HOW TO FIGHT COURT-PACKING?

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ABSTRACT

Whether we like it or not, court-packing has flourished all over the world. Bolivian, Hungarian, Polish, and Turkish as well as Venezuelan political leaders have recently employed various strategies to stack their courts with loyal judges. Even in consolidated democracies, such as the United States, the possibility of court-packing is discussed with an intensity unheard of for several decades. Yet, our conceptual understanding of the phenomenon is still very limited. This article provides a novel conceptualization of court-packing and identifies three court-packing strategies: (1) the expanding strategy, which includes techniques that increase the size of the court; (2) the emptying strategy, which results in a decrease in the number of sitting judges; and (3) the swapping strategy, which aims at replacing sitting judges. Subsequently, it analyzes the potential safeguards, both formal and informal, against court-packing strategies and shows that formal institutions are rarely enough to fend off court-packing attempts.

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When Franklin Delano Roosevelt (hereinafter FDR), frustrated with the stance of the US Supreme Court toward his transformative New Deal legislation, announced his plan to expand the number of Supreme Court Justices on February 5, 1937, he surprised many Americans.[2] If successful, FDR's court-packing plan would have allowed him to appoint six justices immediately, thereby enlarging the membership of the Supreme Court from nine to fifteen (Cushman 2013). This would give FDR a dependable pro–New Deal majority on the Supreme Court (Shesol 2010).

FDR's court-packing plan eventually did not materialize,[3] but it left a deep imprint on US politics as well as on the Supreme Court (Cisneros 2012).[4] Since FDR, no US president has openly discussed a similar proposal. However, the idea of court-packing has always been around,[5] and in these days court-packing appears to be on the table in ways it has not been for several decades (Russell 2018; Zelizer 2018; Burns 2019; Siegel 2019; Tushnet 2019).

In the meantime, court-packing has flourished in other parts of the world. Argentinian president Carlos Menem increased the number of judges of the Supreme Court of Argentina from five to nine in 1990, which immediately gave him four seats to fill (Chavez 2004). Recep Tayyip Erdoğan expanded the membership of the Turkish Constitutional Court from ten to seventeen in 2010 (Özbudun 2015; Esen and Gumuscu 2016; Varol et al. 2017). Viktor Orbán used a similar strategy to achieve a majority on the Hungarian Constitutional Court in 2012 (Halmai 2012; Uitz 2015). Jaroslaw Kaczyński followed suit and expanded the number of judges of the Polish Supreme Court from 81 to 120 (Śledzińska-Simon 2018).

But this is just the tip of the iceberg, for these examples illustrate only one court-packing strategy, namely, expanding the size of the court. In fact, political leaders

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2. But note that some scholars argue that FDR's court-packing plan at the time had an inherent logic and even inevitability (Leuchtenburg 1966, 400).

3. This was a result of negative public opinion (Caldeira 1987), the waning support among the Democratic congressional representative (Shesol 2010), a shift in the Supreme Court's case law toward FDR's preferred policy (Cushman 1998), the resignation of conservative justice Van Devanter (Cushman 2012), and the unexpected death of the Senate majority leader, Joseph Robinson (Tushnet 2019).

4. One should also not forget that FDR got what he wanted, as by 1942 he had appointed seven out of nine Supreme Court justices, including the chief justice (Shesol 2010, 519–20).

5. Note also that the use of court-packing plans as credible threats to induce self-restraint among justices is not entirely dismissed (Siegel 2019).

adopt a plethora of different techniques to help them secure friendly majorities in courts. Three Argentinian presidents in a row reduced the number of Argentina's Supreme Court justices (Chavez 2004). Slovak and Polish political leaders repeatedly thwarted the judicial selection process by refusing to appoint newly elected judges (Steuer 2019; Sadurski 2019a), or they benched judges from opposing coalitions (Śledzińska-Simon 2018). Complex purges in the judiciary took place in many postcommunist judiciaries as a result of the lustration (Robertson 2006, 87). On June 25, 2019, the Court of Justice of the European Union (hereinafter CJEU) deemed the forced retirement of Polish judges to be incompatible with fundamental values of constitutional democracies, condemning the very same strategy previously employed by Prime Minister Orbán in Hungary.[6]

In light of these examples, we introduce a new, broader understanding of court-packing, which encompasses all the techniques that can be used to stack the courts with loyal judges. In contrast to FDR's legacy and his plan to increase the size of the Supreme Court, it includes also other strategies aimed at changing the composition of the bench, namely, emptying the court and replacing sitting judges. In other words, the aim of such a broad understanding of court-packing is to capture politicians' motivation to tinker with the composition of the court, irrespective of their means.

Our definition of court-packing is thus as follows: an intentional irregular change in the composition of the existing court, in quantitative as well as qualitative terms, that creates a new majority at the court or restricts the old one.[7] A *quantitative* change in the composition includes increasing as well as reducing the number of judges on a given court. A *qualitative* change of composition includes replacing the sitting judges (i.e., a change of composition without increasing or decreasing the size of the court). At the same time, all these changes in the composition result in the formation of a new majority,[8] which could be represented by

6. For more detail, see CJEU, *European Commission v Poland*, C-619/18, judgment of June 24, 2019.

7. We discuss this novel conceptualization of court-packing and the individual elements of our definition in more detail in a separate paper (Kosař and Šipulová 2020).

8. We are aware that there might be other motivations behind court-packing (e.g., political leaders may use court-packing simply to reward their allies and supporters with prestigious judicial positions), but we find these motivations only secondary, since taking control of the court being packed via a new majority has historically been the central aim of court-packing. But note that what politicians intend to do with new majorities (e.g., allying the packed court ideologically, silencing the packed court, using the packed court as an "insurance" or even as a "sword" against political opponents) is a separate question, which requires further research (see Ginsburg 2003; Helmke and Rosenbluth 2009; Sadurski 2019a, 2019b).

judges ideologically aligned with the executive power, judges without a connection to the previous regime, or judges from a certain social or age group.

We are aware that court-packing strategies, even if broadly understood as in our article, are still just one part of the puzzle, since court-packing is often combined with other court-curbing strategies, such as jurisdiction stripping and disempowering a judicial council in Orbán's Hungary (Halmai 2012; Landau 2013; and Uitz 2015), reshuffling the composition of a judicial council and changing the Constitutional Tribunal's procedural rules in Kaczyński's Poland (Sadurski 2019b; Śledzińska-Simon 2018; Zoll and Wortham 2019).

