

# Court-Packing in 2021: Pathways to Democratic Legitimacy

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## ABSTRACT

This Article asks whether the openness to court-packing expressed by a number of Democratic presidential candidates (e.g., Pete Buttigieg) is democratically defensible. More specifically, it asks whether it is possible to break the apparent link between demagogic populism and court-packing, and it examines three possible ways of doing this via Bruce Ackerman’s dualist theory of constitutional moments—a theory which offers the possibility of legitimating problematic pathways to constitutional change on democratic but non-populist grounds. In the end, the Article suggests that an Ackermanian perspective offers just one, extremely limited pathway to democratically legitimate court-packing in 2021: namely, where a Democratic President and Congress would be willing to limit themselves to using court reform as a means of repudiating the Republican Party’s constitutional gains but not as a means of pursuing (in fact or in appearance) their own comprehensive reform agenda. The question that this analysis leaves hanging is whether this pathway remains satisfactory when concerns aside from democratic legitimacy are factored into the equation, such as a concern with the protection of certain fundamental rights, or with the possibility of public and institutional backlash against court-packing.

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### INTRODUCTION

In recent years, court-packing has become increasingly synonymous with authoritarian populism<sup>1</sup> because of its use by right-wing populists in various countries<sup>2</sup> as a way of avoiding institutional oversight and scrutiny (a key hallmark of modern populism). At the same time, though, as the United States Democratic Party’s presidential campaigns trundled on, and as potential nominees grappled with how to distinguish their politics from the current President’s populism, court-packing began gaining traction as a potentially legitimate and non-populist legislative option for a Democratic President and Congress in 2021. According to a recent article on the website *Mother Jones*, court-packing started creeping into the Democratic mainstream when presidential candidate Pete Buttigieg claimed during a public appearance that it would be a reasonable response to the problematic tactics that the Republican Party has recently

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1. For an analysis of the authoritarian populism now sweeping the world, see JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016). On the link between populism and court-packing, see Andrew Arato, *Populism, Constitutional Courts, and Civil Society*, in *JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS* 318, 318–41 (Christine Landfried ed., 2019). While the term “populism” has been used lately to cover all manner of political sins, this Article will follow Müller’s analysis by emphasizing two core elements: anti-institutionalism and anti-pluralism. On the one hand, anti-institutionalism refers to the tendency of populists to reject institutional checks on their authority, specifically on the grounds that “they, and they alone, represent the people.” MÜLLER, *supra*, at 3 (emphasis added). On the other hand, anti-pluralism refers to the tendency of populists to conflate the people with their supporters, see, e.g., MÜLLER, *supra*, at 4–5, thereby lending a twisted plausibility to their claims that they authentically and fully represent “the people.”

2. Poland’s experience under the Law and Justice Party is a prime example of this (an example to which this Article will occasionally refer). See Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, *JUDGES F. REV.* 104 (2018); see also Piotr Mikuli, *The Declining State of the Judiciary in Poland*, *INT’L J. CONST. L. I-CONNECT BLOG* (May 15, 2018), <http://www.iconnectblog.com/2018/05/the-declining-state-of-the-judiciary-in-poland/> [<https://perma.cc/A8ZG-7KGW>].

used to ideologically reshape the federal judiciary and, by derivation, the Constitution.<sup>3</sup>

To rehash the well-known story on these Republican tactics, first there was Merrick Garland, President Obama's Supreme Court nominee who was "stonewalled"<sup>4</sup> by a Republican-controlled Senate on extremely questionable grounds.<sup>5</sup> Then, more recently, there was Brett Kavanaugh, whose Supreme Court confirmation was delivered by a Republican Senate in the midst of serious concerns over both his judicial temperament<sup>6</sup> and his history of alleged violence against women (denied aggressively by Kavanaugh).<sup>7</sup> Surely, Buttigieg suggested, these democratically problematic power grabs by Republicans render even seemingly extreme counter-tactics like the expansion of the Supreme Court at least *thinkable* for Democrats if (and that's a big "if") they take Congress and the Presidency in 2021.

Since Buttigieg's initial comments, a number of other presidential candidates, including Senators Elizabeth Warren and Kamala Harris, joined him in expressing their openness to various forms of court-packing (or more specifically, Supreme Court expansion).<sup>8</sup> The question is: where does this leave us? Is court-packing, a perfectly legal and constitutional tactic in the U.S., now politically and morally thinkable too? Or, to put it more precisely, can court-packing be framed as a plausibly *non-populist* response to the democratically questionable actions of Senate Republicans? This Article attempts to answer this question by engaging with the dualist theory of constitutional transformation that has been

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3. See Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), <https://www.motherjones.com/politics/2019/03/court-packing-2020/> [<https://perma.cc/FFP4-SSJA>].

4. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 150 (2019).

5. See, e.g., Eric Zorn, *B-b-but What about the "Biden Rule"?*, CHI. TRIB. (Apr. 7, 2017), <https://www.chicagotribune.com/columns/eric-zorn/ct-b-b-but-what-about-the-biden-rule-20170407-story.html> [<https://perma.cc/Z2RV-SFR2>].

6. For a detailed and critical account of Kavanaugh's most controversial statements, see Laurence Tribe, Opinion, *All the Ways a Justice Kavanaugh Would Have to Recuse Himself*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/opinion/justice-kavanaugh-recuse-himself.html> [<https://perma.cc/SVC2-DHUQ>]; see also Epps & Sitaraman, *supra* note 4, at 158–59 (“At the . . . [Blasey Ford] hearing, Justice Kavanaugh offered testimony that shocked many. He lambasted the ‘two-week effort’ effort surrounding the allegations as ‘a calculated and orchestrated political hit,’ a form of ‘[r]evenge on behalf of the Clintons.’”).

7. See generally Christine Hauser, *The Women who Have Accused Brett Kavanaugh*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/brett-kavanaugh-accusers-women.html> [<https://perma.cc/55ND-UUBV>].

8. See Levy, *supra* note 3.

elaborated over several decades by Yale law professor Bruce Ackerman.<sup>9</sup> While Ackerman's theory is certainly not the only way of addressing this question, it has at least one key benefit when it comes to the quest for a non-populist defense of court-packing. Put simply, in contrast with populist constitutional theories (e.g., Carl Schmitt's<sup>10</sup>) that are ready to endorse illegal or uncivil pathways to constitutional change on the basis of a change's popularity, Ackerman's theory withholds such endorsement until a series of stringent tests have been met,<sup>11</sup> thereby offering the possibility that democratically problematic tactics like court-packing can potentially be "made good"<sup>12</sup> or "perfected"<sup>13</sup> without accepting the populist belief that a single group (even a public majority) is alone capable of legitimating such tactics (tactics that are broadly at odds, one might say, with America's prevailing "sense of justice"<sup>14</sup>).<sup>15</sup> In other words, Ackerman gives us what populism gives us vis-à-vis court-packing—i.e., the possibility of democratic legitimation—*without giving us populism* (and in particular, without embracing the core populist doctrine of "organ

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9. Ackerman's theory is laid out in numerous books and journal articles, but its most comprehensive elaboration is in his first volume. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993).

10. Schmitt famously distinguished between the higher authority of the "absolute" constitution, which he defined as the existent unity of a political community or a people, and the lower authority of the "relative" constitution, which he defined as the various constitutional laws in force at a given point in time (in force, for Schmitt, at the fragile behest of the political community). On this distinction, see CARL SCHMITT, *CONSTITUTIONAL THEORY* 59–71 (Jeffrey Seitzer ed. & trans.) (1928).

11. To quote Ackerman:

The Constitution is, first and foremost, a project in democratic self-rule, providing us with institutions and a language by which we may discriminate between the passing show of normal politics and the deeper movements in popular opinion which, *after much passionate debate and institutional struggle*, ultimately *earn* a democratic place in the constitutional law of a Republic committed to the rule of We the People.

Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1178–79 (1988) (emphasis added).

12. One of the key ways in which Ackerman describes this "making good" is by quoting James Madison's claim, in *Federalist No. 40*, that an expression of popular support for a reform initiative could serve to "blot out antecedent errors and irregularities" in the process of reform—even errors as severe as the failure of an institution to act within its legal powers (as per accusations against the Philadelphia Convention of which Madison was a part). See ACKERMAN, *supra* note 9, at 173–74.

13. See generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 93 (1998) (comparing Ackerman's model of constitutional lawmaking to the property law doctrine of adverse possession, which allows an initially illegal occupant of land to eventually obtain good title by complying with a set of stringent tests over time).

14. JOHN RAWLS, *A THEORY OF JUSTICE* 450–51 (1971). I do not mean to suggest here that Americans today share any common sense of justice, generally; only that many politically engaged Americans seem to share a sense of serious anxiety about court-packing, at least to the point where they would feel *especially* aggrieved if it was used by their political opponents to reshape constitutional law (more aggrieved than if the judicial appointments process was used, for example).

15. Populism, and Ackerman's departure from populism, will be discussed at the end of Section I of the Article, after I have laid out the key features of Ackerman's constitutional theory.

sovereignty,”<sup>16</sup> where a single group or entity is presumed competent to authoritatively represent the People at a particular moment in time).

Bearing this benefit of an Ackermanian perspective in mind, this Article will begin by offering a brief reconstruction of Ackerman’s theory before examining three ways in which court-packing could *potentially* be democratically legitimated within Ackerman’s theory: (1) as a way of consolidating an almost completed process of constitutional reform; (2) as a way of initiating a process of constitutional reform; and (3) as a constitutionally conservative reaction to another group’s attempt to achieve the “factional abduction”<sup>17</sup> of the judiciary and constitutional law. To state my conclusion up front, I will argue that the third option could be successfully deployed as a justification for Democratic court-packing in 2021, provided that the Democrats tread carefully and slowly when it comes to pursuing a more comprehensive and controversial package of legal reforms. In this regard, one could say that my argument turns on a critical distinction between *transformative* court-packing, as practiced recently in countries like Poland,<sup>18</sup> and *conservative* court-packing in the face of an attempted but apparently illegitimate transformation of constitutional law by others. Thinking about it in this way, I hope, will do two things: (1) offer a way for American Democrats to philosophically distinguish their seemingly well-intentioned court reform plans from those of authoritarian populists like the Law and Justice Party in Poland (Erdogan’s Turkey springs to mind as well<sup>19</sup>) and (2) highlight the fragility of such a distinction—because if even Ackerman’s theory of popular constitutional change leaves little room for justification despite its tolerance of illegal and broadly uncivil reform tactics, it should be clear that justification is a delicate business indeed.

