Comparative court-packing

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In the wake of Donald Trump's presidency, a fierce discussion over expanding the US Supreme Court erupted. However, the expansion of a court's membership is just one of several court-packing techniques. Moreover, the American debate is peculiar due to the unique features of the US Supreme Court. The aim of this article is to look at court-packing from a comparative perspective, to link the debates on tinkering with courts' composition on both sides of the Atlantic, and to bring into the conversation a diverse scholarship in the Global North and the Global South. Based on experience from other parts of the world, this article provides a new, broader definition of court-packing that includes not only expansion of the court in question, but also emptying and swapping strategies. It then discusses the typical justifications for and dangers of court-packing and provides a prospective pragmatic mid-level theory that allows us to assess whether a given court-packing plan is legitimate. It argues that the legitimacy of court-packing has two dimensions: one focusing on whether court-packing pursues a legitimate aim (ius ad bellum of court-packing) and a second dimension exploring whether court-packing itself is implemented legitimately (ius in bello of court-packing). This means that even if politicians have a "just cause" for court-packing, their actions are still limited.

1. Introduction

Court-packing wars are back in the United States. One could see it coming. The passing of Justice Ruth Bader Ginsburg and her snap replacement by Justice Amy Coney Barrett became the last straw. For many scholars, commentators, and politicians, this event undermined the legitimacy and ideological balance of the Supreme Court and made clear that the situation called for action. Responding to these calls, President Biden created a thirty-six-member bipartisan expert commission on Supreme Court reform comprising leading scholars from constitutional law, history, and political

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science.[1] On December 7, 2021, Biden's Commission issued its highly anticipated final report,[2] but failed to suggest any solution.

While the recent debate in the United States has, quite understandably, taken center stage, court-packing has flourished for decades in other parts of the world. For instance, in 1990, Argentinian President Carlos Menem increased the number of judges of the Supreme Court from five to nine, which immediately gave him four seats to fill.[3] So did the Venezuelan President, Hugo Chávez.[4] In Europe, Recep Erdoğan expanded the membership of the Turkish Constitutional Court,[5] Viktor Orbán used a similar strategy to achieve a majority on the Hungarian Constitutional Court,[6] and, more recently, Jarosław Kaczyński significantly increased the number of judges on the Polish Supreme Court.[7]

Moreover, the examples from other parts of the world show that expanding the size of the court, which is the traditional meaning of the term court-packing in the US debates,[8] is only one of many possible court-packing strategies. In fact, political leaders may adopt a whole plethora of different techniques which help them to secure friendly majorities at apex courts.[9] For instance, Argentinian President Alfonsín announced a plan to reduce the number of Supreme Court judges to force sitting judges to resign.[10] Venezuelan and Polish political leaders also used various measures to get rid of "recalcitrant" judges appointed by opposing coalitions.[11] Other techniques were more complex and affected the whole judiciary. For instance, widespread judicial purges took place in many post-communist judiciaries after the fall of the Berlin Wall

1 *President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States*, White House (Apr. 9, 2021), www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/.

2 Presidential Comm'n on the Sup. Ct. United States, Draft Final Report (Dec. 2021), www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf.

3 Rebecca B. Chavez, *The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System*, 36 J. Latin Am. Stud. 451 (2004).

4 Matthew M. Taylor, *The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chavez*, 46 J. Latin Am. Stud. 229 (2014).

5 Ergun Özbudun, *Turkey's Judiciary and the Drift Toward Competitive Authoritarianism*, 50 Int'l Spectator 42 (2015); Berk Esen & Sebnem Gumuscu, *Rising Competitive Authoritarianism in Turkey*, 37 Third World Q. 1581 (2016); Ozan O. Varol, Lucia D. Pellegrina, & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 Am. J. Comp. L. 186 (2017).

6 Gábor Halmai, *From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary*, in European Yearbook of Human Rights 367 (2012); Renata Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 Int'l J. Const. L. 279 (2015).

7 Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 19 Ger. L.J. 1839 (2018).

8 Only recently have some scholars adopted a broader definition of court-packing that also includes a reduction in the size of the Supreme Court. *See, e.g.*, Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. Rev. 2748 (2020).

9 David Kosař & Katarína Šipulová, *How to Fight Court-Packing*, 6 Const. Stud. 133 (2020).

10 Chavez, *supra* note 3; Tom Daly, *"Good" Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay*, 23 German L.J. 1071 (2022).

11 Taylor, *supra* note 4; Śledzińska-Simon, *supra* note 7; Wojciech Sadurski, Poland's Constitutional Breakdown (2019).

as a result of lustration,[12] retention elections,[13] and other techniques.[14] More recently, Viktor Orbán and Jarosław Kaczyński tried to get rid of inconvenient judges and replace them with their protégés through a seemingly neutral scheme that lowered the mandatory retirement age for all judges.