However, studying court-packing strategies separately is worth doing for three reasons. First, the widespread use of court-packing all over the world suggests that politicians find it particularly appealing (among the court-curbing strategies[9]) because it allows them to pursue several aims at the same time,[10] both formally and informally,[11] and because this strategy is cheaper and yields faster results than blunt institutional attacks.[12] Second, compared to other examples of court-curbing practices, court-packing has a clear normative content. Modifications of judicial selection processes, abolishing or merging courts, and defining the scope of judicial review typically fall within the constitutional competences of the executive power enjoying a parliamentary majority. Questioning the use of these competences by a democratically elected government is highly problematic and often raises a double-standards issue. In contrast, court-packing is the court-curbing technique per se and allows us to identify negative effects of political interferences in the composition of the judiciary. This also means that someone who resorts to court-packing makes his or her other judicial reforms also suspect. The third reason is pragmatic. A nuanced comparative analysis of all court-curbing techniques is impossible to achieve in a single article. Moreover, we find it important to bring depth and

9. We treat "court-curbing" as an umbrella term, which is broader than "court-packing" in that it includes strategies such as procedural, financial, and institutional attacks (see also the three notes that follow).

10. On the contrary, procedural attacks such as the increased quorum, the sequence rule, or the supermajority requirement may silence the opposition in the court, but they cannot turn the court into a weapon against opponents.

11. E.g., while a court cannot be abolished informally, judges can be forced to resign by informal means.

12. E.g., creating a new court or merging the existing courts takes time and requires a significant amount of resources and personnel to start "delivering the goods."

breadth into the study of court-packing strategies across the globe,[13] as well as to acknowledge various nuances in their use.[14]

The aim of this article is twofold. First, it introduces a new conceptualization of court-packing strategies that builds on examples from all over the world. Second, it analyses the potential safeguards against the illegitimate use of these strategies.

We need to add an important caveat here. By openly discussing court-packing strategies and the existing holes in the judicial systems, we have been told,[15] we provide autocrats with a playbook on how to rig the judiciary. Implicitly, this suggests that we should keep our knowledge to ourselves and share our concerns via different channels. We respectfully disagree. In our opinion, security by obscurity does not work, and we need to openly discuss the court-packing techniques and available cures against them. First, open discussion will force us to improve the design of domestic judiciaries and explore other safeguards against court-packing. Second, it is naïve to think that autocrats fail to comprehend subtle formal and informal techniques that can be used against judges. To the contrary, the recent actions of Latin American authoritarian leaders as well as the tactics of Erdoğan, Orbán, and Kaczyński in Europe show that these leaders are surrounded by skillful lawyers who know all the tricks of the game. In fact, many of those leaders cloaked their court-packing plans in legalese, which enticed David Landau to coin the term "abusive constitutionalism" (Landau 2013) to differentiate these subtle techniques from blatant ruptures of the constitutional order such as military coups. Finally, scholars have an obligation to respond to political realities, and by not doing so we could lose relevance and credibility.

This article proceeds as follows. Section I provides examples of court-packing strategies and identifies common patterns among them. It analyzes the effects of court-packing and looks more closely at various targets of court-packing. Section II analyzes potential safeguards against court-packing strategies. Section III concludes.

I. THREE COURT-PACKING STRATEGIES

There are several reasons why political leaders benefit from independent courts. Delegating certain questions to courts is a successful blame-ducking strategy,

13. Most existing studies on court-packing have focused on either a single jurisdiction or a single region. For exceptions, see Llanos et al. (2015) and Sweeney (2018).

14. So far, the existing studies have focused primarily on a few well-known court-packing techniques.

15. Both when we presented earlier versions of this manuscript and when we elicited comments on this paper from our learned and noble friends.

especially when regarding issues of higher controversy, which could potentially cost the executive important popularity points (Helmke 2002). Independent courts can also serve as an important institutional safeguard against future election winners (Ramseyer 1994; Popova 2012), and they signal when the legislative majority steps over the lines of minority or individual rights (Dyzenhaus 2007).

Yet, throughout the history of the twentieth century, we have seen many instances of both autocratic and democratic leaders trying to secure control over domestic courts. Attempts to keep the judiciary in line with the position and ideology of the executive power keep reemerging across regions, time, and types of political regime. The domination of selection procedures secures the ideological consistency of the judiciary and allows autocratic leaders to keep the courts otherwise, at least formally, independent (Hilbink 2007). Yet control over the composition of courts also attracts democratic governments, despite some researchers claiming that the dangers of runaway courts in healthy democracies are exaggerated (Dahl 1957).

Judicialization became almost an axiom of legal scholarship, yet politicization and attacks on judicial independence have been just as common. While it is true that most of these attacks have been studied on an individual or systematic level, the research remains quite fragmented. This section therefore offers a novel conceptualization of tools and strategies used by political leaders to pack the courts with ideologically similarly aligned judges. We argue that court-packing is not a novel or unprecedented tool developed by populist leaders but, on the contrary, appears all over the world as one of the most attractive court-curbing techniques. A comprehensive analysis of three different types of court-packing, which we identified in existing empirical data,[16] might help us to identify strategies used by political leaders, understand their motives, and analyze potential reactions and safeguards against their employment. The typology therefore offers a useful comparative tool in assessing the formal and informal, direct and indirect political inferences in the composition of domestic courts.

As already indicated in the introduction, our understanding of court-packing is intentionally broad in order to capture all formal and informal, as well as direct and indirect, techniques employed by political leaders to alter the composition of the courts in their favor. Such techniques may result in either quantitative or qualitative change of a court's composition. The quantitative changes include (1) the expanding strategy, which increases the size of the court by raising the number of sitting judges, and (2) the emptying strategy, leading to a decrease in the number of sitting judges. The qualitative techniques, in contrast, primarily aim not to increase

16. Drawing on both existing literature and datasets, especially Helmke (2018) or V-Dem (2018).

or reduce the number of judges but to tinker with the composition itself, typically intending to get rid of "disobedient" judges. Qualitative changes therefore include (3) the swapping strategy, by which political leaders replace sitting judges with more loyal substitutes (without changing the size of the court).

The differentiation of court-packing strategies into these three categories helps us to easily distinguish which political steps—formal (on the level of constitutional or legal amendments) or informal (outside of the legal framework) and direct (openly aimed at changing the composition of court) or indirect (achieving a change in composition as a side effect of other reforms)—result in court-packing, irrespective of the intention of political leaders who employ them. In what follows, we provide a snapshot of successful as well as unsuccessful attempts at court-packing from all over the world.

A. Examples of Court-Packing Techniques

A most common technique, used by both democratic and nondemocratic countries, pursuing the *expanding strategy* is increasing the number of sitting judges. Although historically the expansion of a court's size has been to a certain degree driven by the growing complexity of legal norms that resulted in the need to divide apex courts into more specialized chambers, the very same measures are often used as court-packing strategies (Pérez-Liñán and Castagnola 2014). This is especially so if the increased number allows the executive power to select or secure a friendly majority on the given court. Consequently, there are plenty of examples showing how tinkering with the number of judges sitting at apex courts becomes a tool used by the executive to achieve a politically friendly composition.

