

## NOTE

### A SWITCH IN TIME TO DESTROY NINE

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*In 1937 President Franklin Roosevelt attempted one of the most shocking reforms to a political institution in the United States when he attempted to pack the Supreme Court. What was a radical reform then continues to be framed as such. By far one of the most controversial policy proposals of the 2020 Presidential Campaign was the progressive proposals to engage in the expansion of the federal judiciary. Many Democrats and Republicans admonished these proposals for breaking democratic norms. This Note argues that Democrats should pursue court expansion as a policy goal. I argue that political leaders must play constitutional hardball in order to advance institutional change in the United States. Without reforms to institutions such as the federal judiciary, these bodies will become continuously less responsive to the needs of the citizenry and the political climate of the nation. This Note will discuss several alternative proposals to expand the Court and which may be most politically and legally viable. Ultimately, I argue that the most idyllic form of democracy will be attained if engaged citizens demand that their leaders act with courage and erode norms that no longer function. Demanding some form of expansion of the Supreme Court should be the first step in our journey to that ideal.*

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## INTRODUCTION

“Extraordinary in its hubris” is how constitutional scholars Jeffrey Segal and Lee Epstein described FDR’s plan to expand the Supreme Court.<sup>1</sup> While FDR’s court-packing plan was thwarted by Justice Robert’s “switch in time,” a current political switch in time has provoked conversations about modern court-packing.<sup>2</sup> Scholars have warned that expanding the court in a game of constitutional hardball will erode institutions on which democracy depends.<sup>3</sup> This note argues that concerns about the breakdown of norms reflect an underlying fear of radical social change that, while founded, should not be debilitating to institutional reform. This Note will argue that conversations about court-packing, even if they are “extraordinary in [their] hubris” should continue.<sup>4</sup> Political leaders must use constitutional hardball to create necessary institutional change in the face of institutions that are increasingly less responsive.

Part I will supply background on constitutional hardball and norm erosion. It will provide an overview of arguments about the dangers of playing constitutional hardball. Additionally, Part I will discuss the scholarly framework for thinking about norm erosion and will address the assertions of scholars that erosion of constitutional norms may signal the end of American democracy.

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<sup>1</sup> JEFFERY A. SEGAL & LEE EPSTEIN, *THE POLITICS OF JUDICIAL APPOINTMENTS* 46 (Oxford University Press 2005).

<sup>2</sup> *See id.*; *see also* Laura Kalman, *Law, Politics, and the New Deal*, Yale L.J. 2165, 2172–74 (1999).

<sup>3</sup> *See generally* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018) (arguing that the small subversion of norms is harmful to democracy and that while norm breakdown should not be wholly rejected there are advantages to norm stability); STEPHEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018) (arguing that norm erosion causes democracy to breakdown).

<sup>4</sup> SEGAL & EPSTEIN, *supra* note 1, at 46.

To analyze constitutional hardball policies, this Note will consider constitutional hardball within the context of policies effecting the appointment of federal judges. This Note will consider court packing in its various forms. Part II will provide historical background for court packing. Part III will analyze conservative court packing—the set of policies used by Republicans in the executive and legislative branches over the past decade to hold open seats in the federal judiciary and fill them with conservative appointees. By blockading and packing the federal bench, conservatives engaged in a game of constitutional hardball that radically changed the institution of the federal judiciary. Part IV will analyze the various progressive court packing policies that would expand the membership of the Supreme Court.

Part V will compare conservative and progressive court packing policies. It will discuss why conservative court packing has gone relatively unnoticed whereas the mere mention of Supreme Court expansion sparks outrage and debate. This Part will consider why there seems to be greater comfort with the Republican plan than the Democratic one and what that may signal about the sorts of institutional change that legal scholars, policy makers, and voters are comfortable with. Ultimately, this Note will argue that the discomfort with constitutional hardball and norm erosion is caused by a fear of radical institutional change. Nonetheless, radical institutional change and the risks that it entails may be worth taking and, moreover, may present the only solutions to the political impasse in American politics. As such, Democrats should take their next opportunity during a moment of unified government control to expand the Court.

## I. FRAMEWORK FOR CONSTITUTIONAL HARDBALL AND NORM EROSION

“Constitutional hardball” refers to practices by political actors that are within the bounds of constitutional doctrine but push the traditional understanding of constitutional norms.<sup>5</sup> This norm pushing is called hardball because each side plays for institutional victories that could permanently alter the political landscape.<sup>6</sup>

Constitutional hardball is distinguishable from political hardball because it strains constitutional norms.<sup>7</sup> Constitutional norms are informal norms that constrain government actors.<sup>8</sup> Constitutional hardball taxes constitutional norms because actors engaged in constitutional hardball

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<sup>5</sup> Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

<sup>6</sup> *Id.*

<sup>7</sup> Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 18 COLUM. L. REV. 915, 921 (2018).

<sup>8</sup> Chafetz & Pozen, *supra* note 3, at 1433.

necessarily stretch the powers or limits of the institution that they are a part of.

Examples of constitutional hardball include the impeachment of President Bill Clinton<sup>9</sup> and the Senate blockade of Judge Merrick Garland's nomination to the Supreme Court.<sup>10</sup> While scholars often cite modern cases of constitutional hardball, the phenomenon is not new. Historical illustrations of constitutional hardball are President Franklin Roosevelt (FDR) attempting to pack the Supreme Court in 1937 and the northern states' use of martial law during Reconstruction to force the southern states to ratify the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>11</sup>

The breakdown of constitutional norms implicated in constitutional hardball are not monoliths. Chafetz and Pozen argue that there are three distinctive ways in which constitutional norms erode.<sup>12</sup> Actors destroy, decompose, or displace constitutional norms.<sup>13</sup> Different types of constitutional hardball may implicate distinct types of constitutional norm erosion.<sup>14</sup> Disparities between types of norm erosion may help explain why some instances of constitutional hardball are excepted while others are not.

"Norm destruction" is the flouting of a constitutional norm that, in turn, makes that norm obsolete.<sup>15</sup> The destruction of the norm may be temporary or permanent.<sup>16</sup> An example of norm destruction is FDR serving as president for four terms.<sup>17</sup>

"Norm decomposition" is the reinterpretation of a constitutional norm that facially seems to comply with the norm but is applied in a way that flouts the norm.<sup>18</sup> This form of norm erosion does not directly challenge the old norm. Rather, it replaces the old norm with a new one over time. In this way, it looks more like evolution than erosion. Chafetz and Posen assert that norm destruction and norm decomposition are not distinct categories that norm erosion can be neatly divided into.<sup>19</sup> Instead, the two types of evolution represent the opposite ends of a norm-evolution spectrum.<sup>20</sup>

<sup>9</sup> Tushnet, *supra* note 5, at 527.

<sup>10</sup> Fishkin & Pozen, *supra* note 7, at 917.

<sup>11</sup> Tushnet, *supra* note 5, at 544; PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 348 (7th ed. 2018).

<sup>12</sup> Chafetz & Pozen, *supra* note 3, at 1435.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Separate from this spectrum is norm displacement.<sup>21</sup> “Norm displacement” is a change of a constitutional norm as the result of a new law.<sup>22</sup> Often, this is the result of a breakdown of a norm on the destruction/decomposition spectrum which is later codified into law.<sup>23</sup> Such was the case when the Twenty-First Amendment was passed in response to the destruction of the constitutional norm of a two-term presidency.<sup>24</sup>

Scholars and policymakers generally disfavor norm breakdown as a method for democratic evolution. This is apparent even in the vocabulary—calling these acts norm erosion instead of norm evolution. Norm erosion is even more disfavored when it is implemented through acts characterized as constitutional hardball. In *How Democracies Die*, Levitsky and Ziblatt argue that the breakdown of long-established norms can signal and cause the death of a democracy.<sup>25</sup>

In the United States, Levitsky and Ziblatt argue that two norms underlie our constitutional system: mutual toleration and institutional forbearance.<sup>26</sup> Institutional forbearance is especially relevant to constitutional hardball. Levitsky and Ziblatt posit that constitutional hardball is the opposite of institutional forbearance in that it exploits the virtues of the party in power’s place in the institution to forward their own agenda.<sup>27</sup> They state that eroding these norms and others through these tactics is, at best, ineffective and, at worst, a threat to democracy.<sup>28</sup>

Despite scholars’ pessimism about the use of constitutional hardball and norm erosion, not all perspectives are so despondent. American political theorist Corey Robin embraces a different view.<sup>29</sup> Robin asserts that norm erosion is, ultimately, a basic tenant of democracy.<sup>30</sup> He argues that norm erosion is disruptive to institutions but not necessarily fatal to democracy.<sup>31</sup> In fact, the disruption of institutions is sometimes required to sustain a functioning democracy.<sup>32</sup> Such was the case with the destruction of the institution of slavery and the implementation of the Reconstruction amendments. Sometimes, norms erosion is necessary for democracy to flourish.<sup>33</sup> However, as Robin points out, “the devil is in

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See LEVITSKY & ZIBLATT, *supra* note 3, at 231.

