermine the Court’s legitimacy in the eyes of the people? In other words, even if the law-politics dichotomy is a myth, even if the Court always decides pursuant to a law-politics dynamic, what if court packing by Democrats causes many people to lose faith in the Court’s authority? The chapter answers this question by drawing on political science research demonstrating a positivity bias. The Court has developed a sufficient reservoir of goodwill so that court packing would be unlikely to diminish its legitimacy; any focus on the Court (even because of court packing) is likely to reinforce the public’s positive perceptions of the institution.

Court packing is not the threat to the Supreme Court’s institutional legitimacy that many fear. To be sure, court packing would wield political power against the justices in an effort to influence the Court’s decision making. But politics has always pervaded the Court and its processes. The historical chapters of this book—Chapters 2 to 4—demonstrate that politics has always been part of the nomination process, the confirmation process, and, significantly, the process of setting the number of justices on the Court. The analytical chapters—Chapters 5 and 6—demonstrate that politics is always part of legal interpretation and the Court’s decision-making process. To pretend that politics infects and corrupts the judicial process is to deny the obvious.
Together, then, the historical and analytical chapters justify court packing in general. Because politics pervades the Court’s makeup and adjudicative process, court packing cannot destroy the Court’s institutional purity—the Court’s decisions always and already combine law and politics. But even if court packing is sometimes justifiable—the subject of Chapters 2 to 6—that does not necessarily mean that court packing is justified in our current circumstances. Should the Democrats, in other words, pack the Court when they have the opportunity? Chapter 7 answers this political question: The conservative politics of the Roberts Court demands a political response by Democrats. The Republicans’ rushed confirmation of Barrett barely a week before Election Day in 2020—after refusing in 2016 to consider Garland, nominated more than seven months before Election Day—only reinforces the Democrats’ political position.

But here we should pause. Democrats can consider a multitude of political responses to the Court’s conservatism. Recall that in 2019, some of the Democratic presidential candidates advocated changing the Court without packing it. Potential changes other than court packing fall into two general categories. First, dozens of times throughout American history Congress has attempted to limit or reduce the scope of the Court’s power. The specifics of these court-curbing efforts typically reflected the particular contemporary political disputes. For instance, during the Progressive era of the early twentieth century, Congress considered a bill that would have required at least a two-thirds majority of the justices to invalidate congressional (presumably Progressive) legislation. More frequently, Congress has considered bills that would carve away part of the Court’s subject matter jurisdiction—for all cases involving abortion, to take one example, or for all cases involving national security, to take another. If these court-curbing bills had been enacted into law, then the Court would have been precluded from hearing and deciding cases in the designated areas. The most extreme of these proposals would completely remove the Court’s power to decide constitutional issues.

Second, particularly in recent years, commentators have suggested changes to the Court’s size and makeup that would ostensibly “save” or “preserve” its institutional role as an apolitical, “nonpartisan,” or “neutral” judicial decision maker. These proposals can be subdivided into two basic types. First, some recommend term limits for the Supreme Court justices. While the specifics can vary, the typical proposal suggests staggered eighteen-year terms so that each president appoints a justice every two years. Second, several commentators propose expanding the number of justices in some stylized fashion so the expansion does not amount to straightforward court packing (simply adding justices to shift the partisan balance on the Court). For
instance, Tracey George and Chris Guthrie recommend increasing the Supreme Court to fifteen justices who would function more like judges on a federal Circuit Court of Appeals. That is, randomly selected panels of three justices would decide most cases, while all the justices sitting en banc would decide the unusual or special case. Daniel Epps and Ganesh Sitaraman have developed two alternative schemes also based on a stylized Court expansion. One they call the “Supreme Court Lottery”: Every judge currently on a federal Circuit Court of Appeals would literally become a Supreme Court justice (there are currently 179 circuit court judges). Out of this pool, random panels of nine would decide cases. Panels, though, would be politically restricted: “[E]ach panel would be prohibited from having more than five Justices nominated by a President of a single political party (that is, no more than five Republicans or Democrats at a time).” The second scheme they call the “Balanced Bench.” It would increase the Court to fifteen justices, including five Republicans and five Democrats: “These ten Justices would then select five additional Justices chosen from current circuit (or possibly district) court judges. The catch? The ten partisan-affiliated Justices would need to select the additional five Justices unanimously (or at least by a strong supermajority requirement).”