Probably the best known example is FDR's court-packing plan from 1937, by which he sought to secure new appointments to the US Supreme Court, which was unfavorable to his New Deal legislation. The dispute between the Supreme Court and FDR existed well before the plan. While the conservative Supreme Court pushed for a more constrained executive, the New Deal aimed to expand the government's competences (Caldeira 1987). Nevertheless, it took several decisions of the Supreme Court, which struck down several parts of FDR's New Deal,[17] for FDR to propose the court-packing plan.

17. In particular the Railway Pension Act, National Industrial Recovery Act, the Frazier-Lemke Act, and Agricultural Adjustment Act. Note, however, that how much the Supreme Court actually harmed FDR's flagship New Deal statutes is heavily contested among American historians (Shesol 2010), lawyers (Cushman 2012, 2013), and political scientists (Caldeira 1987).

FDR's court-packing plan was very convoluted compared to court-packing strategies appearing later on. He proposed a bill that permitted him to nominate one additional judge for every sitting justice of the Supreme Court who had served ten or more years and had declined to retire at the age of seventy. This plan would have allowed FDR six new nominations because six justices were over seventy at that time. FDR justified his plan primarily on efficiency grounds, which were, however, briskly refuted by the Supreme Court (Shesol 2010). Once his fake "good government" justification was exposed, FDR rapidly reverted to simple politics. A six-month-long political battle ensued. The proposal was eventually defeated, but only after a substantial political battle, the outcome of which was in doubt until the end, despite fading public support for the court-packing plan.[18] Nevertheless, it is important to add that as much as the Supreme Court won the 1937 battle, it lost the war, for by the end of 1941, after the deaths of Justices Benjamin Cardozo and Pierce Butler and the retirement of four other justices, Roosevelt got to nominate seven out of nine justices.

Similar examples followed throughout the world. In Argentina, the change of the Supreme Court's bench and increase or decrease of its judges has been a signature political move exercised by all presidents since 1950 (Helmke 2018). The very same technique has swept through Central and Eastern Europe recently, the revenge-style court-packing in Hungary (Landau 2013) and Poland (Zoll and Wortham 2019) being the prime examples.

The main differences across jurisdictions lie mostly in the form of proposals, depending on whether the number of sitting judges is regulated by the constitutional or a statutory norm. Both forms of legal constraints, however, seem to be equally easy to overcome. Take the example of raising the number of apex court seats in the Bolivian constitution, which under President Barrientos were increased in 1967 from ten to twelve; or the 2001 Honduran constitutional amendment, wherein the Congress ratified a comprehensive restructure of the judiciary, including the increase of the size of the Supreme Court to fifteen judges (Freedom House 2005). A highly questioned constitutional amendment in Hungary in 2010, with Orbán's administration raising the number of Constitutional Court judges from eleven to fifteen, is another example, as is, in contrast, introducing the change via laws in Argentina with Menem's 1990 proposal sent to the Senate to add four new

18. The details of FDR's court-packing plan, as well as its prequel and aftermath, tell an extremely complicated story that is hotly contested (see Leuchtenburg 1966; 1995; Caldeira 1987; Cushman 1998, 2012, 2013; Proctor 2017; Sweeney 2018; and Tushnet 2019). See also note 3 above.

judges to the Supreme Court,[19] or Poland's Law and Justice party in 2017 significantly increasing Supreme Court judges from 73 to 120 (Zoll and Wortham 2019).

The emptying strategy adopts an opposite logic to the expanding strategy: instead of packing the court with new loyal judges, it aims to get rid of those who oppose the sitting government. However, the actual reduction in the number of sitting judges is not particularly popular with political elites, as it is a step rather difficult to justify to the public. A reduction on the bench, unless related to a complex reform of the judiciary and procedural rules, might be typically challenged on efficiency grounds because it may result in a backlog of cases and failure to deliver speedy justice. In other words, when deciding to reduce the number of judges, political leaders face high costs in terms of controversy, impact on the functioning of courts, and unpopularity with the public. Some of the rare examples can be found in Latin America. For example, a reduction in the number of Supreme Court judges happened three times in Argentina (Finkel 2004). Argentinian presidents aspired to select their own courts, and bench mathematics was a mere technique to achieve this.

Nevertheless, a reduction in the number of judges may also result from other political steps, most frequently an intentional failure of other branches of power to select new judges.[20] Thwarting the selection procedure, by which we mean stopping the selection by not carrying out an essential procedural step) is actually one of those techniques that occur very often across various jurisdictions and regimes. A typical recent example is blocking the allegedly unconstitutionally elected judges of the Polish Constitutional Tribunal by the Law and Justice Government in 2015 (Zoll and Wortham 2019; Sadurski 2019a). Although not compatible with and perceived as unprecedented in consolidated democracies, these techniques have also they fair share of use by democratic leaders: such an example is the 2013 US Senate's refusal to confirm Barack Obama's nominee Merrick Garland as a successor to Justice Anton Scalia in 2013.[21]

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19. Interestingly, in Argentina, Menem first secured a friendly court in 1990. In 1994, he proposed a complex judicial reform as part of a larger constitutional package deal between the two most important political parties in the country, the Peronists and the Radicals. (For more, see Finkel (2004).

20. An example would be Czechia in 2012 or Slovakia in 2007 after the retirement/end of term of office of a few of Constitutional Court judges. The comparison of these two countries also shows how such a scenario might work in different selection designs. While in the Czech case it was the president who refused to nominate candidates to the Senate for confirmation, in Slovakia, the parliament failed to offer the president of the republic the required number of nominees from among whom the president could appoint new judges.

21. Matthew Seligman termed the scenario "constitutional hardball" (Seligman 2018).

The Polish Law and Justice party has also resorted to other innovative court-packing methods in its effort to capture the Polish judiciary without enjoying a constitutional supermajority. In 2017, the pro-governmental interim president of the Polish Constitutional Tribunal Julia Przyłębska sent her opponent, the vice-president of the Constitutional Tribunal Stanisław Biernat, on forced vacation. We qualify this technique as another example of the emptying strategy. It obviously does not immediately end a judge's term of office, but it does allow political leaders, with the help of a court president, to eliminate a judge from sitting on the bench and deciding pending cases.

The third category of court-packing techniques, the *swapping strategy*, has a different character than the enlarging or emptying strategy. It does not necessarily aim to modify the ratio of sitting pro-government judges by changing the size of the bench. Instead, replacement of sitting judges changes a court's composition in qualitative terms. By doing so, political leaders not only select their nominees for the bench but also get rid of "recalcitrant" judges.

Generally, political actors engage in these judicial reshufflings when the nature and the rate of selection fail to allow them to achieve a friendly majority at the court (Helmke 2018). It is worth noting that the replacement strategy appears irrespective of the existence of formal judicial tenures protection (Helmke and Staton 2011).