<sup>26</sup> *Id.* at 102.

<sup>27</sup> See *id.* at 109.

<sup>28</sup> See *id.* at 231.

<sup>29</sup> Corey Robin, *Democracy is Norm Erosion*, JACOBIN (Jan. 29, 2018), <https://www.jacobinmag.com/2018/01/democracy-trump-authoritarianism-levitsky-ziblatt-norms>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

the sometimes.”<sup>34</sup> *Some* norms must be eroded so that democracy can flourish. But *some* norms must remain intact or the fabric of democracy will be compromised.<sup>35</sup>

Nevertheless, there should be a reasoned discussion about what norms should evolve. Refusing to have that discussion and, instead, insisting that all norm erosion is bad is antithetical to democracy.<sup>36</sup> This is the viewpoint that the rest of this Note will embrace—that *some* norm evolution is necessary for a functioning democracy. In the context of the Supreme Court, norm evolution and the constitutional hardball will be required to bring about the change necessary for the Court to function as a more democratic institution.

## II. THE HISTORICAL BASIS FOR COURT PACKING

Under article three, section one of the United States Constitution, Congress has broad authority to regulate the federal courts.<sup>37</sup> This includes Congressional power to set the number of justices that sit on the federal bench.<sup>38</sup> Congress has, for the past 150 years, set the number of Supreme Court justices at nine.<sup>39</sup> But it is not a constitutional mandate that there be nine Supreme Court justices.<sup>40</sup>

Moreover, Congress has passed legislation providing for greater and fewer justices throughout American history. The Judiciary Act of 1789 established the first Supreme Court and set the number of justices at six.<sup>41</sup> Between 1800 and 1869, the President and Congress changed the size of the Supreme Court seven times. Each time the Court’s composition was changed was to further a political agenda.<sup>42</sup> In 1801, a lame-

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<sup>34</sup> Robin asserts that one of the hardest parts of norm evolution is deciding what norms are necessary and which should evolve or erode. For a further discussion, see *id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> U.S. CONST. art. III, § 1.

<sup>38</sup> See U.S. CONST. art. III, § 1. However, despite conventional wisdom and a history that endorses Congress’s power to set the number of seats on the Supreme Court, some scholars argue that the Constitution does not authorize Congress to change the composition of the Court. For an example of this argument, see Peter Nicholas, “*Nine, of Course*”: A Dialogue on Congressional Power to Set by Statute the Number of Justices on the Supreme Court, 2 NYU J.L. & LIBERTY 86, 86–88 (2006).

<sup>39</sup> Judiciary Act of 1869, ch. 22, 16 Stat. 44; *Landmark Legislation: Judiciary Act of 1869*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-circuit-judgeships> (last visited Nov. 6, 2019).

<sup>40</sup> *The Judicial Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/> (last visited Nov. 6, 2020).

<sup>41</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73; *Landmark Legislation: Judiciary Act of 1789*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1789> (last visited Nov. 6, 2019).

<sup>42</sup> LEVITSKY & ZIBLATT, *supra* note 3, at 131.

duck Congress reduced the size of the Supreme Court to five.<sup>43</sup> This change was, largely, to hinder incoming President Thomas Jefferson's ability to appoint a new justice.<sup>44</sup> Jefferson and Congress quickly expanded the court back to six justices.<sup>45</sup> In 1807, Congress expanded the Supreme Court to seven members.<sup>46</sup> In 1837, the Court was expanded to nine justices.<sup>47</sup> During the Civil War, Congress added a tenth justice.<sup>48</sup> In 1866, the size of the Court was reduced to six justices.<sup>49</sup> Then, in 1869, the size of the Court was expanded back to nine justices.<sup>50</sup> The number of justices has since remained at nine.<sup>51</sup>

In 1937, President Franklin D. Roosevelt attempted to expand the size of the Supreme Court.<sup>52</sup> The idea of expanding the Supreme Court was floated in the Roosevelt Administration from its early days.<sup>53</sup> In the late 1920s and early 1930s, the Supreme Court had a decidedly Republican majority.<sup>54</sup> Even on the campaign trail, Roosevelt alluded to changing the composition of the Supreme Court.<sup>55</sup> However, Roosevelt did not act on court packing until 1936.<sup>56</sup> It was not until after Roosevelt and the New Deal Democrat's landslide victory in the 1936 Presidential and

<sup>43</sup> *Landmark Legislation: Judiciary Act of 1801*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-circuit-judgeships> (last visited Nov. 6, 2019).

<sup>44</sup> Judiciary Act of 1801, ch. 4, sec. 3, 2 Stat. 89; *Landmark Legislation: Judiciary Act of 1801*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-judicial-legislation-text-document-1> (last visited Nov. 6, 2019).

<sup>45</sup> 2 Stat. 156; *Landmark Legislation: Judiciary Act of 1802*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1802> (last visited Oct. 10, 2020).

<sup>46</sup> 2 Stat. 420; *Landmark Legislation: Seventh Circuit*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-seventh-circuit> (last visited Oct. 10, 2020).

<sup>47</sup> 5 Stat. 176; *Landmark Legislation: Eight and Ninth Circuits*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-eighth-and-ninth-circuits> (last visited Oct. 10, 2020).

<sup>48</sup> 12 Stat. 794; *Landmark Legislation: Tenth Circuit*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-tenth-circuit> (last visited Oct. 10, 2020).

<sup>49</sup> 14 Stat. 209; *Landmark Legislation: Circuit Reorganization*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-circuit-reorganization> (last visited Oct. 10, 2020).

<sup>50</sup> 16 Stat. 44; *Landmark Legislation: Circuit Judgeships*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-circuit-judgeships> (last visited Oct. 10, 2020).

<sup>51</sup> *About the Supreme Court*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about> (last visited Nov. 6, 2019).

<sup>52</sup> Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 ACAD. POL. SCI. 267, 267 (1988).

<sup>53</sup> William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 U. CHI. PRESS J. 347, 349 (1966).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 348.

<sup>56</sup> Stephan O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad*, 30 McGEORGE L. REV. 863, 896–97 (1999).

Congressional elections that they seriously began to consider court packing as a legitimate policy option.<sup>57</sup> After a series of Supreme Court decisions that struck down New Deal policies, Roosevelt began to prepare to pack the Court with progressive justices.<sup>58</sup>

Roosevelt and the Democrats worried that the Republican-controlled Supreme Court would continue to strike down New Deal policies.<sup>59</sup> It seemed unlikely that seats on the Supreme Court would open in a timeframe that would allow the, now-decided, legislative and executive majority to appoint more sympathetic justices.<sup>60</sup> In response to the realities of the political landscape, the Roosevelt Administration drafted the “Recommendation to Reorganize the Judicial Branch of the Federal Government” which also became known as the Court Packing Plan.<sup>61</sup> The plan was proposed on February 5, 1937.<sup>62</sup>

While the Court Packing Plan is most popularly known for its effect on the Supreme Court, the plan applied to all federal courts.<sup>63</sup> The plan had four primary elements.<sup>64</sup> First, the President would be able to name a new judge to each federal bench for every judge who was older than seventy and had served more than ten years.<sup>65</sup> Second, the Supreme Court would be limited to fifteen members.<sup>66</sup> Third, lower court judges could be reassigned to other districts if necessary.<sup>67</sup> Finally, the Supreme Court would directly supervise lower courts.<sup>68</sup>

From its inception, the Court Packing Plan was controversial.<sup>69</sup> Public opinion on court packing was mixed.<sup>70</sup> Support in Congress, even from New Deal Democrats, was hesitant at best.<sup>71</sup> Republicans unanimously opposed the plan.<sup>72</sup>

Ultimately, the Supreme Court caved in its opposition to New Deal policies.<sup>73</sup> Beginning on the first day of its 1937 term, the Supreme Court narrowly voted to uphold several New Deal policies.<sup>74</sup> This reversal was

<sup>57</sup> *Id.* at 897.

<sup>58</sup> *Id.* at 896–97.

<sup>59</sup> Leuchtenburg, *supra* note 53, at 380–81.

<sup>60</sup> *See id.* at 381.