With of all of this said, before proceeding I should make clear that the concern of this Article is *only* with the question of how court-packing might be cast as a democratically legitimate or perhaps simply tolerable tactic via Ackerman’s theory of constitutional change. By limiting itself to this relatively narrow line of inquiry, the Article neglects (or rather *brackets*) at least three other, undeniably important questions relating to the prospect of court-packing in 2021. First, excepting a glancing comment in its concluding section, the Article does not engage with the

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16. ANDREW ARATO, THE ADVENTURES OF THE CONSTITUENT POWER: BEYOND REVOLUTIONS? 23 (2018).

17. I borrow this phrasing from JOHAN WILLEM GOUS VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY 303 (2014).

18. See Arato, *supra* note 1; see also Sadurski, *supra* note 2.

19. On the complexity of the Turkish situation, see Cem Tecimer, *Recognizing Court-Packing: Perception and Reality in the Case of the Turkish Constitutional Court*, VERFBLOG (Sept. 11, 2019), <https://verfassungsblog.de/recognizing-court-packing/> [https://perma.cc/4VEP-BDS3].

important question of whether court-packing would remain defensible when other standards of legitimacy (or indeed, political wisdom) are considered. Second, it does not deal with the equally important question of whether court-packing would be narrowly tailored to its aims; the question, in other words, of whether the Democrats could use less democratically questionable tactics (e.g., issue-specific legislation) to overcome the allegedly unjustified slant of the U.S. Supreme Court at present.<sup>20</sup> Third, it neglects Ackerman's own recent comments about court reform on the grounds that these comments tell us little, if anything, about the *democratic legitimacy* of court-packing.<sup>21</sup> While the Article's failure to address these issues obviously limits the force of its conclusions, I have isolated the question of democratic legitimacy for an important reason: to show how precarious a defense of court-packing is even where only one measure (i.e., democratic legitimacy) is considered, and even where a theoretical lens (i.e., Ackerman's) has been chosen to maximize the chances of a successful defense. Above all others, it is this point that I hope the reader will bear in mind as we proceed to a short reconstruction of Ackerman's theory in the Article's first section below.

#### I. ACKERMAN'S DUALIST THEORY OF CONSTITUTIONAL MOMENTS

To begin our engagement with Ackerman, it is perhaps useful to consider a distinction that the constitutional theorist Joel Colón-Ríos

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20. In this regard, consider Elizabeth Warren's proposed response to the hypothetical overturning of *Roe v. Wade*. Associated Press, *Elizabeth Warren Unveils Plan to Protect Abortion Rights*, L.A. TIMES (May 17, 2019), <https://www.latimes.com/politics/la-na-pol-elizabeth-warren-abortion-platform-2020-story.html> [<https://perma.cc/XEP7-ZQVF>]. Very simply, Warren's claim is that a Democratic government's best option in this situation would be to forget about constitutional law and focus on passing ordinary legislation mimicking *Roe*'s protections. *Id.* While such legislation would of course be more vulnerable to repeal than an authoritative interpretation of constitutional law, it would at least secure the Democrats' policy preferences during their time in power, provided that the Supreme Court does not take the basically unthinkable step of flipping *Roe* on its head by recognizing the constitutional personhood of the unborn and *requiring* the criminalization of abortion (like the German Constitutional Court did in its *Erste Abtreibung* judgment of 1975, described in VAN DER WALT, *supra* note 17, at 130–51).

21. I am aware of a number of comments that Ackerman has made recently on court reform, but none of them are strictly relevant here. For example, in his latest book, *Revolutionary Constitutions*, Ackerman discusses the prospect of Democratic court-packing, but this discussion focuses on the way that court-packing might play out politically, not on the normative dimension of how it fits with a dualist conception of political morality. See BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* 397–403 (2019); see also Bruce Ackerman, *Opinion, Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html> [<https://perma.cc/FV7D-Z7XJ>] (focusing on how reforms other than court-packing might bolster the sociological legitimacy of the Supreme Court).

makes between two dimensions of democracy.<sup>22</sup> While the first dimension refers to a people's capacity to influence every day decision-making within their political system<sup>23</sup> (e.g., by voting for political representatives), the second dimension refers to their more fundamental capacity to actually change the system by amending the constitutional laws that give it structure<sup>24</sup> (or indeed, by making an entirely new constitution). For Colón-Ríos, the problem with many modern constitutional democracies is that they provide ample room for the first dimension but scant room for the second, specifically insofar as modern constitutions often include complex amendment formulae that make democratic change unlikely.<sup>25</sup> How can we speak of democracy, Colón-Ríos's work wonders, if the supposedly sovereign people are incapable of producing radical, systemic change; second-dimension change as opposed to the electoral "changing of the guards" that defines the first dimension of democracy?

In his *We the People* trilogy, Ackerman asks this same question in relation to the U.S., but he goes further by asking whether the complex amendment requirements contained in Article V of the Constitution have *really* stymied publicly desired, tectonic changes to U.S. constitutional law, even if Article V itself has rarely produced such changes.<sup>26</sup> In his response to this question, Ackerman claims that, rather than suppressing initiatives for seismic change completely, the arduous requirements of Article V have driven reformists to rely on an alternative, informal

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22. JOEL I. COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* 36–40 (2012).

23. *Id.* Colón-Ríos also refers to this as "democracy at the level of daily governance." *Id.* at 36. To suggest that such democracy is present in a particular country, he says, usually means "suggesting that that country's laws and institutions provide for frequent elections, that citizens are allowed to associate in different organisations (including political parties) and to express their political opinions without fear of punishment." *Id.* at 37.

24. *Id.* at 38. To quote Colón-Ríos:

The second dimension of democracy . . . is not about the daily workings of the state's political apparatus, but about the relation of citizens to their constitution. It looks at how a constitutional regime came into existence and how it can be altered . . . [and i]n that respect, it revolves around the following two questions: (1) Is this constitution the result of a democratic process? (2) Can this constitution be altered through democratic means?

*Id.*

25. *Id.* at 17–18. To quote Colón-Ríos:

Constitutionalism is . . . [partly] characterised by a Lycurgian obsession with permanence, a fear of constitutional change according to which a constitution that contains the right content—a good, constitutionalist constitution—should also be a *finished* constitution. That is, a constitution that might be improved by correcting some historical mistakes here and there . . . but whose fundamental principles and the governmental structures it creates should be more or less immutable and therefore placed beyond the scope of popular majorities.

*Id.*

26. See ACKERMAN, *supra* note 9.

amendment track that he calls the “modern system”<sup>27</sup> of amendment.<sup>28</sup> In contrast with the steep federal and state requirements of Article V, the modern system applies a more flexible, intertwined pair of *national* tests to constitutional reform movements: (1) a test of “duration”<sup>29</sup> and (2) a test of dialogue. On the one hand, the test of duration requires that a reform movement remains consistently popular, nationally, over the course of a “generation”<sup>30</sup> (preferably a decade or so). On the other hand, the test of dialogue requires that a reform initiative is subjected to an especially intense level of public debate, with reformist institutions pitted against conservative ones in a contest for the country’s soul. Where an initiative passes these tests, Ackerman suggests it will have earned admission to the country’s “constitutional canon,”<sup>31</sup> which is to say that its institutional advocates will have earned the “[a]uthority to speak for the People”<sup>32</sup> and to have their initiative counted as constitutional *law*. When completed, Ackerman refers to this process as a “constitutional moment”—a moment when the People themselves can be retroactively regarded as having come together to “hammer out a considered judgment on a fundamental matter of principle.”<sup>33</sup>

In his *We the People* trilogy, Ackerman has identified four such constitutional moments that have occurred over the course of American history: the Founding (bypassing the Articles of Confederation rather than Article V), Reconstruction, the New Deal, and the Civil Rights Revolution (or the “Second Reconstruction”<sup>34</sup>).<sup>35</sup> In all of these cases, for Ackerman,

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27. *See id.* at 268.

28. To quote Sanford Levinson on this aspect of Ackerman’s work:

There is something at once splendid and perplexing about the Ackermanian scheme of epicycles that constitute constitutional amendment outside the formal constraints of Article V. Recognizing the patent defects of the 1787 constitutional document, Ackerman has devoted what is now the bulk of his career to demonstrating that it is in fact not a fatal bar to constitutional rectification. Remarkable things *have* happened.

Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2666 (2014).

29. Emiliios Christodoulidis, *The Degenerative Constitutional Moment: Bruce Ackerman and The Decline and Fall of the American Republic*, 74 MOD. L. REV. 962, 967 (2011) (noting, with reference to one of Ackerman’s later books, that the “question of duration” is given pride of place in Ackerman’s theory of constitutional change).

30. As Ackerman puts it, the “basic unit” of the U.S. Constitution, from his perspective, is the “Generation.” Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1519 (1997).

31. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 7 (2014).

32. ACKERMAN, *supra* note 13, at 4.

33. ACKERMAN, *supra* note 9, at 55.

34. *See, e.g.*, ACKERMAN, *supra* note 31, at 1.

35. In the first two volumes of his *We the People* trilogy, Ackerman only counted the Founding, Reconstruction, and the New Deal as completed constitutional moments. The Civil Rights Revolution, by contrast, was characterized as a seemingly “lesser” moment of “constitutional politics” until its



the failure to properly use a legally applicable amendment rule can be compensated for, democratically speaking, by compliance with the two, intertwined tests proposed above. To understand the dynamics of this process more precisely, consider the Civil Rights Revolution, Ackerman's most recent example of a constitutional moment.<sup>36</sup> For Ackerman, while the starting point of the Civil Rights Revolution as a constitutional moment could certainly be cast in terms of the "rich history"<sup>37</sup> of social activism that preceded legal reform, the *really* critical moment—the turning point, if you like—was when this activism was given institutional recognition at the federal level, in this case by the U.S. Supreme Court.<sup>38</sup> On this front, Ackerman claims that the Supreme Court's path-breaking decision in *Brown v. Board of Education*<sup>39</sup> initiated the informal amendment process by issuing what he calls a "constitutional signal"<sup>40</sup> to the other branches of the federal government (and indeed, to the "ordinary American[s]"<sup>41</sup> who, for Ackerman, collectively hold the keys to the Constitution). By placing the issue of civil rights more firmly on the national agenda, the Court made it necessary for Congress and the President to respond, and this in turn allowed the American public to pass judgment on their responses, at least obliquely, when both institutions came up for reelection.

What follows such acts of signaling, for Ackerman, is then a slow burning, electorally tested battle between constitutional reformists and constitutional conservatives. To win this battle, reformists have to *keep* winning across a full generation, but with each victory, they earn a little more authority to push the envelope a little further—a little more beyond the "constitutional status quo."<sup>42</sup> Coming back to the Civil Rights

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eventual admission to the list of full constitutional moments in *We the People: The Civil Rights Revolution*. See generally ACKERMAN, *supra* note 31. On the "lesser" status of the civil rights movement in Ackerman's early work, see Christy Scott, *Constitutional Moments and Crockpot Revolutions*, 25 CONN. L. REV. 967, 975 (1993).