Legislative shortening of the term of office is an example of one such technique, which gives the government the opportunity to fill the emptied seats with its own nominees. Such an attempt was tried in Poland following the 2006–07 governmental debacle over the new lustration law. In the wake of the Constitutional Tribunal striking down the law, which the government hoped to use to rid itself of some political opponents, the ruling coalition proposed to reduce the Tribunal president's term of office from nine to three years. Here, the shortening was a clear example of the government trying to discipline the court president. Nevertheless, subsequent opinion polls actually favored the Tribunal (Stanley 2015).

Some governments are trying to mask the shortening of terms of office with other, seemingly legitimate reforms. From this perspective, the introduction or reduction of the compulsory retirement age is a wolf in a sheep's clothing. While pursuing various splendid aims such as increasing the efficiency of the judiciary, creating working opportunities for young lawyers, and cleaning the system of Communist-era judges allegedly discredited by service for the previous regime, government actions in the end lead precisely to large-scale shortening of the term of office of hundreds of judges and allow the executive to pack the courts, especially at apex courts, where older judges naturally sit in higher numbers. An example of such a

step is the Polish legislation of 2017 or the Hungarian reform of 2012, reviewed by the CJEU as discriminatory and in violation of EU law.[22]

Threat of disciplining, prosecution, or violence is another rampant swapping technique. Various purges of judges appear mostly in relation to successful or unsuccessful coups d'état. In other words, political leaders choose to directly execute violence against judges when they feel threatened by their decisions. A good example is the widespread purge of thousands of judges following the 2016 unsuccessful coup in Turkey (Olcay 2017).[23] In the wake of the coup, the Turkish government declared a state of emergency on July 21, 2016, allowing the Council of Ministers lavish use of various decree-laws.[24] Dozens of judges and judicial officials were arrested. The very first decree allowed the Constitutional Court to dismiss any of its members with a supposed link to a terrorist group.[25] The interpretation of the constitutionality of the provision raises some controversy (Olcay 2017); nevertheless, the Constitutional Court indeed unanimously dismissed two judges, Alparslan Altan and Erdal Tercan, because of alleged links to a terrorist organization and barred them from the judicial profession.

When it comes to violence, practices are most typically found in Latin America or Africa, such as the assassination of the vice president of the Constitutional Council of Senegal, Babacar Sèye, during the first year of the court's activity. He was shot when the Constitutional Council was about to verify the final results of the legislative elections (Llanos et al. 2015). Series of violent attacks on judges' property also followed the review of the 2001 presidential elections in Madagascar (Llanos et al. 2015). Explicit violence typically therefore follows a court's decision that directly threatens the executive or the leading political party.

Partisan dismissal, removal, and impeachment are also common swapping approaches. In 1969, the Egyptian government removed a great number of judges from the bench for purely political reasons, namely, refusal to be enrolled in a political party. The government in fact used a combination of removal and reorganization of apex court, leading to the reappointment of almost one hundred eighty-nine judges of the Supreme Court and Supreme Council for Judicial Bodies (Helmke 2018). In Bolivia, the 1992 impeachment of several Constitutional Tribunal justices was a direct sanction for the Tribunal daring to rule against the

22. For more detail, see CJEU, *European Commission v Hungary,* C-286/12, judgment of November 6, 2012.

23. For an overview of purges, see Research Turkey (2017).

24. The authority to issue decree-laws in the state of emergency follows from Art. 121(3), of the Turkish Constitution.

25. Decree-Law No. 667 on measures to be taken under the state of emergency of July 23, 2016.

president's attempt to be elected for a third term of office (Helmke 2018). Similarly, Venezuelan President Hugo Chávez successfully employed impeachment against his critics on the bench (Taylor 2014).

Forced resignation also represents a swapping strategy. This technique is again typical of Latin America, especially in unstable political regimes where the political leaders feel threatened (Castagnola 2017). For instance, Evo Morales in 2005 forced most of the Bolivian Supreme and Constitutional Court judges to resign. A similar approach was used in Argentina (Castagnola 2017). It is worth noting, though, that executives sometimes get their desired nomination via "voluntary" resignation, triggered by offering judges a golden parachute. Such parachutes may include promotion to a higher court, to executive office, or even to an international organization or provision of another safe job: on Argentina, see Castagnola (2017); on Poland, Siedlecka (2017).[26]

B. Who Is the Target of Court-Packing?

The abovementioned examples of three court-packing strategies all described attempts of political leaders to secure a numerical majority of closely aligned judges in a given court. We could argue that politicians interfere with both lower and apex courts, although supreme and constitutional courts seem to be more prone to court-packing because of their judicial review and judicial law-making powers. However, in some instances, court-packing strategies do not necessarily target the whole bench of the court. Recently, many political leaders have attempted to gain control over courts via rigging the chief justice or a court president.[27] This step is particularly popular in those jurisdictions where court presidents enjoy the power to select judges assigned to their courts. Strong court presidents can potentially exercise a great influence on the court's ideological position, power, and decision-making (Blisa and Kosař 2018). The use of court presidents as important transmission belts[28] between governments and the rest of the judiciary was a particularly

26. Note that the January 2017 resignation of Andrzej Wróbel, justice of the Polish Constitutional Tribunal, allowed the governing Law and Justice party to appoint its eighth justice (a swing justice, in US parlance) and thus gain the majority on the fifteen-member Tribunal.

27. Take the examples of Hungary and Poland.

28. The "transmission belt" metaphor suggests that court presidents can become the conduit of the political leadership's influence over individual rank-and-file judges, especially if political leaders can recall the court presidents anytime at a whim. The main role of the court presidents is, under such circumstances, to transmit orders from political leaders to individual judges in sensitive cases (see, e.g., Kosař 2017).

popular tool of the communist regimes (Kosař 2017), as it offered an easy and cheap way to control the courts and their alignment with governmental policies.

The actual techniques targeting court presidents are often the very same as the techniques identified in our three court-packing strategies. A typical example would be dismissal, or the (threat of) removal, a technique used very often across jurisdictions (Blisa and Kosař 2018). Shortening of a court president's term also follows a similar logic, although with court presidents it is usually a side effect of other steps, as evident in the 2012 Hungarian restructuring of the Supreme Court, which was originally designed and sold as a mere change of the name of the institution. In the end, however, restructuring led to a completely new court being established, with new criteria set its Chief Justice. András Baka, previously presiding over the Supreme Court, did not seek his reappointment as he did not fulfill the new criteria anymore (Kosař and Šipulová 2018). Similarly, Polish court-packing plans, particularly the lowering of retirement age, targeted among others Małgorzata Gersdorf, the president of the Polish Supreme Court, who was a vocal critic of judicial reforms of Law and Justice and threatened that general courts should exercise constitutional review once the Constitutional Tribunal became incapacitated. The proposed law effectively cut Gersdorf's term of office from six to only three years (Zoll and Wortham 2019).