<sup>61</sup> Kline, *supra* note 56, at 908.

<sup>62</sup> Nelson, *supra* note 52, at 267.

<sup>63</sup> Kline, *supra* note 56, at 909.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 909–10.

<sup>66</sup> *Id.* at 910.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Nelson, *supra* note 52, at 267.

<sup>70</sup> Kline, *supra* note 56, at 917.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 921–22.

<sup>73</sup> *Id.* at 939.

<sup>74</sup> *Id.*



caused by Justice Roberts, who changed his preliminary vote on several New Deal cases that the Court had heard in the previous term.<sup>75</sup> Justice Robert's change of heart in the face of mounting political pressure became popularly known as "the switch in time that saved nine."<sup>76</sup>

No political actor has attempted a blatant court packing plan since the 1937 Court Reform Plan. However, both political parties have discussed, attempted, and implemented plans to tinker with the composition of the federal bench to favor their political ideologies and policies.<sup>77</sup> Some of these policies have succeeded. Democrats abolished the filibuster of presidential appointees,<sup>78</sup> and then successfully confirmed three of President Obama's appointees to the Circuit Court for the District of Columbia.<sup>79</sup> The Republican party has successfully packed the lower federal benches with their own nominees.<sup>80</sup> The Democratic party has recently begun discussing expanding the Supreme Court in a response to the Republican party.<sup>81</sup> This escalation of the pushing of norms of the process for appointment to and composition of the federal bench is a game of constitutional hardball.

### III. CONSERVATIVE COURT PACKING

In 2019, President Trump announced his intention to appoint more judges to the federal bench than any other President. In a November 2019 press conference, President Trump said of his number of judicial appointees, "We are going to be, I think, just about No. 1 by the time we finish—No. 1 of any president, any administration."<sup>82</sup> This may be one of a few goals that President Trump actually achieves. While it is unlikely that his administration will be "number one" it will still shape the federal judiciary for decades to come.<sup>83</sup> President Trump has shown an

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<sup>75</sup> *Id.* at 940.

<sup>76</sup> *Id.*

<sup>77</sup> For further discussion on attempts by political parties to tinker with the court, see *infra* Part III & IV.

<sup>78</sup> Currently, this does not include Supreme Court nominees who, under current Senate procedures, may still be filibustered. See Carl Hulse, *Should Democrats Have Saved Their Filibuster for the New Court Fight?*, N.Y. TIMES (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/politics/supreme-court-filibuster.html>. However, a vote for cloture can easily overcome any hopes that a minority party that is not well-organized has to filibuster a Supreme Court nominee. See Barbara Maranzani, *The Last Time a Supreme Court Nominee was Filibustered*, HISTORY (Oct. 28, 2018), <https://www.history.com/news/the-last-time-a-sctus-nominee-was-filibustered-yes-its-happened-before>.

<sup>79</sup> See Hulse, *supra* note 78.

<sup>80</sup> For further discussion of Republican court packing, see *infra* Part III.

<sup>81</sup> For a more detailed discussion of progressive court packing plans, see *infra* Part IV.

<sup>82</sup> Andrew Cohen, *Conservatives Celebrate Federal Courts' Sharp Right Turn*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/conservatives-celebrate-federal-courts-sharp-right-turn>.

<sup>83</sup> *Id.*

unwavering dedication to nominating judges. President Trump and Senator Mitch McConnell even took time during a global pandemic to nominate and confirm circuit court nominees.<sup>84</sup> Despite President Trump's numerous policy fumbles, judicial appointments were one area where he impacted the national landscape.<sup>85</sup>

However, President Trump's appointment of federal judges has not dramatically outpaced some of his contemporary predecessors.<sup>86</sup> By similar points in their presidencies, Bill Clinton and George W. Bush had appointed similar numbers of judges to the federal bench.<sup>87</sup> He has outpaced President Obama, who had only appointed 124 judges by a similar point in his presidency.<sup>88</sup> In total, only 334 judges were appointed and confirmed during the Obama Administration.<sup>89</sup> The confirmation rate for circuit court appointments fell to about 50% during Barack Obama's presidency.<sup>90</sup> When President Obama left office in January 2017, there were one hundred and three vacancies on the federal bench.<sup>91</sup> This left the newly-elected President Trump with an unusual number of judges to appoint.<sup>92</sup>

The vast number of vacancies on the federal bench were not by chance. In fact, President Obama appointed judges to fill many of the seats that were still vacant at the end of his second term.<sup>93</sup> However,

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<sup>84</sup> Melissa Quinn, *Judicial Machine Chugs Along in Senate Amid Coronavirus Pandemic*, CBS (May 26, 2020), <https://www.cbsnews.com/news/senate-judicial-nominations-judges-coronavirus-pandemic/>.

<sup>85</sup> See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RESEARCH CENTER: FACTTANK (July 15, 2020), <https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.

<sup>86</sup> See Russell Wheeler, *Trump's 200th Judicial Appointment: Less Than Meets the Eye*, BROOKINGS (Jun. 26, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/26/trumps-200th-judicial-appointment-less-than-meets-the-eye/>.

<sup>87</sup> By the end of the third year of their first term, both Bill Clinton and George W. Bush had appointed over one hundred fifty judges. Cohen, *supra* note 82.

<sup>88</sup> *Judicial Appointment Tracker*, HERITAGE FOUND., <https://www.heritage.org/judicial-tracker> (last visited Oct. 1, 2020).

<sup>89</sup> *Judgeship Appointments by President*, U.S. CTS. (Dec. 31, 2018), <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf>.

<sup>90</sup> This was a drastic change from historical precedent. For instance, in the 1980s, the confirmation rate for circuit court judges was over ninety percent. LEVITSKY & ZIBLATT, *supra*, note 3 at 163.

<sup>91</sup> Phillip Rucker & Robert Barnes, *Trump to Inherit More than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), [https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d\\_story.html](https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html).

<sup>92</sup> When President Obama took office, there were only fifty-four vacancies on the federal bench. President Trump had nearly double the number of vacant seats on the federal bench when he took office. *Id.*

<sup>93</sup> The most notable instance of this was President Obama's appointment of Merrick Garland whom the Senate never held a hearing on and, ultimately, never confirmed to the Supreme Court. See Ron Elving, *What Happened with Merrick Garland in 2016 and Why it*

Republicans implemented a policy of obstruction that made it difficult for President Obama to appoint judges to the federal bench. This policy essentially amounted to conservative court packing.<sup>94</sup> The conservative court packing plan was two-fold. First, Republicans used legislative power to blockade the confirmation of federal appointees and hold vacancies open.<sup>95</sup> Then, Senate Republicans modified the rules and norms of the judicial confirmation process to quickly confirm those nominees appointed by President Trump.<sup>96</sup>

#### A. *Blockading Judicial Confirmations*

The Republican legislative blockade of judicial appointees can be traced back to the 113th Congress. As early as 2013, Republicans were using Senate procedures to block President Obama's circuit court appointments. In 2013, Senate Republicans, led by Senate Minority Leader Mitch McConnell, successfully blocked three consecutive presidential appointments to the District of Columbia Circuit Court.<sup>97</sup> While Republicans did not have a majority in the Senate, they held enough seats to effectively filibuster judicial nominees.<sup>98</sup> Since the Democrats could not reach the required sixty-vote majority to end a filibuster, Republicans were able to obstruct several judicial nominations.<sup>99</sup> It was in response to this series of norm-breaking obstructions by Republicans that Democrats decided to respond with norm-breaking behavior.<sup>100</sup> In November 2013, the Democrats utilized the "nuclear option" and eliminated the filibuster for district and circuit court appointments.<sup>101</sup> Democrats instituted this modification by changing Senate rules to only require a simple majority vote to invoke cloture and thereby end a filibuster on a nominee.<sup>102</sup> This move allowed President Obama to fill the vacancies on the District of

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*Matters Now*, NPR (June 29, 2018, 5:00 PM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

<sup>94</sup> This note is not the first source to refer to the Republican scheme of obstruction and mass appointments court packing. See Sam Berger, *Conservative Court Packing*, CTR. FOR AM. PROGRESS (Apr. 3, 2019, 9:01 AM), <https://www.americanprogress.org/issues/democracy/news/2019/04/03/468234/conservative-court-packing/>.

<sup>95</sup> *Id.*

<sup>96</sup> See *id.*

<sup>97</sup> Jeremy W. Peters, *Obama Pick for Court is Third in a Row Blocked by Republicans*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2013/11/19/us/politics/republicans-block-another-obama-nominee-for-key-judgeship.html>.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See LEVITSKY & ZIBLATT, *supra* note 3, at 163.