The key aim of this article is to decenter the debate from the unique US context and to look at court-packing from a comparative perspective. In doing so, we also link the debates on tinkering with courts' composition on both sides of the Atlantic,[15] and bring into the conversation diverse scholarship in the Global North and the Global South. The second aim is to provide a pragmatic prospective tool that will allow us to assess the legitimacy of court-packing plans without the benefit of hindsight. In order to do so, we come up with a broader understanding of court-packing which reflects experience from all over the world but is detached from the specifics of individual countries and the dominant American usage of this term. We employ a similar logic in developing a mid-level theory of court-packing, where we identify the justifications for and dangers of court-packing on the basis of our comparative analysis.

The purpose of this article is twofold. First, we argue that court-packing covers not only expanding the size of the court, but also reducing its size and swapping the sitting judges without altering the court's size. According to our broader definition, court-packing is a change of the composition of the existing court, which is irregular, actively driven (non-random), and creates a new majority at the court or restricts the old one. Based on this comparative re-conceptualization of court-packing, we then provide the first comprehensive taxonomy of court-packing techniques. Second, we develop a pragmatic mid-level prospective theory of court-packing. More specifically, we argue that the legitimacy of court-packing has two dimensions: whether court-packing is pursuing a legitimate aim (*ius ad bellum* of court-packing), and whether court-packing is executed legitimately (*ius in bello* of court-packing). The first dimension focuses on *when* it is legitimate to resort to court-packing, while the second explores *how* it can be executed legitimately if it pursues a legitimate aim. These two dimensions are interconnected but should be analyzed separately for analytical clarity. This means that each of five traditional justifications that are used to trigger court-packing (to ensure a smooth democratic transition, to eradicate widespread judicial corruption, to respond to previous illegitimate court-packing, to rebalance an

[12] David Robertson, *A Problem of Their Own, Solutions of Their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity*, *in* Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders 73, 87 (Wojciech Sadurski, Adam Czarnota, & Martin Krygier eds., 2006).

[13] David Kosař & Katarína Šipulová, *Judging the Judges, Judging Ourselves: Never-Ending Dealing with the Past within the Czech Judiciary*, *in* Judges Facing Transitional Justice: Vetting and Other Mechanisms and How They Affect the Rule of Law (Christina Murray & Jan Van Zyl, forthcoming 2023).

[14] Erhard Blankenburg, *The Purge of Lawyers after the Breakdown of the East German Communist Regime*, 20 Law & Soc. Inquiry 223 (1995); Inga Markovits, *Children of a Lesser God: GDR Lawyers in Post-Socialist Germany*, 94 Mich. L. Rev. 2270, 2271–2 (1996).

[15] Interestingly, the political developments and the resulting debates about court-packing are framed differently. While European scholars and policy-makers rally against populist governments and discuss how to fight and undo court-packing, progressive politicians and scholars in the United States try to find ways to justify it.

unrepresentative court, and to increase the court's efficiency) may require different additional conditions to be met in order to be legitimate. Such additional conditions include, for instance, proportionality, or a paired effect (response to previous illegitimate court-packing), or multipartisan support or deliberative review at multiple sites (rebalancing an unrepresentative court). We believe that such nuanced analysis which is detached from the peculiarities of a given country provides a unique tool for assessing the legitimacy of court-packing plans all over the world.

Finally, we must add an important caveat. This article addresses court-packing of apex courts, since it is supreme courts and constitutional tribunals that decide the most politically salient disputes. Although lower courts, particularly those with specific jurisdictions in criminal or business matters, might also attract political interference, their court-packing triggers different issues and considerations.

This article proceeds as follows. Section 2 conceptualizes court-packing from a comparative perspective and explains its defining features in detail. Section 3 divides court-packing into three broad strategies (expanding, emptying, and swapping), shows examples of various mechanisms falling under each strategy, and identifies common patterns among them. Finally, Section 4 discusses typical meta-values invoked by proponents and opponents of court-packing as well as the mid-level justifications for and dangers of court-packing. Subsequently, it analyzes when court-packing is prima facie legitimate and what additional requirements must be met in order to justify it.

2. Comparative reconceptualization of court-packing

The popularity of court-packing across different regime types suggests that to have loyal judges at an apex court is simply irresistible for many political leaders. The ideological alignment of judges, especially at supreme and constitutional courts, is an important benefit for every government. However, electoral terms do not typically coincide with judicial mandates. A government winning an election thus usually has very limited options for changing the composition of courts to its benefit. If it is not content with judges' attitude to crucial societal questions, it has two options. Either it accepts the different view and relies on a standard selection process which might not occur at all during its term, or it refuses to wait. In the latter case, the government then still has a couple of options. It may stop executing judicial decisions,[16] which is a costly decision in terms of the legitimacy of the ruling regime. Alternatively, it can start influencing the content of judicial decisions formally as well as informally via intensifying pressure on sitting judges,[17] limiting courts' jurisdiction,[18] or hastening

[16] Bernd Hayo & Stefan Voigt, *Mapping Constitutionally Safeguarded Judicial Independence: A Global Survey*, 11 J. Empirical Legis. Stud. 159 (2014).