These potential changes to the Court—whether a court-curbing measure, an imposition of term limits, or a stylized expansion—are all problematic. Most, if not all, of them are of questionable constitutionality. Given this, one might expect the Roberts Court to invalidate any enacted change: After all, these proposals would diminish the power of either the current justices or the Court as a whole. As Chapter 7 discusses, the Roberts Court (and the Rehnquist Court before it) has been wary of congressional enactments, so the justices would likely be hostile to any congressional tampering with the Court itself. Some of the proposals have problems unique to them. For example, any court-curbing reduction of the Court’s subject matter jurisdiction would only dent the Court’s power. If Congress were to attempt to eliminate the Court’s power to adjudicate the constitutionality of race-based affirmative action programs, to take one illustration, the Court would still be empowered to protect the wealthy and the economic marketplace, to protect mainstream Christians rather than religious minorities, and to protect men but not women. Historically, such court-curbing measures have rarely been enacted and have achieved only “relative success,” with that limited success typically arising only because one or more justices shifted their judicial positions in response to the court-curbing threat. In the words of the political scientist David O’Brien, if Congress seeks to control a recalcitrant Court, “[c]ourt-curbing legislation is not a very effective weapon.” To be sure, as suggested above, in these
highly polarized times we cannot reasonably anticipate a court-curbing threat to induce one of the conservative justices to shift leftward. Finally, any change to the Court that would ostensibly return it to apolitical or neutral decision making will necessarily fail. As Chapters 5 and 6 explain, the Court always decides cases pursuant to a law-politics dynamic. Apolitical Supreme Court adjudication is a myth. At best, some of the proposed stylized expansions of the Court will leave us with a plethora of five-to-four or eight-to-seven decisions in politically salient cases (or some other partisan split, depending on the total number of justices). In fact, even supposedly neutral decisions are likely to be conservative because polarization has pushed Republican justices more rightward than it has pushed Democratic justices leftward.47

From the Democratic standpoint, when straightforward court packing is compared with the possible alternative changes to the Court, it is superior in two important ways.48 First, the constitutional arguments recognizing Congress’s power to change the size of the Court—without any of the stylized alterations suggested by other commentators—are overwhelmingly strong. Even the current Court, consistently hostile to congressional enactments, would find it difficult to invalidate a statute simply adding justices to the Court.49 Second, only court packing would ensure that an altered Court—a newly progressive Roberts Court—would be able to counter the conservative legacy of the current Roberts Court. As described in Chapter 7, the Roberts Court’s conservatism is deep and wide. The Court has handed down numerous conservative decisions and constructed conservative constitutional doctrines that, if left untouched, can lead to conservative results in the Supreme Court and the lower courts for decades. Democrats can guarantee a change in direction only by establishing a progressive majority on the Court. In fact, if the current Roberts Court were to feel threatened, whether by a court-packing or a court-curbing bill, the conservative justices might be motivated to imminently construct even more and deeper conservative doctrines before it is too late. For instance, the conservative justices might reach for an abortion case that would allow them to overturn Roe v. Wade and eliminate a woman’s right to choose abortion, or they might reach for a Second Amendment case that would allow a strengthening of gun rights.50 Only outright Democratic court packing could overcome the current Court’s substantial conservative legacy.

In sum, to stop the Roberts Court from issuing one conservative decision after another, to prevent the Roberts Court from thwarting a future progressive legislative agenda, the best Democratic approach is to change the makeup of the Court. More specifically, the Democrats should pack the Court by adding at least four progressive justices.51 But what happens when
Democratic President-elect Joe Biden is sworn into office in January 2021 (as of this writing, on November 7, 2020, he was president-elect, though President Trump was raising unsubstantiated legal challenges and refusing to concede; control of the Senate remained in doubt because of Georgia’s runoff elections)? Biden has previously opposed court packing, so is the possibility already dead? No, for four reasons. First, Democrats in Congress might pass a court-packing bill, and Biden, when confronted with the bill, might acquiesce to the wishes of his party. Second, and related to the first point, Vice President-elect Harris (and other presidential advisers) might persuade Biden to change his position and support court packing. Third, the death of Justice Ginsburg and the Republicans’ rushed confirmation of Justice Barrett changed the political calculus surrounding court packing, as Biden himself acknowledged. (He suggested the possibility of creating a commission to study potential Court changes.) Finally, if (or when) the Roberts Court, as currently constituted, starts invalidating Democratic statutes passed under Biden’s watch, the Court itself might provoke him to recognize the need for court packing.