<sup>101</sup> *Id.*

<sup>102</sup> Bart Jansen, *Democrats Can't Filibuster Brett Kavanaugh's Supreme Court Nomination. What Does Cloture Mean?*, USA TODAY (Oct. 5, 2018, 11:42 AM), <https://www.usatoday.com/story/news/2018/10/05/senate-terms-cloture-and-filibuster-mean/1533133002/>.

Columbia District Court.<sup>103</sup> However, it would also have long-term consequences for a party that was about to become the minority party in the Senate for at least the next seven years.

Republican legislative obstruction continued with even greater success in the 114th Congress.<sup>104</sup> In the 2014 congressional elections, Republicans won a majority in the Senate.<sup>105</sup> Under Republican control, the Senate confirmed fewer judicial nominees than any Congress in the last half-century.<sup>106</sup> This was norm breaking behavior, even in a period of divided government. Historically, even in periods of divided government during a president's final two years in office, the Senate was able to confirm a substantial number of judicial appointments.<sup>107</sup> This period of obstruction reached a crescendo when the Senate refused to hold a hearing to consider President Obama's appointment of moderate federal judge, Merrick Garland, to the Supreme Court.<sup>108</sup> Even as the 2016 election approached, Senate Republicans vowed to obstruct then-presidential frontrunner Hillary Clinton's ability to fill the vacant Supreme Court seat if she won the election.<sup>109</sup> Senate Republicans ultimately did not need to

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<sup>103</sup> Richard Wolf, *Obama, Dems Make Mark on Second Most Powerful Court*, USA TODAY (Dec. 9, 2013, 2:22 PM), <https://www.usatoday.com/story/news/politics/2013/12/09/dc-appeals-court-obama-senate/3909961/>.

<sup>104</sup> Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What has He Done with Them?*, BROOKINGS (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/>.

<sup>105</sup> Arlette Saenz & Ben Siegel, *Senate Elections 2014: Republicans Seize Control of the Senate*, ABC NEWS (Nov. 5, 2014), <https://abcnews.go.com/Politics/senate-elections-2014-republicans-projected-seize-control-senate/story?id=26570135>.

<sup>106</sup> During the 114th Congress, the Senate only confirmed two circuit court judges and eighteen district court judges. See *114th Congress - Judicial Nominations List*, U.S. DEPT. J., <https://www.justice.gov/archives/olp/114th-congress-judicial-nominations-list> (last visited Oct. 2, 2020).

<sup>107</sup> During a period of divided government during his last two years in office, Dwight Eisenhower was able to appoint forty-four judges; Gerald Ford was able to appoint forty-eight; Ronald Reagan was able to appoint eighty-five; George H.W. Bush was able to appoint one hundred and twenty-two; Bill Clinton was able to appoint seventy-three; and George W. Bush was able to appoint sixty-eight. See Anisha Singh & Jake Faleschini, *Infographic: Divided Government Has Not Always Meant Slow Judicial Confirmations*, CTR. FOR AM. PROGRESS (Feb. 23, 2016, 12:50 PM), <https://www.americanprogress.org/issues/courts/news/2016/02/23/120299/infographic-divided-government-has-not-always-meant-slow-judicial-confirmations/>.

<sup>108</sup> See Aaron Rupar, *McConnell Now Says He'd Hold SCOTUS Hearings in an Election Year — In a Reversal of 2016*, VOX (May 29, 2019, 10:40 PM), <https://www.vox.com/2019/5/29/18644061/mitch-mcconnell-supreme-court-hearings-2020-merrick-garland>.

<sup>109</sup> Senator John McCain stated, "I promise you that we will be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up." Nina Totenberg, *Sen. McCain Says Republicans Will Block All Court Nominations If Clinton Wins*, NPR (Oct. 17, 2016, 9:44 PM), <https://www.npr.org/2016/10/17/498328520/sen-mccain-says-republicans-will-block-all-court-nominations-if-clinton-wins>. Senator Richard Burr said, "if Hillary Clinton becomes president, I am going to do everything I can do to make sure four years from now, we still got an opening on the Supreme Court." Sabrina Siddiqui, *Republican Senators Vow to Block Any Clinton Supreme Court Nominee Forever*, GUARDIAN (Nov. 2,

hold the seat open for four years. Nevertheless, they were prepared to do so until a Republican president was in office.

### B. *Quickly Filling Vacant Seats by Breaking Norms*

The second part of the Republican court packing plan involves Senate Republicans modifying Senate rules and norms for judicial confirmations to expedite the confirmation of the vast number of Trump appointees to the seats they spent the past five years holding open. Essentially, since President Trump's election, Senate Republicans have done everything in their power to confirm as many judicial nominees as possible. To do this, Republicans have broken longstanding Congressional norms to speed up the confirmation process.

The first norm that Senate Republicans have broken is receiving input from the home-state Senator about a nominee before holding a confirmation hearing.<sup>110</sup> This is known informally as the blue slip process.<sup>111</sup> Despite a fairly consistent modern history of requiring all judicial nominees to receive positive blue slips before the Senate Judiciary Committee would hold a hearing on the nominee, Senate Republicans changed course on this norm during the Trump administration.<sup>112</sup>

The second norm that Senate Republicans have violated was extending the nuclear option like the Democratic-controlled Senate opted to use in 2013. In April 2017, the Republican-controlled Senate voted to change the Senate rules and allow for cloture of a filibuster of a confirmation vote for a Supreme Court nominee to be invoked by a simple

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2016), <https://www.theguardian.com/law/2016/nov/01/republican-senators-oppose-clinton-supreme-court-nominee>.

<sup>110</sup> See Berger, *supra* note 94.

<sup>111</sup> In essence, the blue slip process works like so: when the President sends the nomination of a new federal judge to the Senate, the Chair of the Senate Judiciary Committee will notify the senators of the home state of the nominee by sending them a blue colored form (hence the name of the process). The senators then have the choice to return the slip with a positive response, negative response, or to withhold the blue slip. If the home state senator returns the slip with either a negative response or does not return the slip it signals to the Judiciary Committee that the senator objects to the judicial nomination. Before the Trump administration, there had been a norm spanning the past decade that those judicial nominees who did not receive positive recommendations from both their home state senators would not see for a hearing before the committee thereby, killing their nomination. See Salvador Rizzo, *Are Senate Republicans Killing 'Blue Slip' for Court Nominees?*, WASH. POST (Feb. 21, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/02/21/are-senate-republicans-killing-blue-slip-for-court-nominees/>.

<sup>112</sup> Even though Senate Republicans followed this tradition during the Obama Administration, the Chairman of the Judiciary Committee, Chuck Grassley, refused to hold confirmation hearings on several Obama nominees after he did not receive blue slips back from Republican Senators. See *id.*

majority vote.<sup>113</sup> This reduced the sixty-vote requirement that is typically needed for cloture in the Senate.<sup>114</sup> This was an extension of Senate Democrat's 2013 utilization of the nuclear option, where they changed the vote requirement to invoke cloture to a simple majority on all judicial nominations except for those to the Supreme Court.<sup>115</sup> Senate Republicans chose to exercise the nuclear option after Senate Democrats successfully blocked the nomination of Justice Neil Gorsuch through a filibuster under the old rule.<sup>116</sup> After changing the rule, the Senate confirmed Justice Gorsuch's nomination.<sup>117</sup> The change in the rule also made the possibility of a successful filibuster of Justice Brett Kavanaugh virtually impossible.<sup>118</sup>

The third norm that Republicans in the Senate have pushed to expedite the appointment of judges is reducing the amount of time for debate permitted on each nominee. In April 2019, Senate Republicans voted by a simple majority to change the Senate rules concerning the time for debate on judicial nominations.<sup>119</sup> Republicans led by Senate Majority Leader Mitch McConnell voted to change the time for debate on judicial nominees from thirty hours to two hours.<sup>120</sup> This move allows the Republican-controlled Senate the opportunity to confirm President Trump's judicial nominees at an even quicker pace.<sup>121</sup> Moreover, this allows the Senate to confirm as many nominees as possible before the 2020 elections.<sup>122</sup>

The fourth norm that Senate Republicans have broken is taking seriously the input of the American Bar Association (ABA) in determining which judicial nominees are qualified to serve on the federal bench. The ABA provides the Senate with rankings of judicial nominees in anticipation of their confirmation votes.<sup>123</sup> The Senate should then take into seri-

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<sup>113</sup> Ashley Killough & Ted Barrett, *Senate GOP Triggers Nuclear Option to Break Democratic Filibuster on Gorsuch*, CNN (Apr. 7, 2017, 9:26 AM), <https://www.cnn.com/2017/04/06/politics/senate-nuclear-option-neil-gorsuch/index.html>.