[17] The famous "switch in time that saved nine" in FDR's era, when Associate Justice Owen J. Roberts changed his jurisprudential position (see Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. Legis. Analysis 69 (2010)), is a typical example of such pressure that can be found almost everywhere in the world.

[18] Taylor, *supra* note 4.

the change of composition of the court.[19] This article focuses on the last group of interferences that concern changes in a court's composition.

Such interferences into courts' composition date back several centuries[20] and span virtually all continents.[21] Yet, despite the plethora of historical episodes, scholarship has so far struggled to come up with a unifying term able to conceptualize these interferences into courts' composition. Most debates on court-packing have so far centered on the examples from the United States. However, the US debates have been dominated by FDR's court-packing plan and its legacy. That is why the US literature has adopted a narrow, idiosyncratic view of court-packing. Until very recently,[22] court-packing was associated almost exclusively with increasing the number of judges on a given court. This, however, is only one of many options for achieving a friendly majority at a court. Even the United States has witnessed four attempts to reduce the size of the Supreme Court, two of which were eventually successful.[23] Other techniques to achieve intentional change of a court's composition have been used in Latin America, Central and Eastern Europe, and elsewhere, as the abovementioned examples demonstrate. Many of these interferences outside the United States have been framed not as court-packing, but rather as attacks on judicial independence, abusive dismissal of judges, capturing the selection process of judges, or violations of the separation of powers. The aim of this paper is to remedy the drawbacks of United States-centrism and global fragmentation and to study court-packing from a comparative perspective.

Following these observations, we adopt a broad definition of court-packing, building on our own vast comparative analysis of various examples of how political leaders have intentionally transformed the composition of courts all over the world. This definition is generally applicable and free from idiosyncratic usages in individual jurisdictions. According to this definition, court-packing is "any *change of the composition* of *the existing court* which is *irregular, actively-driven (non-random)* and *creates a new majority* at the court or *restricts* the old one."[24] In what follows, we will explain the key components of this definition.

The definition consists of five elements that together are sufficient and necessary for a given reform to be an example of court-packing. Its first and core element is the change of the composition of the court. This change may be both quantitative and qualitative. A quantitative change of composition includes increases as well as decreases in the number of judges on a given court. Expanding the size of the court does not affect the mandates of sitting judges, but it dilutes their influence. On the other hand, decreasing the court's size strips the affected judges of the judicial robe. A qualitative change of composition then includes replacing the sitting judges with new ones without increasing or decreasing the size of the court. Such change, of course,

[19] Andrea Castagnola, Manipulating Courts in New Democracies: Forcing Judges off the Bench in Argentina 84–108 (2018).
[20] Denis Galligan, The Courts and The People (2021).
[21] *See* Kosař & Šipulová, *supra* note 9.
[22] Braver, *supra* note 8.
[23] *Ibid.*
[24] We introduced this definition in Kosař & Šipulová, *supra* note 9, but we did not elaborate on its components.

presupposes that some sitting judges must vacate their seats, either involuntarily or "voluntarily," for the new judges to replace them. Of course, quantitative and qualitative changes may be combined,[25] but we keep them separate for analytical purposes.

Second, court-packing is an irregular change of the court's composition. That means a change which does not observe the constitutional norms set in the past. Therefore, the nomination of a conservative judge following the voluntary retirement or natural death of a liberal one (or vice versa), which leads to a change of majority at the court, does not qualify as court-packing. For example, Donald Trump's appointment of Brett Kavanaugh as an Associate Justice of the US Supreme Court after Associate Justice Anthony Kennedy had resigned is not court-packing in our understanding. Although it allowed Donald Trump to achieve a swing vote,[26] the President's competence to select new judges is laid down by the Constitution.[27] This is a crucial criterion of our definition, and we know that there will be controversy about what counts as regular and what irregular. There are two major problems here. First, sometimes there is no agreement on what the content of the constitutional norm set in the past is. Just think of the abovementioned snap replacement of deceased Ruth Bader Ginsburg by Amy Coney Barrett. Second, sometimes it can be contested what counts as a "constitutional norm." We understand constitutional norms in a material sense as encompassing not only norms to be found, explicitly or implicitly, in a big-C constitutional code, but also constitutional conventions[28] and small-c norms of the material constitution.[29] Cyclical court-packing is thus still court-packing, because it deviates from the existing constitutional norm and hence it is irregular. In sum, evaluation of the regularity criterion is context-dependent. However, the fact that there might be a gray area in which assessment of the irregularity of a change of the composition of the court might depend on the nuanced understanding of domestic law, political culture, and history does not detract from the value of this criterion in the majority of cases.