II. SAFEGUARDS AGAINST COURT-PACKING

As indicated in the previous section, there are cross-sectional differences in the techniques employed by political leaders to execute their court-packing strategies. We argue that these strategies differ in their execution based on whether political leaders feel the need to justify their court-packing schemes and execute them through constitutional changes and complicated legal and procedural amendments or they directly and openly pack the courts without the pretense of the rule of law or judicial independence compliance.

Taking inspiration from the analysis by Llanos et al. (2015), we differentiate court-packing techniques first, based on whether they were implemented through formal or informal means, and, second, based on whether the techniques target the court composition directly or indirectly.

Whereas some political actors openly admit the aim of their court-packing strategies (see in Section I, for example, Menem's court-packing in Argentina in the 1990s), others prefer to disguise the court-packing in various technical and procedural provisions, seemingly focusing on other aims and leading to the change in the courts' composition almost by accident. The variation between open and covert

attacks (i.e., direct and indirect differentiation) at courts worldwide has already been documented by Trochev and Ellet (2014), Russell (2001), and VonDoepp and Ellet (2011).

Increasing and decreasing the number of sitting judges, reducing the length of their mandates, and removing life tenure very directly challenges judicial independence and its legitimacy best corresponds to what Russel lists as structural interferences (Russell 2001). Similarly, impeaching, disciplining and dismissing judges is also a direct technique, but aimed primarily at individual judicial independence.

Indirect techniques are more difficult to decipher as they refer to aims seemingly unrelated to judicial mandate and courts' composition. For example, politicians often justify a lowering of judges' retirement age as part of broader social policies, but in fact their major goal is often to replace 'recalcitrant' judges by progovernment loyalists. Similarly, vetting of judges may be portrayed as a necessary step to meet the demands of national security and clearance for all public actors. We therefore expect indirect, covert techniques to be more attractive to political leaders who do not hold supermajorities, face uncertain or instable positions, or are bound by other international commitments to judicial independence. Indirect techniques allow the political actors to slightly reduce the costs and required political capital, given that they do not set the bar of justification as high as, for example, constitutional inferences into courts' composition.

On the contrary, formal and informal distinction tells us to what extent actors use the legal framework to push through court-packing or instead rely on informal networks, rules, and hidden interactions between judges and other political actors (Pozas-Loyo and Rios-Figueroa 2018). From this perspective, informal techniques are more dangerous. Plenty of research has already demonstrated the widespread use of informal practices (Sanchez Urribarri 2012), as well as how much they undermine existing formal institutions (Popova 2012).

Direct informal techniques, such as violence, removals, and forced resignation, are used most often by political actors enjoying high popularity, especially as these measures are not covered by constitutional or legal status. On the other hand, indirect informal techniques are tempting for political leaders attempting to silently get rid of their judicial opponents, using tools and techniques outside the legal scope and outside the eyes of the public, without any formalized justification.

Taking into consideration that court-packing strategies can be executed through various means and channels, attacking courts both openly and covertly, we next analyze possible safeguards against court-packing. The following section therefore focuses on institutional and informal safeguards while also discussing topical examples and experiences of countries that have faced various forms of court-packing.

A. Institutional Safeguards

Although constitutional designs vary greatly, the court-packing phenomenon seems to be running across various regime types. To a large extent, this is because political leaders use a combination of formal and informal techniques and strategies with different legitimacy to achieve the political alignment of the judicial bench. That is also probably why empirical studies suggest that the vulnerability of constitutional design has no real relationship to the judicial independence of the given system, at least not on the de jure level, despite various existing international organizations' recommendations.[29]

In fact, evidence of well-meant attempts to upgrade the constitutional design that have backfired is plentiful (Pérez-Liñán and Castagnola 2014, 395), and such attempts have exposed judges to even more political and partisan manipulation (Spáč et al. 2018). The question then arises whether some constitutional designs can actually add to the stability of judicial institutions and prevent rapid court-packing practices.

Looking at the various examples introduced in the previous section, it seems that political actors and executives opting for ex ante techniques typically aim to monopolize the process of selection. As the number of veto players and the level of constitutional fragmentation provide for stronger judicial independence (Helmke 2010), monopolizing the selection process and minimizing the number of actors partaking in various stages and forms of selection usually compose the first step leading to future changes in the number of selected judges.

Institutional fragmentation and guaranteed separation of powers might therefore offer a certain level of protection, especially if secured on the constitutional level, which requires high political leverage to override. This argument corresponds to some empirical works: Llanos et al. (2015) reported Benin's good performance in terms of judicial independence when compared to the rest of the countries in the

29. See several recommendations and the opinion of the European Commission for Democracy through Law (Venice Commission): e.g., the Rule of Law Checklist, CDL-AD(2016)007, adopted at 106th Plenary Session; Opinion No. 377/2006, CDL-AD(2006)016; Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, adopted by the Venice Commission at its 67th Plenary Session; Opinion on the draft law on the amendments to the Constitution, strengthening the independence of judges, and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, adopted by the Venice Commission at its 95th Plenary Session; Opinion No. 860/2016, CDL-AD(2016)026, and Opinion No. 677/2012, CDL-AD(2012)024, which are opinions on the two sets of draft amendments to the constitutional provisions relating to the judiciary of Montenegro, adopted by the Venice Commission at its 93rd Plenary Session; or Opinion No. 582/2010, CDL-AD(2010)015, an Opinion on the draft constitution of the Kyrgyz Republic, adopted by the Venice Commission at its 83rd Plenary Session.

region as rooted in a constitutional setup that is very difficult to change. Similarly, in the 2006–07 Polish battle between the government and the Constitutional Tribunal over the lustration and media law, the Constitutional Tribunal escaped the court-packing plan thanks to a rigid constitutional design. The government, frustrated by the Tribunal continuously striking down several pieces of legislation, proposed to reduce the Tribunal president's term of office from nine to three years and, moreover, to introduce the president of the republic's ability to discipline the court president. The attempt failed, however, based on the government actually lacking the two-thirds majority required for amending the Polish Constitution.

In 2013, Republican governor Pat McCrory proposed an amendment to a state senate bill that would allow the appointment of two more judges to the Supreme Court of North Carolina. An originally dropped amendment was revisited in 2016. The Public Trust and Confidence Committee used the negative reactions of Democrats and several nonpartisan organizations to issue a statement on the protection of judicial independence and opposing the expansion of the Supreme Court unless clearly proven how it would enhance the court's effectiveness and help with its workload (Robinson 2018).

Other institutional safeguards rest on the traditional Westminster model of judicial independence and stress the importance of judicial life tenures and irreducible salaries guaranteed by legal (i.e., constitutional) norms. Nevertheless, in Argentina, although established as early as in 1819 and 1816, life tenures and salaries failed to protect the Supreme Court from recurring court-packing plans.