<sup>114</sup> *Id.*

<sup>115</sup> Jansen, *supra* note 102.

<sup>116</sup> Killough & Barrett, *supra* note 113.

<sup>117</sup> Ariane de Vogue & Dan Berman, *Neil Gorsuch Confirmed to the Supreme Court*, CNN (Apr. 7, 2017, 12:17 PM), <https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/index.html>.

<sup>118</sup> *See* Jansen, *supra* note 102.

<sup>119</sup> Burgess Everett, *Republicans Trigger 'Nuclear Option' to Speed Trump Nominees*, POLITICO (Apr. 3, 2019, 3:47 PM), <https://www.politico.com/story/2019/04/03/senate-republicans-trigger-nuclear-option-to-speed-trump-nominees-1253118>.

<sup>120</sup> Carl Hulse, *In Altering Debate Time, Senate Steadily Hands Reins to Majority Party*, N.Y. TIMES (Apr. 4, 2019), <https://www.nytimes.com/2019/04/04/us/politics/senate-nuclear-option.html>.

<sup>121</sup> *See* Everett, *supra* note 119.

<sup>122</sup> *See id.*

<sup>123</sup> The Standing Committee on the Federal Judiciary ("the committee") within the ABA conducts an independent evaluation of nominees to the federal judiciary. *See* AM. BAR ASS'N,

ous consideration the opinion of the ABA when determining if the nominee will be voted out of the Senate Judiciary Committee and, ultimately, confirmed by the Senate as a whole.<sup>124</sup> However, cooperation with and respect to the ABA's Federal Judiciary Committee has been questionable under the Republican-controlled Senate and White Houses. Under the Bush and Trump administrations, the White House has been unwilling to work with the ABA to provide advanced notice of judicial nominees.<sup>125</sup> This is in contrast to the Obama Administration, which provided the ABA advanced notice of their judicial nominees so that the ABA Federal Judiciary Committee could have more time to assess the nominee's qualifications.<sup>126</sup>

Senate Republicans have been quick to ignore the advice of the ABA ratings and question the legitimacy of ABA rankings as a whole. Nine of President Trump's appointees to the federal bench have been rated "not qualified" by the ABA.<sup>127</sup> Well-over 90% of Trump's appoin-

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STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2020), [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/back-grounder-9-21-2020.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/back-grounder-9-21-2020.pdf) [hereinafter *STANDING COMMITTEE*]. After conducting an evaluation, the committee then provides each nominee with a rating of either well qualified, qualified, or not qualified. *Ratings*, AM. BAR ASS'N, [https://www.americanbar.org/groups/committees/federal\\_judiciary/ratings/](https://www.americanbar.org/groups/committees/federal_judiciary/ratings/) (last visited Jan. 5, 2020). When evaluating a nominee's qualification, the committee looks solely at the nominee's professional qualifications. These qualifications include their integrity, professional competence, and judicial temperament. See *STANDING COMMITTEE* at 3. The materials considered in the committee's evaluation include the Department of Justice's comprehensive questionnaire filled out by the nominee; the legal publications of the nominee; interviews with other legal professionals about the nominee; and an interview with the nominee. See *id.* at 4–5. The committee then holds a discussion and vote on the nominee to determine the rating that the ABA will give the nominee. The rating receiving a majority vote from the committee is the rating that the nominee receives. See *id.* at 6–7. If a nominee receives a rating of not qualified from the committee then the committee and the Senate Judiciary Committee schedules a hearing on the nominee, then a written report of the committee's findings and rating is sent to the Senate Judiciary Committee. See *id.* at 8. For a more detailed explanation of the procedures that control the ABA judicial ratings system, see *STANDING COMMITTEE*.

<sup>124</sup> See generally Tony Mauro, *Ignored or Attacked, ABA Committee Persists in Ranking Judicial Nominees*, NAT'L L.J. (Nov. 8, 2018, 10:07 AM), [https://plus.lexis.com/document/?pdmfid=1530671&crd=D028b61c-b5e8-4cbc-af09-c7ebcb0dcd4d&pdofullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5XG6-R6C1-DY35-F26C-00000-00&pdcontentcomponentid=7600&pdteaserkey=&pdslpamode=false&pdworkfolderlocatorid=NOT\\_SAVED\\_IN\\_WORKFOLDER&ecomp=zt4k&earg=sr0&prid=0eed8f04-48a7-458d-85cf-a40658e5ef78](https://plus.lexis.com/document/?pdmfid=1530671&crd=D028b61c-b5e8-4cbc-af09-c7ebcb0dcd4d&pdofullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5XG6-R6C1-DY35-F26C-00000-00&pdcontentcomponentid=7600&pdteaserkey=&pdslpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=zt4k&earg=sr0&prid=0eed8f04-48a7-458d-85cf-a40658e5ef78).

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See Standing Committee on the Federal Judiciary, *Ratings of Article III and Article IV Judicial Nominees 116th Congress*, AM. BAR ASS'N, [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/web-rating-chart-trump116.pdf?logActivity=true](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/web-rating-chart-trump116.pdf?logActivity=true) (last updated Sept. 30, 2020) (reporting that four nominees received a rating of "not qualified"); Standing Committee on the Federal Judiciary, *Ratings of Article III and Article IV Judicial Nominees 115th Congress*, AM. BAR ASS'N, [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/web-rating-chart-trump-115.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/web-rating-chart-trump-115.pdf) (last updated Dec. 13, 2018) (reporting that six nominees received a rating of "not qualified").

tees were rated “qualified” or “well qualified.”<sup>128</sup> However, when nominees have been rated as “unqualified,” Republican senators have been quick to criticize the ABA and its evaluation process. Senator Mike Lee stated, “Why? Why this organization, any more than any other organization? . . . Let’s review why it is that this organization and this organization alone seems to play a quasi-official role in the Senate Judiciary Committee hearings.”<sup>129</sup> Senator Ted Cruz is also highly critical of the ABA and its ratings and has stated that, “the ABA has a long and ridiculous record of behaving as a partisan mouthpiece when it comes to judicial nominations.”<sup>130</sup> While the ABA has been criticized by Republicans in the past, these attacks by Senators signal what was an even greater departure from the usual critiques of the ABA.<sup>131</sup>

The judicial nominees that received “not qualified” ratings point to another norm that President Trump and Senate Republicans are breaking with the choice and confirmation of nominees—President Trump is appointing federal judges that are, generally, younger.<sup>132</sup> Due to the nature of their lifetime tenure, these judges can be expected to serve on the federal bench for the next few decades.<sup>133</sup> The judges that have been confirmed during the Trump administration have also been more conservative in their ideologies than judges nominated by previous Republican presidents.<sup>134</sup> Additionally, over 70% of the judges that President Trump has appointed have been white men.<sup>135</sup> Regardless of how any one person or party may feel about these trends, it is abundantly clear that the Republican Party, led by President Trump, has effected the makeup of the federal bench.

By challenging and breaking Senate and Constitutional norms over the past decade, the Republican party has been able to transform the federal judiciary. By holding open seats during the Obama administration and then quickly filling them once the Trump administration took over, Republicans have packed the courts with judges who are sympathetic to conservative ideologies. The federal judiciary looks different because of

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<sup>128</sup> See Mauro, *supra* note 124.

<sup>129</sup> Debra Cassens Weiss, *GOP Senators Clash Over ABA During Hearing for Judicial Nominee Rated ‘Not Qualified’*, ABA J. (Sept. 26, 2019, 4:00 PM), <http://www.abajournal.com/news/article/gop-senators-criticize-aba-ratings-during-hearing-for-nominee-rated-not-qualified>.

<sup>130</sup> *Id.*

<sup>131</sup> See Mauro, *supra* note 124.

<sup>132</sup> See Ian Millhiser, *What Trump Has Done to the Courts, Explained*, Vox, <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges> (last updated Sept. 29, 2020, 10:32 PM).

<sup>133</sup> Carrie Johnson, *Trump’s Impact on Federal Courts: Judicial Nominees by the Numbers*, NPR (Aug. 5, 2019, 5:01 AM), <https://www.npr.org/2019/08/05/747013608/trumps-impact-on-federal-courts-judicial-nominees-by-the-numbers>.