36. See generally ACKERMAN, *supra* note 31. Ackerman's *We the People: The Civil Rights Revolution* is fundamentally concerned, in its entirety, with depicting the civil rights revolution as a constitutional moment that followed closely in the footsteps—structurally speaking—of earlier constitutional moments like the New Deal.

37. *Id.* at 49.

38. Ackerman has taken some flak for his failure to pay closer, more direct attention to the social as well as institutional histories that are at stake in periods of constitutional upheaval. For his response to these criticisms, see Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3116 (2014).

39. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

40. This concept will be discussed in more detail later in the article. For now, see ACKERMAN, *supra* note 9, at 272–78.

41. Christodoulidis, *supra* note 29, at 968. To quote Christodoulidis: "The 'ordinary American' is doing a lot of normative work in [Ackerman's theory]." *Id.*

42. This phrase is used frequently in Ackerman's work to designate legally dominant conceptions of constitutional norms and principles at a given moment. As an example, see ACKERMAN, *supra* note 31, at 3.

Revolution, Ackerman sees the 1964 presidential election as a crucial legitimating device, specifically insofar as it pitted President Lyndon Johnson (LBJ) and his newly passed Civil Rights Act (CRA) against a very clear, anti-CRA opponent, Barry Goldwater.<sup>43</sup> With Goldwater subjected to a “crushing defeat”<sup>44</sup> in 1964, the Democrats then used their fresh, raised mandate to legitimately pursue further, deeper change by passing other “landmark”<sup>45</sup> or “super”<sup>46</sup> statutes like the Voting Rights Act. However, for these statutes to gain decisive admittance into the American “constitutional canon,”<sup>47</sup> Ackerman claims that one of two things still had to happen: either reformists could win another “ratifying election,”<sup>48</sup> or their opponents could undertake a calculated “switch in time,”<sup>49</sup> revealing their judgment that constitutional conservatism on the relevant set of issues had become publicly indefensible. In the case of the Civil Rights Revolution, it was the Republican National Committee (RNC) that apparently chose the latter path, the switch in time, by choosing Richard Nixon as their presidential candidate—a “man with a long-standing commitment to civil rights”<sup>50</sup> who ended up playing a “key role in . . . the passage of the Fair Housing Act,”<sup>51</sup> and in constitutionally consolidating the legacy of earlier reformers like LBJ and Justice Earl Warren.<sup>52</sup>

What lies behind all of this, to dig a little deeper, is basically a “dualistic” distinction between a population of voters (or a small-p people) and a People (or a capital-P People) that is made evident by Ackerman’s claim that in general, the “People simply do not exist.”<sup>53</sup> To explain this perhaps perplexing claim, although Ackerman wishes to defend constitutional change beyond Article V,<sup>54</sup> he fully subscribes to the conception of political morality which is inherent in Article V, a conception which turns on the idea that the public and congressional majorities that are in effect jointly responsible for ordinary lawmaking are not equivalent to the sovereign entity, “We the People of the United States of America,” the entity that is alone authorized to amend the U.S.

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43. See ACKERMAN, *supra* note 31, at 66–69.

44. *Id.* at 77.

45. *Id.* at 8.

46. *Id.* at 34.

47. *Id.* at 7.

48. *Id.* at 76–79.

49. The classic example of such a “switch” is of course the Supreme Court’s repudiation of its *Lochner*-era jurisprudence, starting in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For Ackerman’s analysis of this switch, see ACKERMAN, *supra* note 13, at 312–82.

50. ACKERMAN, *supra* note 31, at 77.

51. *Id.*

52. I should make clear that this is Ackerman’s view of Nixon and his position in relation to civil rights rather than mine.

53. ACKERMAN, *supra* note 9, at 263.

54. *Id.*

Constitution.<sup>55</sup> While this sovereign entity is in many ways little more than a “constitutive fiction,”<sup>56</sup> Ackerman follows the moral flow of Article V closely in supposing that the products of an extraordinary, relatively arduous, and highly deliberative lawmaking procedure can be justifiably “attributed”<sup>57</sup> or “imputed”<sup>58</sup> to the People, and that such attribution is occasionally necessary to redeem the Jeffersonian promise that “each generation . . . [can] choose for itself the form of government it believes most promotive of its own happiness.”<sup>59</sup> This is Ackerman’s democratic dualism in a nutshell: the idea that democratic lawmaking should take place along two tracks, one more straightforward track that applies to ordinary lawmaking, and a more demanding but crucially *still accessible* track that applies to constitutional or “higher” lawmaking, and that comes closer to justifying the “transubstantiation”<sup>60</sup> of relevant decision-makers into the perpetually absent but representationally sovereign figure of “the People” (or more accurately, the “attribution” of their decision to the People).

Fair enough, you might think. But what exactly does this have to do with the prospect of court-packing under a Democratic Presidency and Congress in 2021? As noted in the introductory section of this Article, the value of Ackerman’s theory when it comes to court-packing is that his insistence on the supremacy of a *slowly emerging* popular sovereign offers a way of legitimating controversial methods of implementing constitutional change<sup>61</sup> (like court-packing) without necessarily becoming

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55. As Ackerman notes, this point can be traced all the way back to *The Federalist Papers*, which repeatedly distinguishes not only between elected government and the people themselves but also between the people and a popular majority motivated by its own self-interest (Madison refers to self-interested majorities as mere “factions” in *Federalist No. 10*). See ACKERMAN, *supra* note 9, at 165–99.

56. See Levinson, *supra* note 28, at 2653.

57. See Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 11 (Martin Loughlin & Neil Walker eds., 2008).

58. See Emiliios Christodoulidis, *The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse*, 12 KING’S L.J. 111, 119 (2001).

59. See THOMAS JEFFERSON, *Letter to Samuel Kercheval*, in *SELECTIONS FROM THE PERSONAL, POLITICAL, AND PHILOSOPHICAL WRITINGS OF THOMAS JEFFERSON* 352 (Saul K. Padover ed., 1967).

60. As Ackerman puts it, “no institution of normal politics can be allowed to transubstantiate itself into the People.” ACKERMAN, *supra* note 9, at 182. The evident implication of this is that an extraordinary institution or coalition of institutions *can* “transubstantiate itself into the People,” and Ackerman’s work addresses itself insistently to the problem of when this conversion is defensible in the United States. *Id.*

61. Ackerman evidently takes inspiration from the Founders here:

To . . . [the Founders], the legally anomalous character of the “convention” was not a sign of defective legal status but of revolutionary possibility—that a group of patriots might speak for the People with *greater* political legitimacy than any assembly whose authority arose only from its legal form.

ACKERMAN, *supra* note 9, at 175.

an apologist for the populism of, say, the Law and Justice Party in Poland (I will say more on this populism in the next paragraph).<sup>62</sup> To offer some clarification on the way that he thinks about this problem, the problem of legal or political-moral “errors”<sup>63</sup> in processes of constitutional change, Ackerman refers us to property law and the doctrine of adverse possession.<sup>64</sup>

As Ackerman explains in the second volume of his *We the People* trilogy, the relevance of the comparison to adverse possession lies in the fact that, much like his system of informal constitutional amendment, the “doctrine of adverse possession allows a concededly illegal occupant of land to *perfect . . . his title*”<sup>65</sup> to that land by publicly complying with a set of “rigorous conditions”<sup>66</sup> and by “successfully maintain[ing] his dominion for many years.”<sup>67</sup> This leads to a difficult question, though: the question of how *exactly* one ought to view the initial act of occupation or, moving from property law back to constitutional law, the dubious tactics that end up yielding a constitutional moment a number of years down the line. Does the legitimacy of such tactics depend exclusively on the way a budding constitutional moment ends up playing out, i.e., can the use of *any* tactics be retroactively vindicated by a subsequently constructed manifestation of popular sovereignty? Or, conversely, can we distinguish in advance between more and less legitimate tactics in the pursuit of informal constitutional change, perhaps to the point where a constitutional moment could be deemed invalid if it depended or relied too heavily on certain problematic tactics at certain points?

We will return to these crucial questions at the end of the next section,<sup>68</sup> but not before offering a short summary of Ackerman’s theory in order to better elucidate its relation to modern populism—a concept that

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62. Ackerman frames this point by suggesting that his democratic dualism seeks a “third way” between “legalistic perfection” and the “lawless force” of populist usurpation. ACKERMAN, *supra* note 13, at 33, 116.

63. See ACKERMAN, *supra* note 9, at 174 (quoting THE FEDERALIST NO. 40 (James Madison)).

64. See ACKERMAN, *supra* note 13, at 93–95.

65. *Id.* at 93 (emphasis added).

66. *Id.*

67. *Id.* After highlighting this requirement of protracted dominion in property law, Ackerman continues:

So too in constitutional law. Popular sovereignty cannot be won in a single moment. As at the Founding, a rising reform movement must engage in a temporally extended process—in which it is obliged to defend its claims to speak for the People time and again in a series of escalating institutional contests for public support.

*Id.*

68. To be more precise, these questions will be discussed at the end of Section II of this Article, on the idea of court-packing as a move to consolidate a nearly complete constitutional moment (“Option One: Court-Packing as a Move to Consolidate a Constitutional Moment?”). See *infra* pp.48-54.

I have thus far left lurking in the shadows. At the risk of oversimplification, one can arguably distil modern populism down to two core theses: (1) that the will of the people is superior to all law, including constitutional law,<sup>69</sup> and (2) that the will of the people can be adequately represented—and is in fact *best* represented—by a single actor or institution that authentically embodies the people’s spirit at a given point in time (Andrew Arato refers to this thesis using the term “organ sovereignty”<sup>70</sup>). While Ackerman evidently accepts the first thesis, he just as evidently rejects the second thesis, breaking the link between his theory and populism by insisting that the pathway to popular sovereignty is not through direct embodiment (or as he puts it, through allowing a single institution to “transubstantiate itself into the People”<sup>71</sup>), *but through the effective operation of the federal separation of powers across a generation*.<sup>72</sup> In effect, this provides us with the prospect of something like a “third way,”<sup>73</sup> between legalism and populism; between “legalistic nitpicking”<sup>74</sup> (legitimate constitutional change can only take place via Article V) and “lawless force”<sup>75</sup> (constitutional law means nothing in the face of contrary public opinion). To put this differently and perhaps more clearly, one could say that the promise of popular sovereignty is defended in Ackerman’s work against two opposing threats: (1) the threat of the “bicentennial myth,”<sup>76</sup> which denies that Americans have meaningfully reinvented their constitutional identity since the 1780s, thereby confining the American experience of popular sovereignty and political freedom to the very distant past, and (2) the threat of the populist demagogue who claims that their solid electoral mandate justifies all manner of

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69. Schmitt’s distinction between the “absolute” and “relative” conceptions of a constitution is an important example of this, SCHMITT, *supra* note 10, but Ackerman finds more palatable support from the American founders, including in Alexander Hamilton’s claim in *Federalist No. 78* that the “power of the people is superior to” the power of government, see Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1013 (1984).