Third, the change of the composition must be actively driven. Our definition thus does not include changes in courts' composition which are beyond the control of key stakeholders involved in the selection of judges. A typical example is the occurrence of a significant number of vacancies at a given court within a short time span, a situation which is *not* triggered by any key stakeholder involved in the selection of judges. It is instead triggered by other factors, such as the natural deaths of several judges. A typical example is the sudden death of two associate justices of the US Supreme Court in 1938–39, which gave FDR two seats on the Supreme Court. FDR capitalized on this opportunity and managed to get a new majority on the Supreme Court, despite the

[25] A fitting example is the court-packing implemented by Hugo Chávez and his steps to control Venezuela's judiciary. Taylor, *supra* note 4.

[26] On the concept of a swing justice, see Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. Pol. 1089 (2013).

[27] *See* Eric Bradner, Joan Biskupic, & Jeremy Diamond, *Trump Picks Brett Kavanaugh for Supreme Court*, CNN (July 8, 2018), www.cnn.com/2018/07/09/politics/trump-supreme-court-pick/index.html.

[28] *See* Scott Stephenson, *Constitutional Conventions and the Judiciary*, 41 Oxford J. of Legal Studies 750 (2021).

[29] For a similar understanding of a constitutional norm, see Tarunabh Khaitan, *Guarantor Institutions*, 16 Asian J. of Comp. L. S40, S51-S52 (2021).

fact that his court-packing plan failed.[30] The deaths of Antonin Scalia and Ruth Bader Ginsburg pose more difficult problems, because here the "actively driven" and the irregularity requirements operate together. These two deaths opened a rare unforeseen window of opportunity for Republicans to alter the composition of the Supreme Court, but the categorization of these two cases as court-packing depends on whether or not the "SCOTUS bipartisan constitutional convention" that the US Senate cannot confirm a Supreme Court Justice in a presidential election year without bipartisan support exists.[31]

Fourth, the change targets the existing court. This means that court-packing does not cover the creation of new judicial bodies.[32] The establishment of new courts such as the infamous Czechoslovak State Court (1948–52), introduced by the Communist regime in order to conduct show trials of its political opponents,[33] or the more recent proposal by Viktor Orbán to create a new system of administrative courts[34] is thus outside our definition,[35] even if it may serve similar goals to court-packing. We are not claiming that the creation of new courts cannot follow similar aims as intentional change of the composition of existing courts. However, it is a different court-curbing practice.[36]

The fifth and final characteristic of our court-packing definition is that it creates a new majority or restricts the old one.[37] This majority is multidimensional, as it could be represented by judges ideologically aligned with the executive power,

[30] William Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995); Gregory A. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, 81 Am. Pol. Sci. Rev. 1139 (1987); Barry Cushman, *The Court-Packing Plan as Symptom Casualty, and Cause of Gridlock*, 85 Notre Dame L. Rev. 2089 (2013). *See also* Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998); Barry Cushman, *The Man on the Flying Trapeze* 1 (Univ. Va. School of L., Pub. L. & Legal Theory Working Paper Series no. 6, 2012); R. David Proctor, *An Overview of Judicial Independence from Impeachments to Court-Packing*, 47 U. Mem. L. Rev. 1147 (2016); Richard J. Sweeney, *Constitutional conflicts in the European Union: Court Packing in Poland versus the United States*, 18 Econ. Bus. Rev. 3 (2018); Mark Tushnet, *Court-Packing on the Table in the United States?*, Verfassungsblog (Apr. 3, 2019), https://verfassungsblog.de/court-packing-on-the-table-in-the-united-states.

[31] Rivka Weill, *Court-Packing as an Antidote*, 42 Cardozo L. Rev. 2705 (2021).

[32] Establishing a new court raises a whole set of different issues in the process of political transformation. Tom Gerald Daly, The Alchemists: Questioning Our Faith in Courts as Democracy-Builders 88–9 (2017).

[33] *See* Jaroslav Vorel et al., Československá justice v letech 1948–1953 v dokumentech 15–16, 85–9, 171–87, 332–3 (2003).

[34] Renata Uitz, *An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts*, Verfassungsblog (Jan. 2, 2019), https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/.

[35] For a different opinion, see Uitz, *supra* note 34.

[36] We treat "court-curbing" as an umbrella term, which is broader than court-packing as it includes, apart from court-packing, also other strategies such as procedural (e.g. introducing an increased quorum, the sequence rule, or the supermajority requirement), financial (e.g. slashing court budgets, reducing judicial salaries, or pension benefits), institutional (e.g. jurisdiction stripping, the establishment of a new court, abolition of the court, or a merger of existing courts), and judicial leadership (e.g. replacing the Chief Justice or court presidents) measures.