<sup>134</sup> See *id.*

<sup>135</sup> *Id.*



these court packing policies. Currently, one in four circuit court judges and one in seven district court judges were nominated by President Trump.<sup>136</sup> Before the end of this administration, those percentages will be even higher in no small part due to the norm-breaking, constitutional hardball, and court packing carried out by the Republican Party.<sup>137</sup>

#### IV. PROGRESSIVE COURT EXPANSION

In response to an increasingly polarized federal bench, some progressives have called for the expansion of the Supreme Court.<sup>138</sup> As explained earlier,<sup>139</sup> a simple act of Congress could expand the Supreme Court.<sup>140</sup> However, even amongst advocates of court expansion, there have been a variety of proposals as to how the Supreme Court should be expanded. This section will overview a few of these proposals from legal scholars, journalists, and policymakers to give a broad view of what progressive court expansion could look like.

##### A. *The Typical Court Packing Plan*

The first proposal that Democratic leaders have suggested is to simply add seats to the Court through an act of Congress.<sup>141</sup> This is, in essence, the type of plan that most automatically associate with court packing or expansion. Some leaders have advocated for simply adding two seats to make up for the two seats (Justice Gorsuch and Justice Kavanaugh) that were filled through systematic norm-breaking by the Republican party.<sup>142</sup> One Democratic leader who has endorsed this plan is Former Attorney General Eric Holder.<sup>143</sup>

Other groups advocate for greater expansion to all levels of the federal courts. A group called Take Back the Court<sup>144</sup> has led the political

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<sup>136</sup> *Id.*

<sup>137</sup> Jacqueline Thomsen, *As SCOTUS Fight Brews, Republicans Act to Fill Remaining Judicial Vacancies*, NAT'L L. J. (Sept. 22, 2020, 3:55 PM), <https://www.law.com/nationallawjournal/2020/09/22/as-scotus-fight-brews-republicans-act-to-fill-remaining-judicial-vacancies/>.

<sup>138</sup> While the idea of court expansion is not necessarily associated with a particular ideology, for the purpose of this discussion, it will be discussed as a more progressive stance since most advocating for expansion tend to be more progressive in their stances.

<sup>139</sup> *Infra*, Section II.

<sup>140</sup> This vote would have no special procedure. It would only require a majority in both chambers of Congress and the President's approval to become law.

<sup>141</sup> Russell Wheeler, *Pack the Court? Putting a Popular Imprint on the Federal Judiciary*, BROOKINGS (Apr. 3, 2019), <https://www.brookings.edu/blog/fixgov/2019/04/03/pack-the-court-putting-a-popular-imprint-on-the-federal-judiciary/>.

<sup>142</sup> Take Back the Court, <https://www.takebackthecourt.today/> (last visited Jan. 7, 2020).

<sup>143</sup> Wheeler, *supra* note 141.

<sup>144</sup> See TAKE BACK THE COURT, <https://www.takebackthecourt.today/> (last visited Jan. 7, 2020).

charge on this point.<sup>145</sup> The group has embraced a variety of commitments from public leaders to court packing.<sup>146</sup> However, the group itself advocates for expanding courts throughout the federal system by an act of a progressive-controlled Congress and not through bipartisan reforms.<sup>147</sup>

These plans to add seats to the court are appealing for several reasons. First, these plans are much simpler than other proposals.<sup>148</sup> While other initiatives may require a constitutional amendment or broader coalition building, this plan would only require that Democrats take control of the legislative and executive branches long enough to implement it.<sup>149</sup> Second, this plan directly responds to the political tactics that Republicans have used over the past decade. Republicans have packed the federal courts.<sup>150</sup> Playing a game of constitutional hardball, Democrats could respond by packing the Court.<sup>151</sup> Finally, this plan will foster positive outcomes for its supporters. If Democrats do not change the composition of the Supreme Court, the Republican-controlled Court may be able to overturn key pieces of legislation meant to expand democracy,<sup>152</sup> even if Democrats regain control of legislative and executive branches.<sup>153</sup>

However, this plan does have flaws. First, it is a temporary fix to what may be a more pervasive problem of a judiciary too vulnerable to the political tides of the President and Congress. Moreover, this plan is criticized for just being another move in the game of constitutional hardball that Republicans will counter as soon as they gain power again.<sup>154</sup>

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<sup>145</sup> While this group is still at the political fringes, it is the most identifiable action organization dedicated to a cause that is becoming increasingly more important in mainstream politics. So, its opinions on the mechanisms by which court expansion should occur are worth seriously considering.

<sup>146</sup> See TAKE BACK THE COURT, *supra* note 144.

<sup>147</sup> See AARON BELKIN, THE CASE FOR COURT EXPANSION 2, 6, 9–12 (June 27, 2019), <https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5d14e7ae04c5970001fa4cb1/1561651120510/The+Case+or+Court+Expansion.pdf>.

<sup>148</sup> Some of these other, more complicated, reforms will be discussed *infra*, parts B and C.

<sup>149</sup> See BELKIN, *supra* note 147.

<sup>150</sup> See *infra*, section III.

<sup>151</sup> See 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>.

<sup>152</sup> These pieces of policy may include legislation to curb gerrymandering and expand voter protections. See *id.*

<sup>153</sup> BELKIN, *supra* note 147; see also *id.*

<sup>154</sup> See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 176–77 (2019); Bob Bauer, *Don't Pack the Courts*, ATLANTIC (July 6, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/dont-pack-the-courts/564479/>.

### B. *The Term Limit and Senior Justice Plan*

Another Supreme Court reform plan that would have the practical effect of expanding the size of the Supreme Court is to change the appointment system to limit Supreme Court Justices to only serve for eighteen years as sitting justices. A Note published by the University of Virginia Law Review fifteen years ago proposed the first version of this plan.<sup>155</sup> In their version of the proposal, the lifetime tenure for Supreme Court Justices would be abolished, and justices would only be permitted to serve eighteen-year terms.<sup>156</sup> By eliminating lifetime tenure, it would create a set number of justices that each President would appoint.<sup>157</sup> A Supreme Court Justice term would expire every two years.<sup>158</sup> Each president would appoint two members to the court.<sup>159</sup> If a Justice were to leave the Court before the expiration of their term, then the President and Senate would appoint and confirm a new justice to serve at the remainder of the term but could not be reappointed to the court once their tenure expired.<sup>160</sup>

However, this iteration of this plan would run afoul of the constitution that, currently, provides that federal judges serve lifetime appoints on the condition of “good behavior.”<sup>161</sup> Therefore, this version would require a constitutional amendment to implement. Considering the contemporary extreme polarization of the American electorate<sup>162</sup> and party leaders,<sup>163</sup> such a possibility seems unlikely.

Since the term limit plan was introduced 15 years ago, the plan has been refined by legal scholars and endorsed by law professors.<sup>164</sup> One recent refinement may eliminate the need for a constitutional amendment to enact the proposal. A group of conservative and progressive law professors submitted a letter to Congress that detailed a version of a retirement plan.<sup>165</sup> Essentially, like the original plan, appointments would be scheduled for the first and third years of a presidential administra-

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<sup>155</sup> See generally James E. DiTullio & John B. Schochet, Note, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004).

<sup>156</sup> *Id.* at 1119.

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> U.S. CONST. art. III, § 1.

<sup>162</sup> See, e.g., *Polarization 1994 – 2017*, PEW RSCH. CTR. (Oct. 20, 2017), <https://www.people-press.org/interactives/political-polarization-1994-2017/>.

<sup>163</sup> See, e.g., Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693–94 (2016).

<sup>164</sup> Vikram Amar et. al., *Letter to Congress on the Regularization of Supreme Court Appointments Act of 2017*, FIX THE COURT (June 29, 2017), <https://fixthecourt.com/2017/06/tlproposal/>.

<sup>165</sup> See *id.*

tion.<sup>166</sup> Each President would be able to appoint only two Justices per term.<sup>167</sup> After eighteen years of service on the Supreme Court, Justices would become Senior Justices.<sup>168</sup> Senior Justices would receive all the benefits of their office; they could sit on lower courts; and they could break a tie of the Supreme Court in “extraordinary circumstances.”<sup>169</sup> The creation of these senior justice positions would have the practical effect of expanding the federal courts.

Unlike the previous proposal, this plan should be less vulnerable to political manipulation. However, make no mistake: despite the bipartisan nature of the plan, it would still necessarily involve breaking constitutional norms and would likely be implemented in a game of constitutional hardball. Additionally, it is unclear if, even with the refinements to the plan, it would still require a constitutional amendment to enact.<sup>170</sup>

### C. *The “5-5-5 Plan”/“Balanced Bench Plan”*

Even during the 2020 Presidential Primary, there was hesitancy amongst the candidates to support a plan for expanding the Supreme Court. In fact, there was only one candidate who openly supported court expansion—Mayor Pete Buttigieg.<sup>171</sup> Buttigieg’s plan has informally been called the “5-5-5 Plan”<sup>172</sup> because it calls for an expanded Supreme Court which would be made up of five Democratic justices, five Republicans justices, and five remaining justices to be chosen from the Court of Appeals by a unanimous or near unanimous vote of the other ten justices.<sup>173</sup> This plan would expand the Supreme Court by adding, in total, six seats to the Court.