70. ARATO, *supra* note 16, at 23.

71. ACKERMAN, *supra* note 9, at 182.

72. Andrew Arato has offered a very different reading of Ackerman, suggesting that Ackerman’s theory only emphasizes the separation of powers during periods of normal politics, not during periods of constitutional politics when the People themselves begin to speak. While there is a certain amount of rhetoric in Ackerman’s work that supports this reading, it is undercut, I would argue, by Ackerman’s explicit claims that it is a reform movement’s slow passage through the American separation of powers that will eventually vindicate its bold claims to speak for the People. As Ackerman writes in *The Civil Rights Revolution*, for example, a reform movement must “undertake an arduous march through the presidency, Congress, and the Court before it can legitimately enact sweeping changes.” See Ackerman, *supra* note 31, at 43. For Arato’s analysis, see ARATO, *supra* note 16, at 108.

73. ACKERMAN, *supra* note 13, at 33.

74. See Bruce Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63, 86 (Sanford Levinson ed., 1995).

75. ACKERMAN, *supra* note 13, at 116.

76. ACKERMAN, *supra* note 9, at 34.

constitutional novelty. In response to these opposing threats, Ackerman gives us a fascinating and auspicious hybrid: namely, the idea that the sovereign People should be regarded as speaking when a majority of the voting population *keeps speaking*, and keeps lending its support for the same initiative over a sustained period of time and after a rich sequence of highly public debates. The question now on the table is: how does the prospect of court-packing generally and, in 2021 in particular, look when viewed through the lens of Ackerman's hybrid theory of constitutional change?

## II. OPTION ONE: COURT-PACKING AS A MOVE TO CONSOLIDATE A CONSTITUTIONAL MOMENT?

Having cast our eyes back over Ackerman's constitutional theory, then, let us turn back to the matter at hand by asking whether that theory allows court-packing to be treated as a democratically defensible pathway to systemic change. While Ackerman does not offer an unequivocal answer to this question, his thoughtful engagement with President Franklin Delano Roosevelt's (FDR) infamous court-packing plan in Volume II of *We the People* provides some important clues on his thinking, and will accordingly serve as a useful starting point in framing Ackerman's perspective on court-packing as a road to constitutional amendment outside Article V.<sup>77</sup> Without delving too deep into the well-worn story of the FDR plan,<sup>78</sup> suffice it to say here that the plan came within sight of fruition when Roosevelt won his second presidential election in 1936, when he maintained his office with one of the most decisive, sweeping mandates in American history.<sup>79</sup> From the outset, this already tells us

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77. See ACKERMAN, *supra* note 13, at 312–44.

78. On this story, see also JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2011), and William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, SUP. CT. REV. 347 (1966).

79. This is an understatement. As Ackerman explained in an earlier law review article, what distinguishes FDR and the New Deal Democrats from subsequent reformers (like Reagan's Republicans) is the way that the former continued to *accumulate* support with each election, culminating in their blunt obliteration of the opposition in 1936. To quote Ackerman on this:

Before Franklin Roosevelt gained the Senate's advice and consent to transformative appointments, he did more than simply win reelection. Most obviously, he led the Democratic Party to a remarkable series of electoral victories in Congress. Looking narrowly at the Senate, the difference between the Roosevelt and Reagan years does not show up so dramatically on the day each President first took possession of the White House: in both 1932 and 1980, the President's party took control of the Senate for the first time in many years (fourteen years in the case of the Democrats, twenty-six in the case of the Republicans). The key difference is that Roosevelt succeeded, and Reagan failed, to build on this initial success. During Reagan's first six years, Republican support in the Senate remained in the low 50's, and finally sank to minority status in 1986, despite the

something crucial about how to read Ackerman's views on the FDR plan, because if Ackerman is anything less than resounding in his recognition of FDR's democratic authority to pack the Supreme Court after a second, crushing electoral victory (and as we will see, he is far from resounding on this count), then does it not seem that from his perspective, court-packing is a governmental option to be justified *extremely hesitantly, if ever?*

Keeping this thought closely in mind, we can pick up the story by recalling that although FDR's plan suffered a massive defeat at the hands of an otherwise friendly<sup>80</sup> Congress, it is also seen as having provoked the Supreme Court's repudiation of the *Lochner* era<sup>81</sup> in *West Coast Hotel*, the infamous "switch in time that saved nine"<sup>82</sup> and that ended the Supreme Court's long, bitter resistance to the New Deal. How does Ackerman view this chain of events? The first thing to note is that, on his reading, the switch occurred toward the tail end of a period of intense constitutional politics, after the constitutional philosophy of the New Deal had already cleared an impressive succession of electoral hurdles and was for Ackerman on the brink of yielding a completed constitutional moment. In this regard, one may initially suppose that by 1937, the Supreme Court was increasingly unjustified, from a dualist point of view, in its institutional resistance. Did the increasing gulf between enduring public opinion and the Supreme Court's *Lochner* jurisprudence give Roosevelt a right to use a tactic as contentious and drastic as court-packing to constitutionally entrench the New Deal?

Not *quite*, as it turns out. Or at least, things are not as simple as saying in advance that court-packing is simply right or wrong, legitimate or illegitimate, thinkable or unthinkable. On the contrary, for Ackerman, *the* thinker of the constituent power in modern America,<sup>83</sup> everything hinges on how ordinary Americans, the distinctive "heroes"<sup>84</sup> of Ackerman's

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President's warning about the fate of future Supreme Court nominees. In contrast, the New Deal Democrats kept building their representation to unprecedented heights during the next two elections—so that, after their landslide victory of 1936, there were no fewer than seventy-six Democrats in the Senate.

Ackerman, *supra* note 11, at 1173.

80. As noted in the footnote above, "there were no fewer than seventy-six Democrats in the Senate" when FDR put forward his court-packing plan. *Id.*

81. For an especially interesting and thoughtful analysis of the *Lochner*-era and its modern-day descendants, see Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); *see also* *Lochner v. New York*, 198 U.S. 45 (1905).

82. *See* Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 69 (2010); *see also* KENT ROACH: THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE? 19 (2001).

83. As an example of this claim, see Andrew Arato, *Carl Schmitt and the Revival of the Doctrine of the Constituent Power in the United States*, 21 CARDOZO L. REV. 1739 (2000).

84. *See* Christodoulidis, *supra* note 29, at 969.

theory, *would have* responded to court-packing if it had been successfully implemented. In this sense, while a large majority of Americans went with Roosevelt in 1936 despite being warned that court-packing could be on the horizon (e.g., by FDR's opponent, Alf Landon<sup>85</sup>), this does not tell us how voters would have reacted to court-packing as a definitive occurrence rather than an uncertain prospect. Indeed, when the Supreme Court eventually undertook its famous switch in time, it effectively "killed"<sup>86</sup> what Ackerman refers to as a "remarkably sophisticated constitutional debate"<sup>87</sup> over whether "unconventional steps like court-packing"<sup>88</sup> would suffice to enact decisive constitutional change or whether reformists would ultimately need to take a much longer and more precarious walk home through Article V. What a shame, Ackerman seems to sigh, that we will never know how voters would have responded to and weighed in on this debate.<sup>89</sup> This is especially so insofar as early Gallup polling suggested that public opinion was swinging in Roosevelt's favor before the switch, although it was still very much on a knife edge (as Ackerman says, "on the eve of the Court's 'switch,' Gallup was reporting a close division of opinion"<sup>90</sup>). Would "continued judicial resistance . . . have played into [the President's] hands, allowing him to present court-packing as the only practical solution"<sup>91</sup> to the problem of a staunchly "intransigent"<sup>92</sup> and unpopular Supreme Court?

We need not answer this question. On the contrary, the most important question for the purposes of this Article is one that I have already answered: the question of whether court-packing *could* have been a democratically acceptable means of consolidating the constitutional transformations of the New Deal. Ackerman's answer to this question, as we have seen, is that it would have depended on how the American public weighed in on Roosevelt's legacy at the next election, after the President had successfully pushed his packing plan through Congress. Without overstating things, then, Ackerman's emphasis on popular sovereignty as a redemptive force renders court-packing ultimately thinkable, but conditionally so, where ordinary voters actually show their clear support for its *executors* via electoral politics. This is why I suggested above that court-packing is not simply right or wrong, legitimate or illegitimate, thinkable or unthinkable. To put it simply, the legitimacy of court-packing

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85. ACKERMAN, *supra* note 13, at 310.

86. *Id.* at 315.

87. *Id.* at 314.

88. *Id.* at 315.

89. *Id.* at 314–15.

90. *Id.* at 333.

91. *Id.* at 335.

92. *Id.*



and of similar practices is, in Ackerman's view, a question of political history, of how the country happens to sway in the winds of opposing constitutional arguments and extraordinary institutional actions.

To flash forward to the impending future, does this mean that court-packing in 2021 could be retroactively legitimated if it were followed, say, by a Democratic landslide in the 2022 midterms and by even more landslides further down the road? The answer to this question ultimately depends on how we read Ackerman. On one reading, it may seem that Ackerman's theory withholds judgment from early efforts to represent a People (acts of "creative statesmanship"<sup>93</sup>), and allows all such efforts to be validated or invalidated by public opinion over time, even if they are rightly questionable and hence contestable when they initially take place. However, a much better reading, I think, would take account of Ackerman's comments on another democratically questionable strategy, the use of the ordinary judicial appointments process to radically and quickly transform constitutional law (à la FDR after the failure of his packing plan). On this tactic, Ackerman argues fervently in the closing pages of *We the People: Transformations* that later Presidents should—for reasons of political strategy<sup>94</sup> as well as reasons of dualistic political morality—be far more cautious than FDR when appointing new justices, assuming that subsequent presidents (especially in these times of extreme political polarization<sup>95</sup>) will lack the type of mandate that FDR had when he made his boldest appointments to the court.<sup>96</sup> To quote one of the key passages in this section:

Nonetheless, the New Deal precedent . . . [of transformative appointments following the failure of court-packing] . . . may be abused by future Presidents with far more equivocal mandates than Roosevelt's. After all, each President's power to influence the Court depends on the vagaries of death and resignation. A significant number of vacancies may open up during the term(s) of an ideological President who lacks broad and deep support. Given the ease with which Senatorial confirmation battles can obscure the

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93. ACKERMAN, *supra* note 9, at 44.