[37] We are aware of the fact that purposeful court-packing may result from a different motivation. *See, e.g.*, Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11 Hague J. Rule L. 63 (2019). These motives are, however, of only secondary character to us, because taking over control of the court was historically always the very first aim of court-packing.

judges with no ties to the previous regime, or judges from certain social or age groups. Our definition is therefore objective and captures changes in majority irrespective of whether or not they were intended by political actors. Even legislation primarily (genuinely or seemingly) pursuing a different aim which creates a new majority only as a side effect therefore also falls within our definition of court-packing. A fitting example is the reduction in the mandatory retirement age for judges in Hungary and Poland.

The subsequent behavior of judges appointed via court-packing is also irrelevant. If the political leader increases the number of judges, aiming to secure a loyal majority, this step will qualify as court-packing even if judges emancipate and refuse to submit to the politician's expectation in their decision-making (we explore these considerations in more detail in Section 4).

It is also worth noting that a loyal majority does not necessarily mean an exact majority of all judges of the court. Many courts, especially supreme courts and constitutional tribunals, allocate cases to smaller panels and chambers. Sometimes, therefore, it is enough to change the composition of the most important panels, typically the election chamber,[38] constitutional chamber,[39] control chamber,[40] or a disciplinary chamber.[41] In other words, court-packing does not necessarily need to target the majority of the whole court. It is enough if it aims at getting a majority in a strategically important chamber.

Similarly, the size of the change of the court's composition is irrelevant in order for it to qualify as court-packing. In our understanding, court-packing is any strengthening[42] or weakening[43] of the existing majority, or a creation of a new one (if there was no stable majority). In some cases, even the exchange of a single judge

[38] This was a tactic of Hugo Chávez's in Venezuela. Taylor, *supra* note 4.

[39] This applies to jurisdictions where there is no specialized constitutional court and the task of constitutional review is vested in a specialized chamber of the Supreme Court. Taylor, *supra* note 4.

[40] *See* Case C-487/19 W. Ż. and des affaires publiques de la Cour supreme (nomination).

[41] A well-known example of court-packing consisting of the creation and staffing of the disciplinary chamber of the Supreme Court comes from Poland and was found to be problematic also by the CJEU. *See* Joined Cases C-585/18, C-624/18, C-625/18, A. K. and Ors. v. Sąd Najwyższy, ECLI:EU:C:2019:982 (Nov. 19, 2019); Case C-791/19, Comm'n v. Poland, ECLI:EU:C:2021:596 (July 15, 2021).

[42] Imagine a situation where former US President Trump decided to pass a law which would immediately increase the number of US Supreme Court justices by two, strengthening the majority he had already had at the Supreme Court since 2018.

[43] Imagine that the government has five out of thirteen Constitutional Court judges on its side. Even if it increases the number of constitutional judges "only" by two to fifteen and thus has only a minority of seven judges, the power distribution changes and its position is definitely stronger (see Jan Petrov, *(De-)judicialization of Politics in the Era of Populism: Lessons from Central and Eastern Europe*, 26 Int'l J. Hum. Rights 1181, 1192-1194 (2021)). Moreover, at courts where a supermajority is required to reach a certain decision (e.g. to strike down a statute; see in general Cristóbal Caviedes, *A Core Case for Supermajority Rules in Constitutional Adjudication*, 20 Int'l J. Const. L. 1162 (2022)), the seven "pro-government" judges can block such decisions, despite being a minority. This move may in turn even paralyze the court (*see* Sadurski, *supra* note 37). This scenario thus must a priori be considered court-packing.

(the so-called swing justice in US parlance[44]) may allow the political actor crucially to change the distribution of power at the court.[45] Similar observation would hold at courts where there was no stable majority prior to court-packing. What matters is whether a new majority is formed *or* an old one is restricted. Hence, irregular change of the composition of a previously unpredictable or evenly split court is still court-packing.

On the other hand, changes in the composition of the court that will become effective only in the future, when the respective political actors may no longer be part of the executive, are not within our definition of court-packing. Such reforms are not aimed at creating a new majority at the court or restricting the old one. A typical example of such reform is doubling the number of judges of the EU's General Court. The increase in the number of judges from twenty-eight to fifty-four led to many controversies within the European Court of Justice[46] and perhaps, due to the reducing docket, was in retrospect not even necessary. It is however clear that it was not aimed at creating a new majority, as the increase in judges was spread over several years when the key actors of the reform had already gone and could not benefit from the reform. A similar example comes from Czechia. An increase in the Supreme Administrative Court's judges from thirteen (January 2003) to thirty-three (September 2020) was not court-packing. The increase was gradual, spread over several years and among several presidents and ministers of justice, and was conditioned by the consent of the Chief Justice of the Supreme Administrative Court.