Despite popularizing the plan in the mainstream, Buttigieg did not design this policy. The “5-5-5 Plan” was created by legal scholars Daniel Epps and Ganesh Sitaraman who call the plan the “Balanced Bench Plan.”<sup>174</sup> Under the Balanced Bench Plan, the Supreme Court would start with an expanded ten justice bench. Five of these justices would be Democratic justices and five would be Republican justices.<sup>175</sup> These ten justices would then choose five other justices by near-unanimous

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<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See id.*

<sup>172</sup> Mark Joseph Stern, *Pete Buttigieg’s Court Packing Alternative is Wonky and Nonpartisan. It’s Also Unconstitutional.*, SLATE (Apr. 16, 2019, 3:32 PM), <https://slate.com/news-and-politics/2019/04/pete-buttigieg-court-packing-reform-2020.html>.

<sup>173</sup> Pete Buttigieg, *Judicial System*, PETE FOR AM., <https://peteforamerica.com/issues/#JudicialSystem> (last visited Jan. 7, 2020).

<sup>174</sup> Epps & Sitaraman, *supra* note 154, at 193.

<sup>175</sup> *Id.*

consent.<sup>176</sup> These additional justices would be chosen from the circuit court level two years in advance to serve a one-year, nonrenewable term.<sup>177</sup> If the five seats cannot be filled by the other ten justices, then the court will not have a quorum and cannot hear cases that year.<sup>178</sup>

This plan is appealing because it does the most to take partisan politics out of the composition of the court and, thereby, the legal arguments likely to win the day in those courts. By creating a system where the other justices must choose five justices that will likely form the deciding votes in most cases, there is an incentive for both sides to choose those justices who are more moderate.<sup>179</sup> However, this proposal would reinforce a system in the Supreme Court where most votes will come down to a single justice's opinion. This is not unlike the Supreme Court that existed before Justice Kennedy left the court.<sup>180</sup> Moreover, unlike other paths for reform,<sup>181</sup> this system supports a Supreme Court that would likely decide cases on more narrow legal grounds as opposed to grander political philosophies. As such, the decisions would be less ideological and, instead, based in more moderate jurisprudential stances because those are the only opinions likely to garner a majority of the justices. However, if the goal is to remove partisan politics and confirmation battles from the court as much as possible then this plan is likely the best solution.<sup>182</sup>

However, there are concerns over the constitutionality of this plan. The biggest constitutional concern is the appointment of the justices under this plan.<sup>183</sup> This set-up may run afoul the Appointments Clause.<sup>184</sup> Under the Balanced Bench Plan, the President's judicial appointment powers would be transferred to the legislature<sup>185</sup> and the Supreme Court<sup>186</sup> itself.<sup>187</sup> However, Epps and Sitaraman argue that since these new justices would be appointed from the circuit courts, where they were already appointed and confirmed to serve, their appointments

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<sup>176</sup> *Id.*

<sup>177</sup> *See id.* at 193, 195.

<sup>178</sup> *See id.* at 193.

<sup>179</sup> *See id.* at 194.

<sup>180</sup> *See id.*

<sup>181</sup> Such as the typical court packing plans discussed *infra*, part A.

<sup>182</sup> *See id.* at 199–200.

<sup>183</sup> *See* Aaron Belkin, *5-5-5 and Appellate Rotation Plans Are Unconstitutional and Unworkable*, TAKE BACK THE COURTS 1 (March 2019), <https://www.takebackthecourt.today/5-5-5-and-appellate-rotation-plans-are-unconstitutional-and-unworkable>.

<sup>184</sup> The Appointments Clause provides that the President “with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court.” U.S. CONST. art. II, §2.

<sup>185</sup> In the case that the Congress would appoint the first ten justices. However, Epps and Sitaraman do not explicitly state that this would be the case under their version of the Balanced Bench Plan.

<sup>186</sup> In the case of the remaining five justices.

<sup>187</sup> Belkin, *supra* note 183.

would not be new appointments.<sup>188</sup> Therefore, the Appointments Clause would not apply to those judicial nominations.<sup>189</sup> However convincing this argument may be, the constitutionality of this plan is still dubious.

### V. PACK THE COURT?

There have been hundreds of pages written about why Democrats should not pack the court.<sup>190</sup> In contrast, there has been extraordinarily little written about how Republicans have actually succeeded in packing the federal bench through norm-breaking and constitutional hardball. What is the difference between these two conceptions of court-packing that one had gone largely unnoticed whereas the mere mention of the other is enough to excite impassioned debate?

The biggest difference between the Democratic and Republican conceptualizations of court-packing are the ways that they create the same effect—a shift in the composition of the Court. The Democratic plans advocate for an institutional change of the federal court system, the Republican plan works within the institution or the courts and only erodes norms within the legislative institution.<sup>191</sup> The Republican plan has not changed the way the courts are set up. It did not add seats. It did not create a new Court. It did not move justices around. It simply changed the people who make up the institution as it already stands. The norms that Republicans broke were those governing the Senate.<sup>192</sup> While still concerning, breaking those norms can be more easily overlooked as typical political maneuvering.

Progressive court packing plans advocate for a change to the Supreme Court as an institution. All versions of the plan advocate for an expansion of the number of seats on the court.<sup>193</sup> Some plans call for even greater reform to the mechanisms by which justices are appointed. These changes violate the one-hundred-year constitutional norm of having a Supreme Court made up of nine justices appointed by the President.<sup>194</sup> These plans also violate the norms of institutional forbearance and mutual toleration that Levitsky and Ziblatt argue stabilize democracy.<sup>195</sup> As such, Levitsky and Ziblatt are very critical of progressive

<sup>188</sup> Epps & Sitaraman, *supra* note 154, at 201.

<sup>189</sup> Epps & Sitaraman, *supra* note 154, at 200–01.

<sup>190</sup> *See, e.g.*, Epps & Sitaraman, *supra* note 154, at 175; Bauer, *supra* note 154.

<sup>191</sup> *See, e.g.*, Take Back the Court, *supra* note 144; LEVITSKY & ZIBLATT, *supra* note 3, at 174.

<sup>192</sup> *See* Berger, *supra* note 94.

<sup>193</sup> *See* Wheeler, *supra* note 141; DiTullio & Schochet, *supra* note 155, at 1119; Stern, *supra* note 172.

<sup>194</sup> Judiciary Act of 1869, ch.22, 16 Stat. 44 (codified as amended at 28 U.S.C. § 1 (2018)).

<sup>195</sup> LEVITSKY & ZIBLATT, *supra* note 3, at 102.

court packing, despite their recognition that Republicans have also eroded norms surrounding the federal courts in the Senate.<sup>196</sup>

The difference between the levels of discomfort that scholars, policymakers, and voters seem to feel towards the Republican and Democratic court packing plans seems to point toward three different conclusions—that here is something different about the courts than other institutions, that there is something different about the two parties, and that there is something different about sweeping institutional change. One of these conclusions, or the combinations of all of them, make Democratic court packing proposals much more controversial than the Republican court packing plan.

First, there is something about the Court as an institution that makes the idea of changing it uncomfortable. The Court is considered by many to be the branch of government that is above politics.<sup>197</sup> The courts are referees of political games rather than players. This may be true. But it is more likely a myth couched in the flawed theory of American Exceptionalism.<sup>198</sup> Regardless, it is a consideration that undoubtedly creates discomfort around the idea of playing hardball with the courts.

Additionally, the fact that the law and the courts are conservative institutions makes the idea of radically changing the court system unsettling.<sup>199</sup> The law is conservative. The basic principles of law-making in the courts is that decisions are bound by the rules of previous courts.<sup>200</sup> The times when the courts implement radical changes are exceedingly rare. The fact that the law is conservative makes the idea of radically reforming judicial institutions unsettling.

Second, there are implicit differences between the Democratic and Republican parties that makes Republican court packing more acceptable than the Democratic alternative. For the past decade, the Republican party has become the party of norm breaking.<sup>201</sup> The Republican party has maintained executive and legislative majorities despite a national

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<sup>196</sup> See *id.* at 119, 145–46.