94. For Ackerman, there is a high risk that "interbranch struggle" over a contentious judicial appointment may "only reveal the shallowness of . . . [the President's public and Congressional] support." ACKERMAN, *supra* note 13, at 395.

95. See *Divided America*, ASSOCIATED PRESS, <https://www.ap.org/explore/divided-america/index.html> [<https://perma.cc/V4LX-KJFN>].

96. To quote Ackerman:

Most Presidents do not come into office with a mandate for fundamental change of the kind that Franklin Delano Roosevelt plausibly claimed in the aftermath of the elections of 1936 . . . If the American people were ever endorsing a break with their constitutional past, they were doing so in the 1930's.

ACKERMAN, *supra* note 9, at 53.

underlying issues, it is just too easy for randomly selected Presidents to revolutionize constitutional law without the kind of popular support required in dualist theory.<sup>97</sup>

The message here is quite clear, but Ackerman was even clearer in a 1988 law review article on the idea of “transformative”<sup>98</sup> judicial appointments. In that piece, Ackerman suggested that the use of the appointments process to transform the Supreme Court is actually a “bad thing,”<sup>99</sup> even if it has some advantages over the Article V process and even if there is in reality “no going back to the good old days when [A]rticle V provided the only means by which Americans debated changes in their constitutional destiny.”<sup>100</sup> This does not mean that Roosevelt was overreaching when he eventually “packed”<sup>101</sup> the Court via the appointments process (Ackerman’s inclusion of the New Deal as a legitimate constitutional moment makes this crystal clear<sup>102</sup>); just that the appointments process does not have checks baked into it that would prevent a President with a much thinner mandate from seizing the court in a relatively short space of time and, from speaking for the People before their full, constitutional will has materialized (before the People have *appeared*, one might even say<sup>103</sup>).

It is hard to miss the parallels between these moments of warning from Ackerman and the current situation in the United States, where happenstance has indeed given a President who lost the popular vote by a significant margin two very consequential Supreme Court picks in his first term. Putting these parallels to one side, the deeper implication for present purposes is that while sustained popularity across a generation can serve to validate, vindicate, or “perfect”<sup>104</sup> controversial tactics retroactively (or as Publius put it, to “blot out . . . irregularities”<sup>105</sup>) from a dualist perspective, Ackerman also seems to believe that there are limits—albeit effervescent, uncertain and context-sensitive ones—with respect to when

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97. ACKERMAN, *supra* note 13, at 405.

98. *See* Ackerman, *supra* note 11.

99. *Id.* at 1179.

100. *Id.*

101. I do not mean to suggest here that this method of packing is the same, morally, as passing a law that enlarges the court and transforms it in one fell swoop. On the contrary, as FDR’s Congressional opponents—in his own party—made clear, there is something far less problematic and altogether more “orderly” about piecemeal, incremental packing through the appointments process, presumably since it provides opportunities for opposition movements to interrupt a transformative President’s progress. *Id.* at 1176.

102. *See generally* ACKERMAN, *supra* note 9, at 105–30.

103. One may well say this under Ackerman’s influence. As he puts it in the first volume of *We the People*, under normal political conditions (as opposed to periods of constitutional politics), “the People simply do not exist.” *Id.* at 263.

104. *See* ACKERMAN, *supra* note 13, at 93.

105. ACKERMAN, *supra* note 9, at 174.

certain tactics can be used. In effect, the overarching rule from which such limits can be derived is that bolder, more morally or legally dubious tactics should be reserved for the *closing phases* of an unfolding constitutional moment, when the public has already given support for an initiative repeatedly but are still seeing their emergent and almost fully emerged voice thwarted by a group of constitutionally conservative institutions that did not get the memo. In this sense, rather than viewing Ackerman's theory as one that grants legitimacy only in hindsight, one may view it as turning on something like a "two-tiered"<sup>106</sup> legitimacy test that requires first that there is a strong measure of proportionality between the boldness of the tactic used and the progress of the constitutional moment and, second, that all tactics used by reformers are validated by the repeated expressions of public support required to constitute a full-fledged constitutional moment.

### III. OPTION TWO: COURT-PACKING AS A CONSTITUTIONAL SIGNAL?

So, this is how Ackerman discusses the most famous and infamous episode of attempted court-packing in American history. While this analysis can surely help us understand Ackerman's general perspective on the political morality of court-packing, FDR's position was strikingly different from the position that a Democratic President might hope to find themselves in come 2021, not least of all because there is no Democratic constitutional moment currently underway to be consolidated and because the chances of a Democratic landslide are grievously slim (America is now

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106. In effect, my proposal here comes close to but modifies the following test attributed to Ackerman in an I-CONnect blog entry:

Ackerman accepts the legitimacy of popular, extra-legal changes to constitutional law, but in a very precise, non-populist way that gives rise to a *two-tiered legitimacy test*. To explain: when the use of formal amendment procedures is problematic, it is presumed that political and legal actors may legitimately act outside of or stretch pre-existing laws to publicize an emergent movement to reorient national values (as the Warren Court did, for example, with its *Brown* decision). At one level, Ackerman's theory regards such action as legitimate, since it promotes republican debate over national values (essential for the production of constitutional moments). However, at another level, Ackerman's theory also regards such action as illegitimate—or rather, as not-yet-legitimate—because responsible actors can not yet claim to be acting in the name of "the people," only in the name of a budding popular will that they aim, precisely, to let/make bloom.

Richard Mailey, *Weak-Form Judicial Review as a Way of Legally Facilitating Constitutional Moments?*, INT'L J. CONST. L. I-CONNECT BLOG (Feb. 22, 2018) (emphasis added), <http://www.iconnectblog.com/2018/02/weak-form-judicial-review-as-a-way-of-legally-facilitating-constitutional-moments/> [https://perma.cc/4DPC-LPEN]. My modification to this formulation is that I do not believe that all legally or morally questionable acts are equal when it comes to meeting the first tier of the test. Rather, my sense is that there is a proportionality component in Ackerman's thinking, which allows for bolder and more controversial action the closer a constitutional moment is to completion—especially where recalcitrant conservative branches are digging their heels in despite an enduring public appetite for change.

too polarized for a landslide in any direction<sup>107</sup>). This leaves us to ask, in the remainder of the Article: is there anything more specific that Ackerman's theory suggests about the potential legitimacy of court-packing in 2021? Are Democrats doomed to wait until they have repeatedly claimed FDR-level mandates before considering an option like court-packing? In other words, from the perspective of Ackerman's dualism, would a popular succession of Democratic governments have to watch more or less passively, and haplessly, while their boldest (and from their perspective most *essential*) legal reforms get scuppered by an *arguably*<sup>108</sup> illegitimate Supreme Court for years to come?

In the next two sections, I will move us closer to answering these questions by considering two ways in which court-packing *might* yet be defended in 2021 using Ackerman's model of constitutional amendment. To begin with, in this section, I will consider whether court-packing in 2021 could be framed as what Ackerman calls a constitutional signal. As already noted, a constitutional signal is the first, initiating step in Ackerman's "alternative signaling system"<sup>109</sup> of constitutional amendment, where an institution of the federal government translates the pleas of a social movement for constitutional transformation into a deliberately contra-constitutional act, e.g., a law that cuts clearly against the "constitutional status quo."<sup>110</sup> While the third volume of Ackerman's *We the People* trilogy suggests that this act can come from any branch of government, including the Supreme Court, I will focus my attention here on the executive-led approach that appears in the first volume of *We the People* and which Ackerman has affirmed as recently as 2014.<sup>111</sup>

As presented in *We the People*'s first volume, Ackerman's signaling test proposes that an ideal constitutional signal will possess three key characteristics. First, it will be issued by a "plebiscitarian"<sup>112</sup> leader who can plausibly "claim a mandate from the People."<sup>113</sup> Second, it will be legally solidified by being submitted to and approved by Congress in the

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107. See, e.g., *Divided America*, *supra* note 95.

108. See Epps & Sitaraman, *supra* note 4.

109. ACKERMAN, *supra* note 9, at 278.

110. See, e.g., ACKERMAN, *supra* note 13, at 418.

111. For Ackerman's recent affirmation of this test, see Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3110 (2014).

112. ACKERMAN, *supra* note 9, at 83.

113. *Id.* at 268. Although Ackerman uses the term "People" with a capital P here, I would suggest that his theory disallows such claims in the early phases of the higher lawmaking process. As he puts it, "no institution of normal politics can be allowed to transubstantiate itself into the People." *Id.* at 182. This suggests that what Ackerman really means to say here, when he suggests that the President must have a mandate from the People, is that the President should have a mandate from the electorate, or the population of voters. To say any more than this in the signaling phase is surely to rely on the type of "naive synecdoche" that Ackerman rejects when he formulates his dialogic, protracted model for recognizing acts of popular sovereignty. *Id.* at 183.

form of a “transformative statute that challenge[s] . . . the fundamentals of the preexisting regime.”<sup>114</sup> And third, the reform initiative itself will have a level of public support, over and above the President’s personal mandate, that is “extraordinary in three senses: depth, breadth, and decisiveness.”<sup>115</sup> While the first two of these three requirements are straightforward, the third requirement is more complex and merits distinct consideration. What, then, does Ackerman mean by deep, broad, and decisive public support?

Beginning with depth, Ackerman suggests that a reform initiative will have deep support when a supportive individual has “deliberated as much about her commitment to . . . [it] as she thinks appropriate in making a considered judgment on an important decision in her private life.”<sup>116</sup> Although it is surely difficult, if not impossible, to determine the extent of such support across a large population, Ackerman nonetheless opts to put a loose figure on this requirement by suggesting that a legitimate constitutional signal must possess the deep support of around 20% of the voting population.<sup>117</sup> The conditions of breadth and decisiveness then require, respectively, that an additional 31% of the population support the relevant initiative on less considered but basically non-selfish grounds (as Ackerman puts it, “numbers count”<sup>118</sup>), and that the initiative is “in a position to defeat *all* the plausible alternatives in a series of pairwise comparisons.”<sup>119</sup>

Taken together, these requirements seem to place some rather steep limits on an initiative’s admission to what Ackerman calls the “higher lawmaking”<sup>120</sup> track. For several reasons, though, Ackerman suggests that the requirements should not be applied too stringently. The first reason for this suggestion is that Ackerman supposes that little harm will be done by accepting the legitimacy of an under supported signal, given that such a signal will be highly unlikely to “survive the obstacle course that awaits on the higher lawmaking track (though of course, nothing is certain in politics).”<sup>121</sup> Second, Ackerman suggests that imposing overly strict limits on acts of signaling will risk “betray[ing] . . . the Constitution’s

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114. *Id.* at 268. I should note that Ackerman technically places this step in the subsequent “proposal” phase of a constitutional moment, but the two phases—signaling and proposing—are sufficiently intertwined, I think, to justify its inclusion here as a key aspect of constitutional signaling.