3. Court-packing modalities

In the previous section we explained our conceptualization of court-packing and its key elements. In this section we further develop that conceptualization and identify three categories of court-packing. We collected examples of court-packing from all over the world and found that they follow three broad patterns: (1) the expanding strategy, which increases the size of the court by adding new judges to the sitting ones; (2) the emptying strategy, leading to a decrease in the number of sitting judges; and (3) the swapping strategy, by which political leaders replace sitting judges with more loyal substitutes without changing the size of the court. Each of these strategies contains several techniques.

All three court-packing strategies, with the relevant examples of individual techniques, are depicted in Table 1. The examples included are illustrative and do

[44] Enns & Wohlfarth, *supra* note 26.

[45] This is particularly relevant for courts with a small number of judges, where the exchange of one person might significantly change the division of power. See the resignation of Andrzej Wróbel, Justice of the Polish Constitutional Tribunal, discussed below in note 135. The debates about replacing a swing judge in the US context are also particularly relevant here (*see* Enns & Wohlfarth, *supra* note 26). However, sometimes even replacing the lonely dissenter may effectively silence the opposition.

[46] Alberto Alemanno & Laurent Pech, *Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System*, 54 CMLR 129 (2017); Duncan Robinson, *The 1st Rule of ECJ Fight Club. . . Is About to Be Broken*, FIN. TIMES (Apr. 27, 2015), www.ft.com/content/b3979694-b42b-38b4-b1a7-dddbdb2c1878.

Table 1. Typology of court-packing strategies. Italics mark unsuccessful attempts at court-packing

Strategy	Technique	Country
Expanding strategy	Increasing the number of judges	*United States (federal level) 1937* Argentina 1957, 1987, 1990 Brazil 1965 Bolivia 1967 Russia 1993 Chile 1984, 1998, 2004 Honduras 2001 Zimbabwe 2001 Venezuela 2004 Turkey 2012 Hungary 2012 United States (state level: *North Carolina 2013*, 2016; Arizona 2016; Georgia 2016) Poland 2017
Emptying strategy	Downsizing the court	Argentina 1950, 1966 Brazil 1968 Mexico 1994 Ecuador 2004
	Thwarting the selection	Serbia 2002–2010 Ukraine 2005, 2006 Czech Republic 2003–05, 2011–13 Poland 2015, 2016 United States 2016 Albania 2018 Slovakia 2007
	Forced vacation	Poland 2017
	Benching	Venezuela 2004 Pakistan 2007 Poland 2015
Swapping strategy	Introduction or reduction of mandatory retirement age	Peru 1973–77 Bangladesh 1977 Hungary 2012 Poland 2016 *Brazil 2019*
	Removal of life tenure or shortening the limited term	El Salvador 1950, 1966 Brazil 1968 Venezuela 1999
	Vetting	Czechoslovakia 1991 Mexico 1994 Bolivia 2009 Macedonia 2011 Ukraine 2014 Albania 2016 *Slovakia 2019*
	Abusive disciplining	Slovakia 2002 Poland 2020

Table 1. Continued

Strategy	Technique	Country
	Abusive impeachment	Argentina 1947 Bolivia 1992 Chile 1992–93 Argentina 1990–98, 2003 Peru 1997 Chile 2004 Sri Lanka 2013 Philippines 2018 El Salvador 2021
	Abusive criminal prosecution	Malaysia 1988 Ukraine 2002 Chile 2004 Turkey 2016 Poland 2016
	Abusive dismissal	Egypt 1955, 1969 Peru 1969, 1973 Argentina 1976 El Salvador 1979 Chile 1988, 2004 Guatemala 1993 Mexico 1993, 1994 Ecuador 2004, 2007 Haiti 2005 Niger 2009 Venezuela 1999, 2013 Turkey 2016 Ukraine 2020–21
	Forced resignation	Argentina 1960, 2003 Chile 1974, 2004 Zimbabwe 2001 Bolivia 2005, 2007 *Pakistan 2007*
	Golden parachute	Argentina 1958 United States 1965 Poland 2016
	Premature appointment	Poland 2015
	Use of violence and physical attacks	Colombia 1985, 1979–91 El Salvador 1988 Guatemala 1988 Senegal 1993 Benin 1996 Madagascar 2001

not aspire to capture *all* historical accounts of court-packing.[47] Our aim was not to compile an exhaustive list, but to achieve as much diversity as possible regarding

[47] The examples are so numerous that we cannot include them all here. We thus decided to upload the full table, including references: Judicial Studies Institute, https://justin.law.muni.cz/en/publications (last visited Jan. 24, 2023). We encourage readers to write to us regarding court-packing plans, old as well as new, not mentioned therein using our email addresses included in the heading of the article.

court-packing techniques and their countries of origin. Moreover, we limited our analysis to court-packing plans that took place after World War II,[48] with the exception of the iconic FDR's plan. On the other hand, our list includes both successful and unsuccessful attempts at court-packing (unsuccessful examples are in italics), because even the threat of court-packing can have consequences. In what follows, we discuss each court-packing strategy in more detail.