<sup>197</sup> See *Most Americans Trust the Supreme Court, but Think It's 'Too Mixed Up in Politics'*, ASSOCIATED PRESS (Oct. 16, 2019), <https://apnews.com/press-release/pr-prnewswire/ca162cc03b3261ff608ab7d8cfc31a25>.

<sup>198</sup> See generally Steven G. Calabresi, “*A Shining City On A Hill*”: *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U.L. REV. 1335 (2006); Aziz Rana, *This Was the Decade the US's Self-Serving Myths Fell Apart*, GUARDIAN (Dec. 30, 2019, 8:28 PM), <https://www.theguardian.com/commentisfree/2019/dec/30/american-myths-exceptionalism-meritocracy-donald-trump>.

<sup>199</sup> In this context, conservative does not refer to the political ideology associated with modern Republican party but, rather, the political ideology of showing deference to past practice.

<sup>200</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992).

<sup>201</sup> It is necessary to note that norm breaking was not exclusive to Democrats. Nevertheless, Republicans in government engaged in norm breaking behavior more often than Democrats over the last ten years. See LEVITSKY & ZIBLATT, *supra* note 3, at 157–67.

electorate that trends towards the Democratic party.<sup>202</sup> This has caused two changes in American politics. First, Republicans are expected to push the norms. It is no longer a surprise and, therefore, little is being done to stop the pattern. Second, this behavior is being accepted because the Republicans only have norm breaking to fall back on since they do not have the mandate of a majority of the country. Republicans have essentially stopped following the forbearance norm.<sup>203</sup>

Yet, in many responses to Democratic court packing, authors have all but begged the Democrats to engage in forbearance and not hardball.<sup>204</sup> However, these pleas ignore the reason that forbearance is a norm. Forbearance is a norm because it encourages functionality.<sup>205</sup> But, that vision of functionality only works if there is an expectation it will be followed. There is no longer an expectation that the Republican party will forbear.<sup>206</sup> If only one party forbears, the forbearance norm no longer exists. The norm is going the break down anyway and, consequently, the Court will become the political chess piece of a party. It is not in the spirit of democracy to allow that. Democrats should break the forbearance norm to reform the Court because doing so is only in response to a one-sided game of constitutional hardball the Republican party is already engaged in.<sup>207</sup>

Third, there is a conceptual difference between working within the structure of an institution and advocating for sweeping institutional change. This is particularly salient when the institution being changed is one as central to the constitutional order as the federal courts. The idea of radically changing constitutional institutions is worrisome to scholars like Chafetz and Pozen,<sup>208</sup> Epps and Sitaraman,<sup>209</sup> and Levitsky and Ziblatt.<sup>210</sup> While these fears are often framed in terms of constitutional hardball and norm erosion, the reason that hardball is being played and norms are eroded is because the changes are so radical that the institution as it stands cannot withstand them.

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<sup>202</sup> See, e.g., *Trends in Party Affiliation Among Demographic Groups*, PEW RSCH. CTR. (Mar. 20, 2018), <https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups/>; Sabrina Siddiqui, *Democrats Got Millions More Votes - So How did Republicans Win the Senate?*, GUARDIAN (Nov. 8, 2018), <https://www.theguardian.com/us-news/2018/nov/08/democrats-republicans-senate-majority-minority-rule>.

<sup>203</sup> See *id.* at 175, 203.

<sup>204</sup> See, e.g., *id.* at 217.

<sup>205</sup> See *id.* at 107.

<sup>206</sup> See *id.* at 174, 208.

<sup>207</sup> See Klarman, *supra* note 151.

<sup>208</sup> Chafetz & Pozen, *supra* note 3, at 1447.

<sup>209</sup> See Epps & Sitaraman, *supra* note 154, at 175.

<sup>210</sup> LEVITSKY & ZIBLATT, *supra* note 3, at 231.



Why are scholars fearful of radical changes? It probably goes back to the “devil in the sometimes.”<sup>211</sup> It is necessary that some institutions remain unchanged. It is problematic if democratic norms as a whole break down. The problem is that it is almost impossible to tell which norm breakdowns will cause democratic reform and which will cause authoritarian control until it is too late. If the “devil is in the sometimes,” who decides what sometimes is the right time? Realistically, it will usually be the party in political power that gets to decide. If that party is corrupted or decides incorrectly, then it will have dire consequences for American democracy. In the face of that risk, once answer would be that it is better not to act. That is the route that many scholars trend towards.<sup>212</sup>

However, even if there is a risk, that risk is worth taking. In the case of the federal courts, not acting will mean that there continues to be a dysfunctional federal judiciary that is controlled by a single ideology. The Court will lose legitimacy with the public. It will have the unchecked power to block the policies of a progressive legislature and president. The result will be a failure of democracy all the same. The fear of radical institutional change is founded, but it cannot be debilitating to necessary institutional reform.

There is a risk of democratic norm erosion that will come with changing the composition of the Supreme Court. That risk should not be minimized. But the risk of doing nothing cannot be ignored. Every day it becomes clearer that norms no longer matter to the Republican party. The only way that the Court will be saved is by embracing breaking the norms that once governed it in the interest of creating a more democratic and functional institution. As such, now that Democrats have control of all three branches of government, they must act with fortitude and foresight and implement a plan to expand membership of the Supreme Court.

## CONCLUSION

We are at a breaking point in American politics. The two political parties are more polarized than ever and are both struggling to find their identities in the unpredictable political climate. A global pandemic has further upset the political disfunction and highlighted how unprepared the United States government is to deal with crisis.<sup>213</sup> If 2020 has proven anything, it is that the institutional shortcomings of the federal courts are

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<sup>211</sup> Robin, *supra* note 29.

<sup>212</sup> See Epps & Sitaraman, *supra* note 154, at 175; LEVITSKY & ZIBLATT, *supra* note 3 at 231.

<sup>213</sup> Carl Hulse, *Congress Was Already Broken. The Coronavirus Could Make It Worse.*, N.Y. TIMES (July 25, 2020), <https://www.nytimes.com/2020/07/25/us/congress-broken-partisanship-coronavirus.html>.

not the only dilemma that American institutions must reckon with. The opportunity to play constitutional hardball will not be limited to the courts. In fact, the composition of the courts may be one instance of comparatively lesser importance: we need only look to impeachment, foreign interference in American elections, unwavering minority party control of government due to the Electoral College, systematic barriers to voting, and a government unresponsive to the plight of its citizens during a global pandemic.<sup>214</sup> The January 6, 2021 attack on the United States capitol as Congress attempted to certify the 2020 election showed the consequences if institutions are unequipped to deal with the changing political landscape.<sup>215</sup> The problems facing the United States will require *some* tactical constitutional hardball and norm evolution to solve. We must, however, remain vigilant against “the devil in the sometimes” and remember that total erosion of the core constitutional values and the undermining, as opposed to development, of institutions can denigrate democracy.<sup>216</sup>

Cornell Law School Professor Aziz Rana posited that the 2010s forced American political leaders to “confront the limits of the country’s own mythology.”<sup>217</sup> 2020 has ushered in an even more sinister shade to American politics. Mythology has turned nightmare. A myth we must confront and question is whether strict adherence to democratic norms is enough to maintain our democratic institutions. The nightmarish reality of 2020 has shown that we no longer have the luxury of making these changes slowly. The truest and most egalitarian form of democracy will be a reality in which engaged citizens demand that their leaders act with courage and erode norms that no longer function. The 2020s must be the decade that citizens and leaders show up in unprecedented ways to make changes.

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<sup>214</sup> See Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html>; Paul R. Pillar, *Foreign Interference in U.S. Elections is Even Worse Than You Think*, BUS. INSIDER (Feb. 3, 2020), <https://www.businessinsider.com/foreign-interference-in-us-elections-even-worse-than-you-think-2020-2>; Nate Cohn, *The Electoral College’s Real Problem: It’s Biased Toward the Big Battlegrounds*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/upshot/electoral-college-votes-states.html>; Ankita Rao et al., *Is America a Democracy? If So, Why Does It Deny Millions the Vote?*, GUARDIAN (Nov. 7, 2019), <https://www.theguardian.com/us-news/2019/nov/07/is-america-a-democracy-if-so-why-does-it-deny-millions-the-vote>; see also *id.*

<sup>215</sup> Ted Barrett and Manu Raju, *US Capitol secured, 4 dead after rioters stormed the halls of Congress to block Biden’s win*, CNN (Jan. 7, 2021), <https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html>.

<sup>216</sup> Robin, *supra* note 29.

<sup>217</sup> Rana, *supra* note 198.