More recent European examples suggest that the fragility of constitutional engineering might be essentially rooted in principles of electoral democracy. Broad and fast rounds of court-packing strategies implemented in Poland or Hungary hint that it is not just unstable leaders who try to control the courts via court-packing. Court-packing appeals also to populist leaders who enjoy wide public support, sometimes even translated to parliamentary supermajority. However, motives of court-packing strategies differ. While unstable nondemocratic leaders of countries with muted electoral competition fear the instability of their position and opt to use courts as a weapon against their enemies (Helmke 2010), democratic leaders seem to be attracted by court-packing in case of ideological dissonance with courts' decision-making. Whereas in a very fragmented political context apex courts can negotiate the content of amendments to protect their position (Pérez-Liñán and Castagnola 2014), or they can even review amendments in constitutional review, a similar observation does not hold for governments enjoying large majorities if they decide to limit the competences and independence of domestic courts.

Some of the very first steps executed by both Viktor Orbán's and Jarosław Kaczynski's governments were to limit the involvement of other political actors in future appointment processes. Orbán, who was in an easier position, holding a constitutional majority after an unprecedented win in the 2010 parliamentary election, completely restructured both the Hungarian Supreme Court and judicial self-governing body, creating essentially new institutions staffed with his nominees overseeing all future selection processes (Halmai 2012; Uitz 2015). Similarly and in line with our suggestion that court presidents are important transmission allies for political elites, Orbán's government also transferred the competence to elect the president of the Constitutional Court from the Court's judges to the parliament, making the position more vulnerable to political inference. Kaczyński, lacking the majority required for a change of Constitution, had to stick to more technical practices, using mostly forced retirements or disciplining (Zoll and Wortham 2019). The selection and the disciplining of judges were both transferred to executive competences and concentrated in the hands of the minister of justice. Comparison of the Polish and Hungarian examples of court-packing also demonstrates that unless the constitution sets very clear checks for judicial selection, the processes are quite easy to modify even for governments that do not hold parliamentary supermajorities.

In conclusion, some institutional recommendations,[30] as well as set-ups, if executed well can help the constitutional system eliminate loopholes and make it more difficult for political actors to attack the courts. Overall, a more fragmented system of actors partaking in the selection of judges adds to the stability of judicial independence. The involvement of bicameral parliaments and the regulation of the selection rules on the constitutional standard do too. Judicial councils, unless poorly designed, might add another protective element into the system. Yet, it is also important to realize that no institutional design is bullet-proof, not even if regulated at a constitutional level. If government enjoying a constitutional majority manages to change the constitution, it may easily render existing constitutional safeguards futile.

B. Other Formal Safeguards

In addition to the aforementioned institutional safeguards stemming from domestic constitutional design of separation of powers, we recognize two additional formal safeguards, namely locking certain provisions concerning judicial independence in (1) constitutional provisions that are either unamendable or more difficult to amend, and on (2) international level.

30. See supra n29.

First, constitution makers may entrench certain features of the judicial system into an unamendable "eternity clause" and vest the protection of this clause with the constitutional court (Preuss 2011; Suteu 2017; Vyhnánek 2017). Sometimes constitutional courts define such invisible eternity clauses by themselves and adopt the so-called doctrine of unconstitutional constitutional amendment even without an explicit textual hook in the constitutional texts (Roznai 2017; Albert 2018). This, for instance, is the path chosen by the Slovak Constitutional Court, which identified judicial independence as a main component of the unamendable core of the Slovak Constitution and struck down the constitutional amendment that introduced security clearance for Slovak judges.[31] Such entrenchment should, in theory, make the basic features of the judiciary resistant to any change irrespective of the public will and of the leverage a wining political party gains in a popular election.

Another version of such domestic safeguard is a tiered constitutional design, which aims to combine the virtues of rigidity and flexibility of the constitution by creating different rules of constitutional amendment for different parts of the constitution (Dixon and Landau 2018). According to the tiered design, most provisions are made fairly easy to change, but certain articles or principles are given higher levels of entrenchment. This should potentially preserve space for needed updates to the constitutional text, a virtue of flexible design, while also providing stability for the core of the constitution and protecting against antidemocratic forms of constitutional change, including court-packing strategies. In practice, the tiered design would then also prevent strategical use of extraordinary legislation outside the normal legislative process, which was implemented both by Orbán and Kaczyński to smoothly dismantle the core safeguards of the judicial system. The tiered constitutional design is more sophisticated than the doctrine of unconstitutional constitutional amendment because it allows for more than two tiers and does not rely exclusively on constitutional courts to protect the top tier, which can also be protected by supermajority requirements, referenda, temporal limitations, and single-subject requirements (Dixon and Landau 2018).

The ultimate goal of these safeguards is to raise the bar for adopting formal judicial reforms that would affect the core of judicial independence. However, even these formal safeguards may not necessarily stop a well-designed court-packing strategy, which relies more on informal mechanisms and subtle technical changes that are difficult to challenge before the courts in a timely fashion. Moreover, even

31. Even more interestingly, the Constitutional Court identified the principle of separation of powers as a part of the eternity clause, clearly reacting to security clearance being seen as a threat to constitutional judges, but also following a path dependency of previous Slovak executives targeting other branches of power, including the judiciary. For more detail, see Slovak Constitutional Court, judgment Pl. ÚS 21/2014 of January 30, 2019, or Domin 2019.

eternity clauses do not prevent political leaders, such as Viktor Orbán in Hungary, who achieved a landslide victory, from adopting a new constitution. To be sure, one can contemplate upgrading the unconstitutional constitutional amendment doctrine to the doctrine of "unconstitutional constitutions" (Landau et al. 2019), but this nuclear option is a stretch in most environments.

The second additional safeguard against court-packing is to lock in the core principles of judicial independence in supranational law, which is beyond the reach of domestic politicians. This is what many European states did when they ratified the European Convention on Human Rights and joined the European Union. In other parts of the world, there is no equivalent to the European Union, and the regional human rights courts engage with domestic judicial design much less than the European Court of Human Rights; but the recent case law of the Inter-American Court of Human Rights concerning courts and judges suggests that even judges in Latin America might use the supranational safeguards as potential leverage or cure against court-packing (Kosař and Lixinski 2015). Even in the rest of the world, supranational bodies such as the African Court on Human and Peoples' Rights, the UN Human Rights Committee, and the UN Special Rapporteur on the Independence of Judges and Lawyers are not entirely toothless.