115. *Id.* at 272.

116. *Id.* at 274.

117. *Id.*

118. *Id.*

119. *Id.* at 277.

120. The higher lawmaking track is the sequence of tests that an initiative must pass to be counted as a constitutional amendment outside Article V under Ackerman’s theory (i.e., *as a constitutional moment*). *Id.*

121. *Id.* at 280.

foundational commitment to popular sovereignty”<sup>122</sup> by depriving citizens of the opportunity to reconsider, “on appropriate occasions”<sup>123</sup> *and in ever-changing ways*, the terms of their constitutional co-existence (his broader argument is of course that this is what Article V has problematically tended to do). “Worse yet,” Ackerman writes:

[blocking reform movements too quickly] . . . will alienate the movement’s many partisans from the ongoing process of government. These people will not passively accept the fact that the door to higher lawmaking has been slammed in their face. If existing institutions refuse to hear the voice of the People, they will be tempted to take more radical steps to gain the center of the political stage—abandoning entirely the higher lawmaking structures intended to organize the debate and seeking more violent and elitist forms of fundamental change.<sup>124</sup>

This passage comes at the end of the section of Ackerman’s first *We the People* book on constitutional signaling, and it may leave one wondering if the requirement of deep, broad, and decisive support is more a flexible preference for Ackerman than a rule. Does this suggest that Supreme Court expansion could, from an Ackermanian perspective, be defensibly undertaken in 2021 by a supportive President and Congress if it had a mere preponderance of public support (or at least a bit less public support than the “extraordinary”<sup>125</sup> levels *preferred* by Ackerman)? To begin addressing this question, recall that the core justification for Ackerman’s alternative lawmaking system is that it is distinguishable from “demagogic lawlessness and populism”<sup>126</sup> even though it involves bypassing legal norms in the name of popular sovereignty (a populist gesture, par excellence). To achieve this distinction, the Ackermanian alternative lawmaking system relies heavily on what Claude Lefort calls the “institutionalization of conflict.”<sup>127</sup> The President issues a constitutional signal, but the layered structure of the American system leaves ample room for other institutions and actors (e.g., the Supreme

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 191. “[A] constitutional road to the people, ought to be marked out, and kept open, for certain great and *extraordinary* occasions.” *Id.* (emphasis added).

126. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4 (2011).

127. Claude Lefort, *The Permanence of the Theologico-Political?*, in *POLITICAL THEOLOGIES: PUBLIC RELIGIONS IN A POST-SECULAR WORLD* 160–61 (Hent De Vries & Lawrence E. Sullivan eds., 2006).

Court) to *strike back* by defending a more “conservative”<sup>128</sup> constitutional vision. The problem is, court-packing does not allow for this conflictual, Lefortian dynamic. On the contrary, the decisive function (if not the purpose) of court-packing in 2021 would be precisely to remove the final bastion of institutional resistance to Democratic reform, thereby homogenizing the upper echelons of the federal government or, at the very least, watering down the Supreme Court’s capacity to present a conservative alternative to a budding Democratic reform movement.<sup>129</sup>

A Democrat might respond to this argument by noting that while court-packing (or expansion) would certainly change the likelihood that the Supreme Court would pose a meaningful challenge to the transformative impulses of a Democratic government, it would leave another key site of resistance, the Republican Party, untouched and ready to fight back at the next election. Of course, in a very broad sense, the potential for Republican resistance *does* interrupt the monologic, anti-Lefortian thrust of court-packing, because if court-packing was pursued in a new administration’s first term, it would likely only come to pass within sight of the midterm elections, thereby giving voters an opportunity to promptly penalize Democrats if they perceive overreach, or if they otherwise reject their governmental vision. However, while electoral politics is an important aspect of the Ackermanian model, the rather more decisive, legitimating dynamic is the inter-*institutional* one at the federal level. Indeed, according to Ackerman, it is precisely this dynamic that sets the dualism of the American system most sharply against the “levelling democracy”<sup>130</sup> or “monism”<sup>131</sup> of the UK, “where a single election can indeed generate dramatic changes.”<sup>132</sup> In this sense, the crucial point for Ackerman is that a scheme of tectonic change in America should not just be tested by its proponents’ reelection prospects but by a meaningfully robust separation of powers as well, i.e., by the need for reformers to “undertake an arduous march through the presidency, Congress, and the

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128. As Ackerman explains in relation to the Supreme Court’s role during the New Deal, for example: “[T]he Supreme Court [during the New Deal] was contributing to the American people’s political education by presenting a rich constitutional critique revealing the extent to which the New Deal’s innovations could be seen as departing from our nation’s traditional political principles.” Ackerman, *supra* note 11, at 1174.

129. See Arato, *supra* note 1.

130. To quote Ackerman on the notion of “levelling” democracy: “In this single-track view, there is only one place in which the political will of the American people is to be found: the Congress of the United States. If the Congress enacts a law, the People have spoken; if not, not. It’s that simple . . .” Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1035–37 (1984).

131. See, e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 464 (1989).

132. ACKERMAN, *supra* note 31, at 43.

Court,”<sup>133</sup> before their initiative can finally be admitted to the country’s constitutional canon.

To be clear, though, none of these arguments negate the potential legitimacy of a Democratic constitutional signal in 2021 along other lines. From an Ackermanian perspective, a successful signal and proposal *could* be issued, depending on the level and quality of public support for it, in the form of a statute that consciously contravenes and challenges previous Supreme Court rulings on critical issues like campaign finance (*Citizens United*<sup>134</sup>) or gun control (*Heller*<sup>135</sup>).<sup>136</sup> However, for Ackerman, the value of such moves is not that they would necessarily facilitate positive constitutional reform but that they would provoke national and inter-institutional dialogue on the relevant issues, thereby creating a space for ordinary Americans—the distinctive deciders within Ackerman’s theory—to ultimately determine over the course of the next generation if the time for change has arrived. While it may be tempting for Democrats to avoid this “arduous”<sup>137</sup> and precariously uncertain process of consensus-building, Ackerman’s theory regards such a process as non-negotiable where the informal amendment track is being used, and for good reasons. Above all, the most important reason for this requirement is that the key role of the federal separation of powers as a way to “stagger”<sup>138</sup> reform processes is really the most significant factor (as noted in Section I) that separates Ackerman from populist constitutionalists like Carl Schmitt<sup>139</sup> as well as from the authoritarian populism of Poland’s court-packing Law and Justice Party. In the end, *everything*—all the *institutionalist, dialogic, non-populist* legitimacy that Ackerman’s theory claims to capture—hinges on the strength of this distinction, and on the extent to which Ackerman joins the likes of Claude Lefort rather than the likes of Schmitt. The problem is that for the reasons just mentioned, one cannot sustain this distinction while casting court-packing as a constitutional signal. This realization leads us now to our third and final opportunity to stage an Ackermanian defense of court-packing in the next section.

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133. *Id.*

134. *Citizens United v. FEC*, 558 U.S. 310 (2010).

135. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

136. For a comprehensive survey of the Roberts Court’s jurisprudence, see LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* (2014).

137. ACKERMAN, *supra* note 31, at 43.

138. *Id.*

139. *See generally* SCHMITT, *supra* note 10.



#### IV. OPTION THREE: COURT-PACKING AS AN EXPRESSION OF CONSTITUTIONAL CONSERVATISM?

So, court-packing in 2021 is hard to frame as a constitutional signal under Ackerman's theory. Is there another way of framing it, though, that would more decisively separate the Democrats from authoritarian populist court-packers like the Law and Justice Party in Poland<sup>140</sup> and populist constitutional theorists like Carl Schmitt<sup>141</sup>? In this Section, I will offer an affirmative answer to this question by casting Democrats in a completely new (and extremely limited) constitutional role, namely, the role of constitutional *conservatives* rather than reformers. In its most distilled form, the essence of this argument is that even if a single set of electoral wins would not give Democrats anything like a mandate to begin exacting constitutional change via transformative court-packing (or even via the appointments process<sup>142</sup>) in 2021, it would give Democrats a mandate—and a constitutional obligation, one may even argue—to swiftly and decisively curb the transformative agenda that is currently being pursued by Republicans via eminently controversial uses of the appointments process.

In making this argument, I will address two key questions. Firstly, on what precise Ackermanian grounds could Democrats challenge the transformative efforts of the Republican party? And secondly, what kind of court-packing or reform initiative would this challenge permit or require? Beginning with the first question, the crucial point is that Ackerman's theory requires that constitutional reform attempts outside Article V enjoy the consistent support of ordinary Americans across a full generation—with no major breaks or hiccups.<sup>143</sup> In this regard, while a Democratic President and Congress may well believe that the current President's failure to win the popular vote in 2016 delegitimated his scheme of transformative judicial appointments from the outset, their main

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140. See Sadurski, *supra* note 2.

141. See generally SCHMITT, *supra* note 10.

142. There is an important distinction to be made here between ordinary and transformative uses of the appointments process. In a 1988 law review article on the idea of "transformative appointments," Ackerman compares two Reagan appointments: Bork and O'Connor. Ackerman, *supra* note 11. Of these two, only Bork—who of course was not confirmed—counts for Ackerman as a transformative appointment, partly because of his intellectual prowess (and his related potential to lead the right wing of the court across a generation), partly because of his comparatively extreme views (by contrast, O'Connor was a moderate with conservative leanings), and partly because his views were so clearly documented (hence acting as a "signal" to the country of what a Justice Bork would look like in practice). See *id.* at 1169–70.

143. Note, for example, that one of the crucial differences that Ackerman stresses between the transformative efforts of FDR and Reagan is that unlike FDR, Reagan failed to build on his initial success by winning more commanding electoral victories or, at the very least, by maintaining control of Congress. See *id.* at 1173.

Ackermanian argument as constitutional conservatives would be that any mandate that the Republicans *may or may not have had* to pursue constitutional transformation post-2016 would have then been decisively terminated by their failure to win critical elections in 2020.