3.1. The expanding strategy: Increasing the number of judges

Increasing the number of judges sitting at the court is the most common court-packing strategy in both democratic and non-democratic countries, perhaps because of its seemingly rule-of-law-compatible character. Although historically the expansion of a court's size has to a certain degree been driven by the growing complexity of legal norms which resulted in the need to divide apex courts into more specialized chambers, the very same measures are often used as court-packing strategies.[49] This is particularly so if the increased number allows the executive power to secure a friendly majority on the given court. Consequently, there are plenty of examples that show how tinkering with the number of judges at apex courts becomes a tool used by the executive in order to achieve a politically friendly judiciary.

The best-known example of the expanding strategy is FDR's court-packing plan of 1937, which resulted from his clash with the conservative majority of the US Supreme Court who opposed his New Deal legislation.[50] In response to this opposition, FDR 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. As six justices were over seventy at that time, this formula would immediately have given FDR six new nominations, enough to secure a stable majority. In justifying his plan, FDR relied on the alleged inefficiency of the Supreme Court, but the Court quickly refuted his claims.[51] After FDR's real ideological rationale was exposed, his court-packing plan was eventually defeated, but only after a substantial political battle the outcome of which was in doubt to the end, despite fading public support for the court-packing plan.[52] Nevertheless, it is important to add that as much as FDR lost the 1937 battle, he won the war as, by the end of 1941, after the deaths of Cardozo and Butler and the retirement of four

[48] For instance, several court-packing plans were put into operation in the US in the nineteenth century. Braver, *supra note* 8.

[49] Anibal Pérez-Liñán & Andrea Castagnola, *Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America*, 46 Brit. J. Pol. Sci 395 (2016).

[50] Note that it is heavily contested among American historians (Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (2010)), lawyers (Cushman, *supra* note 30), and political scientists (Caldeira, *supra* note 30) how much the Supreme Court actually harmed FDR's flagship New Deal statutes. We cannot delve into this debate here.

[51] Shesol, *supra* note 50.

[52] The story of FDR's court-packing plan (and its prequel and aftermath) in detail is extremely complicated and also hotly contested. *See* Leuchtenburg, *supra* note 30; Caldeira, *supra* note 30; Cushman, *The Man on the Flying Trapeze*, *supra* note 30; Proctor, *supra* note 30; Sweeney, *supra* note 30; Tushnet, *supra* note 30.

other justices, FDR was able to nominate seven out of nine justices.[53] Since then, no court-packing proposal on the federal level has gone as far in the legislative process as FDR's plan, but similar plans were introduced and sometimes even successful at the state level.[54]

In Latin America, a famous quotation from President Menem—"why should I be the only President who won't appoint his own Supreme Court?"[55]—has similar iconic status. In 1994, Menem introduced a constitutional reform that seemingly reduced his powers and bolstered judicial independence. Yet, before taking this step, he almost doubled the size of the Argentinian Supreme Court by increasing the number of sitting judges from five to nine.[56] This allowed him to create a pro-government majority on the Supreme Court, known in Argentina as the *mayoría automática menemista* (the automatic Menemist majority) because of its propensity for ruling in Menem's favor.[57] He was not alone though, as in Argentina increasing the size of the Supreme Court has been a signature political move exercised by many presidents.[58] In fact, the expanding strategy has flourished across Latin America. A Bolivian President, Barrientos, implemented a similar technique in 1967 by expanding the number of Supreme Court judges from ten to twelve.[59] Likewise, the Venezuelan President Hugo Chávez increased the number of Supreme Court judges from twenty to thirty-two.[60] Other Latin America countries have experienced similar episodes.[61] Central America has witnessed this strategy as well. For instance, in 2001 the Honduran Congress ratified a constitutional amendment which led to a comprehensive restructuring of the judiciary, including an increase in the size of the Supreme Court from nine to fifteen judges.[62]

The same technique has also found traction in Europe. In 1993, Russian President Boris Yeltsin famously suspended the Russian Constitutional Court led by Valerii Zorkin and adopted a new constitution by referendum that increased the number of its

[53] *See* Frank Reel, *When a Switch in Time Saved Nine*, N.Y. Times, Nov. 10, 1985, at E26, www.nytimes.com/1985/11/10/opinion/l-when-a-switch-in-time-saved-nine-143165.html.

[54] *See* Elizabeth L. Robinson, *Revival of Roosevelt: Analyzing Expansion of the Supreme Court of North Carolina in Light of the Resurgence of State Court-Packing Plans*, 96 N.C. L. Rev. 1126 (2018); Martin K. Levy, *Packing and Unpacking State Courts*, 61 Wm. & Mary L. Rev. 1121 (2020).

[55] Chavez, *supra* note 3; https://www.gretchenhelmke.com/uploads/7/0/3/2/70329843/judicial_manipulation_helmke.pdf; Daly, *supra note* 10.