However, since Europe shows the highest degree of supranational embeddedness, we will focus primarily on this region and use it as a magnifying glass for how the supranational level can be engaged in fighting domestic court-packing plans. Whereas Latin American institutionally executed court-packing does not leave much space to maneuver for targeted courts, Central and Eastern European episodes shows us different patterns of both constrainer behavior and court responses. Irrespective of constitutional majorities or popularity, populist leaders still feel a need to embed their court-packing plans in a constitutional setting and legal language. With Hungary, Poland, or Romania, we can find very intricate reasoning and justification of proposed reforms, typically aimed at efficiency (Von Bogdandy and Sonnevend 2015; Kosař and Šipulová 2018; Śledzińska-Simon 2018).

The emphasis on justification is a signal partly to the opposition and partly to the commitments of European domestic political leaders toward the European Union and the Council of Europe. The European Union in particular developed several political and judicial mechanisms aimed at securing the adherence of member states to EU law and its underlying principles.[32] The mechanisms range from

32. As contained in the Founding Treaties. Art. 2 of the Treaty on the European Union, listing common values shared by the EU member states—"respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities"—is of particular relevance.

soft measures like monitoring and conditionality clauses (the so-called Copenhagen criteria conditioning the entry of states into the European Union) to hard tools such as infringement proceedings, or sanctions and suspension of membership rights according to Article 7 of the Treaty on the European Union (if the member state is in serious and persistent breach of EU law).

In the past, Article 7 was often criticized as a "nuclear bomb solution," whose dire consequences and rigid procedure make its implementation improbable (Sedelmeier 2016).[33] The application of the Article 7 is rather difficult, both technically (the need for a wide consensus across member states and institutions) and politically, as it goes against the grain of the idea of mutual partnership and trust among member states. The recent development in Hungary and Poland only confirms these fears, with European institutions proving to be too slow and too reluctant to call member states and EU leaders non-democratic, or to threaten them with exclusion from the EU club (Closa 2020). The indirect political pressure proved to be way more effective. For instance, in 2012, the European Union exerted indirect pressure on the Hungarian government by freezing loans and payments from the Cohesion fund, forcing the government to backtrack on some of the most controversial reforms.[34]

An important judicial tool giving some leverage to European national courts is the infringement proceedings, in which the CJEU reviews the compatibility of domestic legislation with EU law obligations. By doing so, the CJEU can help domestic judges in several ways. It may delay controversial amendments and allow domestic courts to gain more legitimacy, making it more difficult for a government to justify its court-packing plan.

However, CJEU proceedings have their limits. First, they have to be directly related to obligations stemming from EU law, which typically does not regulate the principle of the separation of powers or judicial independence. Second, infringement proceedings for a violation of EU law can in theory lead to substantive sanctions for a member state. Yet, they prove to be quite lengthy[35] The mere initiation of proceedings is for the Commission (or another member state, which is, however,

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33. The triggering of the Article requires an interinstitutional agreement within the European Union. The European Council decides by qualified majority after a round of proposals by the European Commission or a third of member states that have obtained the consent of the European Parliament.

34. It is worth noting that Art. 7 has been triggered by EU institutions in the case of both Hungary and Poland.

35. But note that the CJEU has been willing to act more quickly recently. See CJEU, Order of the Vice-President of the Court in Case C-619/18 R, *Commission v Poland* (which suspended the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges in Poland).

very rare) and depends on several rounds of questioning, observations, and recommendations. Third, the history of similar proceedings also shows that the CJEU has been quite reluctant to actually impose financial sanctions.

The European Commission brought actions for failure to fulfill obligations (prohibition of discrimination) before the CJEU in the cases of the Hungarian and Polish laws lowering the retirement age of judges. The CJEU found both amendments discriminatory.[36] On November 21, 2018, the Polish parliament, the Sejm, passed an act reinstating the previously retired judges (Bogdanowicz and Taborowski 2018). The Hungarian case was less successful in effect: Although the CJEU found the provision to be in violation of EU law, judges failed to obtain any result other than a proclamation. In other words, the CJEU judgment came too late in the Hungarian case. Orbán's government had to amend the law, but the Hungarian Constitutional Court failed to find a way of reinstating retired judges. In other words, retired judges got moral compensation, but the court-packing strategy remained successful (Sedelmeier 2016). Even more striking example of the failure of the CJEU's condemning ruling that was supposed to instigate a domestic change is the refusal of Polish authorities to comply with the CJEU judgment regarding the controversial "muzzle law" and the new model of disciplinary liability of judges (Zontek 2020).[37]

Finally, a more direct path for domestic courts is the preliminary ruling procedure, that is, raising a question for the CJEU to interpret the compatibility of the legislation with EU law. The benefit of the preliminary ruling procedure is the potential to stay the existing proceedings and the effect of reviewed legislation until the CJEU issues its decision. This practice has been used, for example, by the Polish Supreme Court, which has referred a question to the CJEU on the compatibility of the forced retirement of its most senior judges with EU law.[38] Moreover, the preliminary ruling procedures allows networking among domestic courts across EU member states, putting additional pressure on the EU institutions and governments (Bárd and Morijn 2020). Like infringement, however, preliminary ruling is also conditioned by the relationship between the obligations and commitments of

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36. CJEU. judgment of June 24, 2019, in Case C-619/18 R, *Commission v Poland*. See also supra n6 and n22.

37. CJEU, judgment of in Case C-791/19 *European Commission v Poland*.

38. CJEU, Preliminary Reference of the Polish Supreme Court in Case C-522/18 *D.S. v Zakładowi Ubezpieczeń Społecznych Oddział w Jaśle,* of August 2, 2018. See also preliminary questions regarding the independence of the Polish judiciary C-537/18 *Krajowa Rada Rada Sądownictwa*, C-558/18 *Miasto Łowicz*, C-563/18 *Prokuratura Okręgowa w Płocku*, C-585/18 *Krajowa Rada Sądownictwa i in.*, C-623/18 *Prokuratura Rejonowa w Słubicach*, C-624/18 *CP*, or C-625/18 *DO*.

EU law. Implementation of the CJEU's findings rests with domestic courts, which can use the findings as leverage against their domestic executives.

Although, as demonstrated, we are conscious of the many shortcomings of EU legal and political measures, we nonetheless argue that the embeddedness of the constitutional setup in international regimes and commitments complicates things for political elites and increases the costs of potential court-packing strategies.

C. Informal (Social and Cultural) Safeguards

A prequel to many court-packing and court-curbing attacks starts with the attempt of political leaders to delegitimize the courts and lower public confidence in the judiciary. This common trait appeared in both established and developing democracies. For example, FDR announced his court-packing plan in emotional public speeches, trying to persuade the public not only that the conservative Supreme Court did not understand the heart of the New Deal package but also that old justices were inefficient and unable to cope with their caseload (Shesol 2010). Similarly, in the United Kingdom, shortly after the results of the Brexit referendum, mass media fed by pro-Brexit leaders published unprecedented headlines,[39] naming and shaming courts as the enemy of the people (Barnard 2018).