From the outset, it is worth noting that this argument has the debatable benefit of bypassing a range of divisive issues, including, for example, the controversial appointment of Brett Kavanaugh to the Supreme Court.<sup>144</sup> To explain this point, while the current President's mandate (or lack thereof) poses a significant problem for the dualistic legitimacy of Justice Kavanaugh's nomination, dualism is less directly concerned with either the allegations surrounding Justice Kavanaugh's past conduct or the conspiratorial rhetoric of his confirmation hearings.<sup>145</sup> Of course, these factors are gravely and rightly important from a broader political and moral perspective, but recall that we are confining ourselves for now to an engagement with Ackerman's dualist theory of constitutional transformation, and recall further that this theory allows enduring and dialogically tested public support for constitutional change to "blot out"<sup>146</sup> or "perfect"<sup>147</sup> defects in the amendment process. The question is: could the problematic appointment of Justice Kavanaugh be counted as a potentially excusable defect in the Republicans' quest for constitutional change, i.e., excusable by an eventual manifestation of popular sovereignty in the Republicans' favor? In lieu of a simple answer to this question, suffice it to say that although more dubious or aggressive tactics should be deployed later in the amendment process under Ackerman's model, Ackerman's emphasis on the redemptive force of popular sovereignty suggests quite clearly that a backward-looking approach—one that re-litigates the Kavanaugh affair—is not most effective Ackermanian argument for conservative or defensive court-packing. On the contrary, if the Democrats win big in 2020, their principal Ackermanian argument would be that Republican reformists had been democratically repudiated and should have their constitutional gains reversed via "remedial" changes to the Supreme Court. To paraphrase none other than President Trump on this point, one could say that, from an

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144. On the Kavanaugh hearings and the various controversies surrounding them, see generally Tribe, *supra* note 6. See also Epps & Sitaraman, *supra* note 4, at 159–60.

145. See Epps & Sitaraman, *supra* note 4, at 158–60.

146. ACKERMAN, *supra* note 9, at 174 (quoting THE FEDERALIST NO. 40 (James Madison)).

147. See ACKERMAN, *supra* note 13, at 93. As noted previously, here Ackerman analogizes an adverse possessor—who perfects his initially poor title to land by complying with certain legal conditions over time—to a constitutional reform movement aiming to bring about a constitutional moment.

Ackermanian perspective, the “only important thing is the . . . people,”<sup>148</sup> and it is the people—and not just those who are understandably appalled by Kavanaugh’s confirmation<sup>149</sup>—who must choose whether to finally and firmly reject the Republicans’ transformative constitutional vision.

As narrow as this argument might seem, there are still a lot of variables on which its success depends. In particular, the success of this argument hinges on how fully Democrats would be willing to invest themselves in the Ackermanian role of constitutional conservatives, which would depend, in turn, on the specific contours of their court reform package and on the aggressiveness with which they would pursue nationally controversial elements of their political agenda. To make this point clearer, let us very briefly consider each of these two factors in turn, starting with the court reform package itself.

What kind of reform (or “packing”) package would allow the Democrats to cast themselves as constitutional conservatives? The easy but negative answer to this is of course that the Democrats could not do anything that could be reasonably mistaken for stacking the deck in their favor, but this answer simply leaves us to ask again: what *could* they do? One of the most interesting answers to this question has come from presidential candidate Pete Buttigieg, whose “Balanced Bench”<sup>150</sup> proposal is based on a recent article in the *Yale Law Journal*.<sup>151</sup> To quote an explanatory passage from that article:

The . . . [Balanced Bench] proposal has several components. First, the Supreme Court would start with ten justices. Five would be affiliated with the Democratic Party, and five with the Republican Party. 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 a strong supermajority requirement). These additional five Justices would be chosen two years in advance, for one-year terms. And if the Justices

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148. See MÜLLER, *supra* note 1, at 22. As Müller points out, though, the current President has a very different understanding of what constitutes a “people,” as evidenced by the full quote that I have paraphrased above: “[T]he only important thing is the unification of the people—because the other people don’t mean anything.” *Id.* As this quote suggests, the President, and populists generally, has little or no interest in social groups and individuals that cannot be brought to share their moral and political vision (i.e., that cannot be “unified” behind that vision). *See id.*

149. *See, e.g.,* Tribe, *supra* note 6; *see also* Epps & Sitaraman, *supra* note 4.

150. *See* Epps & Sitaraman, *supra* note 4, at 193–205. While Epps and Sitaraman offer a second proposal on “how to save the Supreme Court” (“the Supreme Court Lottery”), I am only considering the “Balanced Bench” plan because it was the plan that was originally embraced by Buttigieg and that, according to the *Mother Jones* article cited earlier, brought court-packing onto the table as a serious option for the Democrats if they win big enough in 2020. *See* Levy, *supra* note 3.

151. Epps & Sitaraman, *supra* note 4.

failed to agree on a slate of additional colleagues, the Supreme Court would lack a quorum and could not hear any cases for that year.<sup>152</sup>

On its face, this plan evidently aspires to attain an ideological equilibrium on the Supreme Court, and this arguably renders it more plausible as a public-regarding, non-partisan project, i.e., as a *constitutionally conservative* project of the type considered here. However, there are troubling questions (in what way would justices be “partisan-affiliated”?)<sup>153</sup> as well as constitutional objections (e.g., relying on the Appointments Clause<sup>154</sup>) that could be thrown at such a plan, as recognized by the plan’s authors and as raised, more forcefully, by various others.<sup>155</sup> Curiously, to the extent that these objections hold water, it seems that while partisan and indeed *populist* court-packing is constitutionally sound and legal, Buttigieg’s sincere proposal to *balance* the Supreme Court may require an Article V amendment (as would equally admirable efforts to limit the power of the Court<sup>156</sup>). These constitutional

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152. *Id.* at 193.

153. See Jamelle Bouie, Opinion, *Why Pete Buttigieg Is Wrong About the Supreme Court*, N.Y. TIMES (June 6, 2019), <https://www.nytimes.com/2019/06/06/opinion/buttigieg-warren-supreme-court.html> [<https://perma.cc/J89J-TAG7>]. On this question, Epps and Sitaraman indicate in their original article that the best option would likely be if “partisan-affiliated” judges were chosen by representatives of the two main parties or by a bipartisan commission, but there are numerous questions that this leaves very insistently and problematically hanging, most notably the question of who gets the phenomenal and hugely consequential power to choose judges on behalf of their party (and the related question of how their empowerment can be justified). See Epps & Sitaraman, *supra* note 4.

154. See Epps & Sitaraman, *supra* note 4, at 200–05. Epps and Sitaraman have recently offered another response to these constitutional objections in Daniel Epps & Ganesh Sitaraman, *The Constitutionality of the 5-5-5 Plan*, TAKE CARE BLOG (May 17, 2019), <https://takecareblog.com/blog/the-constitutionality-of-the-5-5-5-supreme-court-plan> [<https://perma.cc/S39D-N9AS>]. However, as well argued as they are, their various responses do not overcome the fact that their plan is constitutionally controversial and would be likely to generate substantial backlash, both institutionally and socially.

155. See Aaron Belkin, *5-5-5 and Appellate Rotation Plans Are Unconstitutional and Unworkable*, TAKE BACK THE COURT (Mar. 2019), <https://www.takebackthecourt.today/5-5-5-and-appellate-rotation-plans-are-unconstitutional-and-unworkable> [<https://perma.cc/Z9J5-U4KJ>]; see also Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps and Sitaraman*, 129 YALE L.J.F. 93 (2019), <https://www.yalelawjournal.org/forum/supreme-court-as-superweapon> [<https://perma.cc/27LK-TJS2>].

156. For an example of efforts to limit the Court’s power by constitutionalizing a “weak-form” model of judicial review, see generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001). The example of this approach that seems to be best-known globally is the Canadian notwithstanding clause, which allows Canadian legislatures (both federal and provincial) to override judicial decisions on certain constitutional rights for renewable five-year periods. From an Ackermanian perspective, the problem with such an approach is that it allows for kneejerk responses to unpopular court decisions rather than responses reflecting a more enduring, dialogically tested rejection of those decisions on the part of the public. With this pitfall in mind, one may accordingly wonder if the constitutional amendment proposed by Senator Burton

implications create a potent problem for the Buttigieg plan and other similarly creative or unconventional plans. Assuming that Article V is not an option (and current divisions suggest that it is probably not), one is left wondering if the idea would be to try get the plan through Congress despite credible claims of constitutional infirmity, thereby damaging the Democrats' self-presentation as constitutional conservatives and potentially also precipitating a constitutional crisis by leaving the Supreme Court to decide whether to block or permit its own reform. Is there a way out of this impasse, a way forward that does not raise constitutional red flags *or* look like partisan court-packing, both of which would erode the Democrats' claims of constitutional conservatism?

A perhaps disappointing way around this problem could be for Democrats to couple a modest form of court-packing—"court-balancing," let's call it<sup>157</sup>—with various forms of self-limitation. Assuming, then, that changing the Supreme Court's composition is the only strategy that could not attract *reasonable* constitutional scrutiny, consider the following two scenarios as possible Ackermanian pathways to conservative court-packing in 2021. For the first scenario, suppose that a Democrat *decisively* ousts Trump in 2020 and sets to work not by lobbying a new, blue majority Congress to stack the Supreme Court decisively in their favor but by advocating the "balancing" addition of a tenth Justice. Anticipating Republican and voter backlash as a response to even this modest and fully legal reform, suppose further that Congress sets the effective date for the law after the midterms to give the American public—the "ordinary Americans" who hold the keys to the Constitution under Ackerman's theory—an opportunity to at least have a say on whether the fresh

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Wheeler, as an alternative to FDR's court-packing plan, would be a more dualist way of limiting the court's power. The key part of this proposed amendment states:

In case the Supreme Court renders any judgment holding any Act of Congress . . . unconstitutional, the question with respect to the constitutionality of such Act or provision shall be promptly submitted to the Congress for its action at the earliest practicable date that the Congress is in session . . . but no action shall be taken by the Congress upon such question until an election shall have been held at which Members of the House of Representatives are regularly by law to be chosen. If such Act or provision is re-enacted by *two-thirds of each House of the Congress* . . . such Act or provision shall be deemed to be constitutional and effective from the date of such reenactment.

ACKERMAN, *supra* note 13, at 321 (emphasis added).

157. As Epps and Sitaraman point out in their article, Eric Segall has cogently defended the idea that the Supreme Court should be "permanently and evenly divided along partisan and ideological lines" (e.g., by simply adding another Justice to stall but not override the impact of recent Republican appointments). See Epps & Sitaraman, *supra* note 4, at 196. While the Democrats' use of this strategy would admittedly have a number of pitfalls, its distinct advantage for Segall is that it would potentially compel the Court to "produce narrower, more consensus-based decisions," thereby bolstering its legitimacy in the face of critical claims that hot-button issues are too often decided along starkly ideological lines. *Id.* For Segall's proposal, see Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).

appointment will be approved by a Democratic or Republican Senate (and maybe on whether there will be a fresh appointment at all).

Assuming that this first option will prove unsatisfactory for Democrats who view court-packing as morally and strategically urgent, consider a second, perhaps *slightly* more robust option. This time, while the first move is once again an attempt to simply balance the Court with a tenth Justice, the President now decides to act more aggressively by relying on a supportive Congress to push his or her new Justice quickly through the confirmation process (no delayed effective date this time). However, alongside this marginally more aggressive stance, suppose that the President and congressional leaders band together to make an extraordinary pledge to the nation. They will not, they claim, pursue parts of their legislative agenda that they believe the prior Court would have invalidated or that are otherwise nationally controversial in the extreme—not unless they hold onto Congress in the midterms. This proposal takes us to the second factor mentioned above in assessing the plausibility of the Democrats' claim to be acting as constitutional conservatives: namely, the aggressiveness with which they pursue their own reform agenda. Does an Ackermanian approach require or favor anything like the extraordinary, self-limiting pledge of this scenario?

I am not sure if an Ackermanian approach *requires* such self-limitation, but there are good reasons for supposing that it implies a preference for it. Put simply, Ackerman's very specific conception of dualist democracy is clear in at least discouraging the mixing of constitutional roles, specifically in the sense that proponents of reform usually require a fresh mandate before they proceed to a new phase of the higher lawmaking process<sup>158</sup> (signaling, proposing, etc.<sup>159</sup>). In this regard, it would certainly make sense to suppose that special caution is required when a group of constitutional conservatives (in this case a Democratic government purporting to use court-packing as a way of terminating Republican transformation) wishes to shift not simply between stages of a

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158. As evidence of this requirement under Ackerman's theory, see ACKERMAN, *supra* note 31, at 63–79 (illustrating the need for fresh mandates when transitioning between phases of constitutional change during the civil rights movement).

159. *Id.* at 66, 72. I have not detailed all of the phases that Ackerman identifies in American constitutional moments in this Article, partly because certain (especially later) phases are not strictly relevant to my argument here, and partly because I believe that Ackerman's theory is more than a matter of identifying a highly specific set of stages that must be followed by subsequent reformers to attain legitimacy. Rather, what Ackerman shows us above all—the radical core of his theory, if you like—is that the American People can issue (and *have* issued) sovereign decisions in ways that are, at the time, radically new (and is not this type of radical creativity the very essence of sovereignty?). That said, if the reader wishes to survey the specific stages that Ackerman recognizes in recent constitutional moments like the New Deal or the Civil Rights Revolution, a good place to start is with the early chapters of *We the People: The Civil Rights Revolution*. See ACKERMAN, *supra* note 31.

reform process, but to shift roles completely, from constitutional conservatives to constitutional reformers. To legitimize this shift, I would suggest strongly that Ackerman's dualism requires an electoral return to the voting population for support, but with this requirement a critical reader may detect a problematic lack of political realism. Could we *really* expect, this reader might ask, that a Democratic Party consumed by its own, urgent sense of justice will consciously defer the implementation of its political agenda despite momentarily having a wealth of political power in its hands? Could we *really* ask the supporters and prospective beneficiaries of that agenda to wait until after the midterms for implementation? And would a newly elected government that stalled like this *really* make it through those midterms unscathed, even if many voters recognized its honorable, dualist intentions?

#### CONCLUSION

These questions on the realism and indeed tolerability of Ackerman-style dualism are all vitally important, and they require some clarification as well as some final analysis. To begin with, suppose I am right that moderate court-packing in 2021 is defensible from an Ackermanian, dualist point of view (although only in the very narrow and extremely limiting way just described). Does this mean that court-packing or balancing in 2021 can now be regarded as *thinkable* and, conversely, that more ambitious court-packing plans should be regarded as *unthinkable*? To answer this question bluntly, *nothing* that I have said over the course of this Article justifies such a sweeping conclusion. On the contrary, my argument—*my only argument*—is that Ackerman's work offers an important, non-populist way of defending the *democratic legitimacy* of court-packing in 2021 (or more preferably at some point further down the road, in the midst of time-tested support for Democrats and their constitutional agenda). What the article does not say, and will not say, is that democratic legitimacy should be the only or primary concern when assessing the morality and wisdom of an initiative like court-packing. Indeed, even Ackerman himself concedes that, despite his fundamental concern with the facilitation of popular sovereignty and the “second dimension”<sup>160</sup> of democracy in America, political actors will sometimes be well-advised to tolerate serious democratic deficits to ensure implementation of a socially beneficial or morally praiseworthy initiative. As Ackerman writes with respect to the Philadelphia Convention and its democratic defects:

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160. See COLÓN-RÍOS, *supra* note 22, at 36.

[T]he Federalists were not conducting a philosophy seminar. They were trying to win. Another round of elections would have given Anti-Federalists a chance to win a lot of seats at the next convention, enabling them to defeat the Federalists' centralizing ambitions. The majority in Philadelphia were utterly unwilling to take this chance. It had taken a lot of hard work to get to Philadelphia, and Madison & Co. were grimly determined to make the most of their opportunity.<sup>161</sup>

With this passage in mind, I want to finish now by very briefly presenting two ways in which my Ackermanian perspective can be seriously challenged. Firstly, one may argue that the level of deep and bitter disagreement in the United States right now is such that any efforts at constitutional transformation outside Article V would be doomed to invite tireless and damaging accusations of “demagogic populism and lawlessness”<sup>162</sup> from a multitude of angles (consider this an argument focusing on the “sociological legitimacy”<sup>163</sup> of court-packing, if you like). Secondly, one may argue that the intentionally slow and staggered pace of change advocated by Ackerman's dualism (and captured by the two proposals put forward in the preceding Section) errs by leaving those affected by problematic laws and policies to wait out their suffering, haplessly, while their fellow citizens deliberate across a full generation.

Upon hearing these two counter-arguments, an Ackermanian dualist may retort: indeed, these are problems, but they actually reveal the great merit of Ackerman's theory. To explain this claim, it should be obvious from my framing of the two problems above that one cannot address both of them at the same time, since resisting controversial strategies to mitigate social or institutional “backlash”<sup>164</sup> will mean abandoning your full pursuit of justice (as you see it) and vice versa. However, as Ackerman argues in the second volume of *We the People*, while we cannot have our cake and eat it too, we can still try to walk the line between our most cherished constitutional objectives.<sup>165</sup> In this regard (and as noted earlier), Ackerman presents his theory as a “third way”<sup>166</sup> of dealing with constitutional change—an approach that seeks to transcend the gulf between “legalistic

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161. ACKERMAN, *supra* note 13, at 89.

162. See ACKERMAN, *supra* note 126.

163. See Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1843–44 (2005).

164. See generally Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007).

165. See, e.g., ACKERMAN, *supra* note 13, at 33.

166. *Id.*; see also Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 INT'L J. CONST. L. 193, 203 (2008).



perfection”<sup>167</sup> and “lawless force,”<sup>168</sup> hopeless hesitation (in the face of potential backlash), and overzealousness (in order to pursue justice as we understand it). Isn’t this, the retorting dualist may ask, the best that we can actually do given “the misfortune of how things are”<sup>169</sup> in the increasingly *dis-United States*?

Maybe so. But as a counterpoint, consider the following hypothetical. Late in 2021, a Democratic President and Congress watch in horror as the Supreme Court overturns *Roe v. Wade*,<sup>170</sup> thereby legalizing severely restrictive abortion laws of the type that numerous states have just passed in our own, non-hypothetical reality.<sup>171</sup> How do they respond? Do they act swiftly to pack the Supreme Court or to reinstate *Roe* by less secure means (e.g., ordinary legislation)? Or do they take a more incremental approach, perhaps “balancing” the Court in the way I have just proposed while pledging legislative restraint on controversial issues like abortion until (or rather, unless) they retain their mandate in the midterms. To the extent that Ackermanian dualism, *on my no doubt contestable reading*, carries a preference for the latter path or some version of it, how could we justify this choice to all those affected by the Supreme Court’s decision in the interim? What do we say, for example, to the young woman in Alabama who has been raped, but who, rather than finding the criminal law by her side, now stares down the barrel of a system that threatens her with serious violence if she terminates the resultant pregnancy? Can we confidently present someone in her position with the claim that, despite having the power to act, and despite their professed, intense opposition to the Supreme Court’s decision, Democrats should wait it out? No matter how we spin it, this is a deeply troubling question for political and constitutional theories of the Ackermanian type—theories

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167. ACKERMAN, *supra* note 13, at 116.

168. *Id.*

169. FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 8 (1999).

170. *Roe v. Wade*, 410 U.S. 113 (1973). To clarify, I should note that this is a completely hypothetical scenario, one that is less based on evidence that *Roe* is likely to be overruled and more on the opportunity that the Court’s conservative majority now provides for the anti-abortion movement in the United States.

171. See, e.g., Eric Levenson, *Abortion Laws in the US: Here Are the States Pushing to Restrict Access*, CNN (May 30, 2019), <https://www.cnn.com/2019/05/16/politics/states-abortion-laws/index.html> [https://perma.cc/9GKX-NJU2].

that advocate “minimalism”<sup>172</sup> over “heroism”<sup>173</sup> to borrow Cass Sunstein’s terminology. Is it a question that is troubling enough to warrant a more heroic, urgent approach on issues like abortion, an approach that may involve endorsing more extreme forms of court-packing (or related tactics) than my reading of Ackerman allows for? I leave that up to you but with a residual question attached. The question is, if you believe your perspective on such issues is right, and you believe that your government is entitled to act decisively despite deep disagreement within your society on a given issue, what separates you from the populists who believe that “they, *and they alone*, can represent the people”?<sup>174</sup> I do not mean to suggest that this question is unanswerable; only that it is a critical moral and strategic question for American liberals in the months and years ahead.

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172. I borrow this term from Cass Sunstein, who uses it to refer to judges (although I dare say that it is usefully applicable to political actors in general). To quote:

Some judges are . . . Minimalists, in the sense that they favor small, cautious steps, building incrementally on the decisions and practices of the past. Unlike Heroes, who celebrate ambitious accounts of liberty and equality or of the Constitution’s structural provisions, those who adopt the minimalist Persona emphasize the limits of large-scale theories. They emphasize that human beings, and judges in particular, have a limited stock of reason. They embrace the idea of humility.

CASS R. SUNSTEIN, CONSTITUTIONAL PERSONAE: HEROES, SOLDIERS, MINIMALISTS, AND MUTES 16 (2015).

173. To quote Sunstein: “The defining characteristic of judicial heroes is that they are big and bold. They are entirely willing to invoke an ambitious understanding of the Constitution to invalidate the decisions of the federal government and the states.” *Id.*

174. See MÜLLER, *supra* note 1, at 3 (emphasis added).