Both Hungary's Fidesz and Poland's Law and Justice justified their far-reaching judicial reforms with claims of courts being corrupt, slow and ineffective, biased ("opposition courts"), too autonomous, too detached from society, and lacking accountability. The counter-majoritarian problem reappears frequently as well, with the criticism that courts are undemocratic (because judges are not elected by the people) being a popular theme.

Public trust is particularly important for the courts, which do not have budgetary powers (Caldeira 1987), and it can be a certain deterrent for democratic political leaders (Caldeira 1986; Gibson, Caldeira and Baird 1998; Vanberg 2001). In nondemocratic countries with low overall standards of judicial independence and human rights protection, courts typically do not enjoy significant public confidence and are more prone to be victims of skillful political games by witty political leaders. A noteworthy example comes from Peru, when Alberto Fujimori's decision to purge the judiciary proved to attract 89 percent of public support. Similarly in Bolivia, the Juan Evo Morales proposal "Towards a New Justice System," naming justice as the more corrupt institution, seemed to resonated with citizens.

39. For more on the reaction of British media, see Phipps (2016) or Pells (2016).

We can, however, also find successful examples of courts using public confidence and positive media images to their advantage, although admittedly mostly among democratic consolidated countries. FDR's 1937 attempt to pack the US Supreme Court might seem mild compared to future examples from other countries. Carefully formal, subtle, and presented as a need to increase the efficiency of the judicial system, it still failed to gain public support as a result of two strategic Supreme Court steps. First, the Supreme Court managed to prove to the senators, including several Democrats and FDR's staunch political allies, and to the public that it was neither inefficient nor necessarily against FDR's New Deal (by the famous "switch in time that saved the nine"). Second, the intellectual leader of the conservative bloc (the so-called four horsemen who often voted together to strike down New Deal legislation) retired,[40] which allowed Roosevelt to nominate his own justice to the Supreme Court, which took the wind from FDR's sails. These two strategic steps eroded public and senatorial support for FDR's court-packing plan and significantly contributed to the plan's failure.

More recently, the Supreme Court of the United Kingdom went even further to tilt the scales of public trust back to its advantage, putting tremendous effort into transparency and public relations and, to show it is not remote from the ordinary people, settling public hearings outside London, across whole of the United Kingdom. The Supreme Court of Canada under the leadership of Beverley McLachlan and the Supreme Court of Ireland adopted similar techniques to increase public confidence in the courts. These steps were not taken directly in the wake of a credible threat of court-packing, but they helped to foster public awareness and trust in the courts, hence surely raising the costs for politicians attempting to pack the courts.

Public trust also seemed to previously have worked out in favor of the Polish Constitutional Tribunal. Despite the government's best efforts to discredit the Tribunal, the majority of Poles trusting it actually rose from 72 percent in 2004 to 80 percent in 2007. The Slovak Constitutional Court similarly hoped for the help of transparency and more public engagement in the selection process. After the controversial nomination of a former prime minister as a candidate for new constitutional judge, in an unprecedented move, a local nongovernmental organization prompted the three-day-long live streaming of candidate hearing by a selection committee in Kosice's main square (Steuer 2019).

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40. Such strategic retirements are typical also for other common law systems. Kerby and Banfield (2014, 353) showed that judges of Westminster-driven systems are more likely to resign if the party that appointed them is expected to lose government power.

III. CONCLUSION

What makes court-packing a particularly compelling phenomenon to study is the often thin line between legitimate judicial reforms—those that aim at reconstructing the bench—and illegitimate interferences. The tricky point is that changing the composition of the court does not always negatively affect its legitimacy. Just think of how the European General Court (EGC) was enlarged in 2015, carried out on the proposal of the EGC itself (Robinson 2015; Dehousse 2016; Alemanno and Pech 2017).

More controversially, even problematic court-packing strategies might be justified and result in more good than harm. For instance, Neil Siegel, who is otherwise strongly against the Democrats' recent court-packing ideas, suggests that

> [t]here is one situation . . . in which Court-packing might be justified and might do more good than harm: if there is clear and convincing evidence that a [US] President who made one or more appointments to the [US Supreme] Court was not legitimately elected, and adding Justices was the only feasible way to undo the likely decades-long impact of those appointments on the [US Supreme] Court's decision-making. That scenario, in my judgment, would fall outside the scope of the negative precedent of 1937 [FDR's court-packing plan] and the subsequent path of wise self-restraint by the political branches. (Siegel 2019)

In some countries, this is not just a hypothetical debate. For instance, in Poland, President Duda refused to swear in two justices of the Polish Constitutional Tribunal who had been properly elected by the previous Sejm. The vexing question is how to remedy this situation if the opposition wins the parliamentary elections in 2019 and the presidential elections in 2020. Can it legitimately resort to court-packing to reduce the effects of the previous court-packing? And if so, which court-packing strategy would be more legitimate, expanding the size of the Polish Constitutional Tribunal or swapping the two improperly elected Justices? To answer such a question, we need to have a better normative theory of court-packing, one that would contain a clear benchmark to justify why certain strategies and reasons are legitimate but others not.

In this article we have introduced the new conceptualization of court-packing as an intentional irregular change in the composition of the existing court that creates a new majority at the court or restricts the old one. We divided existing court-packing strategies into three overarching categories— expanding, emptying, and swapping techniques—aimed at quantitatively or qualitatively changing court composition. We also argued that all court-packing strategies need to be a priori

considered potentially harmful, although that is not to say they cannot ever be legitimate. Just take the Polish example given earlier or consider the widespread lustration of judges in transitional scenarios (Robertson 2006, 87; Kosař 2013, 250–55; Kosař and Šipulová 2019), which serve as a good litmus test as to the limits of the normatively charged understanding of court-packing (see also Siegel 2019).

Such normative understanding, however, calls for a careful analysis of rationales behind the court-packing strategies. There is some inclination to think that motives, at least to a certain extent, also mirror various views on what judicial independence is. However, the differences across regions are not black and white: we do not have a dichotomy between countries that entirely escape court-packing and those that experience cyclical court-packing attacks. Court-packing strategies are present across regions, time, and political regimes, but the techniques and their justifications differ. It might be true that leaders in politically unstable settings are more prone to attempted court-packing; but several court-packing techniques appear also in consolidated democracies, and perhaps the reactions of courts, the rest of the political arena and the public toward such attempts can teach us something.

In the ideal scenario, the next step for future research would be to come up with a normatively neutral umbrella concept, which would allow us to capture all existing judicial reforms aimed at changing the composition of the bench. Then based on their legitimacy, the reforms would be divided them into three groups: problematic court-packing, borderline cases, and legitimate judicial reforms. Such a comprehensive data analysis would allow us to better understand the varying dynamics of these as attempts to reconstitute the court, to find patterns and links between motivations and particular court-packing techniques, and finally, to fight deleterious court-packing attempts effectively and legitimately.

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