[56] Chavez, *supra* note 3, at 455.

[57] Rebecca Bill Chavez, *The Appointment and Removal Process of Judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence*, 42 Latin Am. Pol. & Soc'y 36 (2007).

[58] Helmke, *supra note* 55.

[59] *See also* Pérez-Liñán & Castagnola, *supra note* 19.

[60] The instrumental nature of this court-packing was apparent, as Chávez increased the number of Supreme Court justices in a way that secured him a majority in every single panel—including the electoral one. *See* Taylor, *supra* note 4, at 253.

[61] *See* Anibal Pérez-Liñán & Andrea Castagnola, *Presidential Control of High Courts in Latin America: A Long-term View (1904–2006)*, 1 J. Pol. Latin Am. 87 (2009); Azul Aguiar-Aguilar, Courts and the Constitutional Erosion of Democracy in Latin America. V-DEM Institute. Users Working Paper (May 2020).

[62] Freedom House, Countries at the Crossroads 2005: Honduras, RefWorld (May 5, 2005),www.refworld.org/docid/4738690c5a.html.

justices from fifteen to nineteen, allowing Yeltsin to appoint six new justices by 1995.[63] In 2012, Recep Erdoğan expanded the membership of the Turkish Constitutional Court from eleven to seventeen judges.[64] Due to its newly gained parliamentary supermajority, Orbán's administration adopted a constitutional amendment that increased the number of judges of the Hungarian Constitutional Court from eleven to fifteen and gave Orbán four seats to fill, which helped him gradually to silence the court as an effective veto.[65] Jarosław Kaczyński borrowed the expanding strategy from Orbán's playbook and expanded the number of judges of the Polish Supreme Court from eighty-one to 120.[66]

3.2. The emptying strategy: Reducing the number of judges

Unlike the expanding strategy, the emptying strategy seeks to get rid of those who oppose the sitting government. However, reducing the court's size is a costly political decision, as it more openly interferes with judicial independence and is rather difficult to justify to the public. In addition, a decreasing the number of judges, unless related to a complex reform of the judiciary and procedural rules, might be challenged on efficiency grounds as it may result in a backlog of cases and failure to deliver timely justice. The emptying strategy can be pursued by legislative downsizing of the court as well as by less visible creative executive actions that are temporary.

a) Downsizing

Rare examples of straightforward downsizing of a court through legislation can be found in Latin America. For example, a reduction in the number of Supreme Court judges has taken place three times in Argentina.[67] Argentinian presidents aspired to select their own courts and bench mathematics were merely a technique to achieve this. Cycles of increasing and downsizing the Supreme Court therefore were repeated for decades. In 1950, Argentinian President Juan Perón reduced the number of judges from eight to five. In 1958, Arturo Frondizi increased it to seven, but after the coup of 1966 Juan Carlos Onganía reduced it to five again. Carlos Menem's expansion of the Supreme Court to nine justices, outlined above, was undone in 2006 when the number of judges returned to five. Another example comes from Brazil, which reduced the number of the Supreme Federal Tribunal's justices from sixteen to eleven, undoing

[63] Note that only thirteen seats out of fifteen were filled when the constitutional reform was implemented. *See* Herbert Hausmaninger, *Towards a New Russian Constitutional Court*, 28 Cornell Int'l L.J. 349 (1995); Alexei Trochev, Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006 at 73–8 (2008).

[64] Özbudun, *supra* note 5; Esen & Gumuscu, *supra* note 5; Varol, Pellegrina, & Garoupa, *supra* note 5.

[65] David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 209 (2013). But note that it took several years for Orbán to achieve full control of the Hungarian Constitutional Court.

[66] Śledzińska-Simon, *supra* note 7; Fryderyk Zoll & Leah Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42 Fordham Int'l L.J. 875 (2019).

[67] Jodi Finkel, *Judicial Reform in Argentina in 1990s: How Electoral Incentives Shape Judicial Change*, 39 Lat. Am. Res. Rev. 56 (2004).

the court-packing implemented by the military government in 1965.[68] It is important to stress here that virtually all examples of downsizing the court were reactions to previous court-packing by means of expanding the size of the court. This suggests that cyclical court-packing raises specific issues that should be studied in depth in the future.

b) Thwarting the selection process

Nevertheless, for ruling politicians it is sometimes enough if they reduce the number of judges on a given court temporarily through executive actions, either to paralyze the court or to wait until a regular vacancy appears and they can fill it with their own candidates. Such reduction in the number of sitting judges is often a prequel to the swapping techniques,[69] but it should be addressed separately for analytical purposes. A prime example of such temporary emptying of the court is thwarting the selection process. This often happens if the political leaders do not control the whole process of the selection of judges, and thus they try to block it by not carrying out an essential procedural step. This is actually a rather widespread phenomenon, but it is more common in countries where more actors take part in the selection process, as it suffices if one of them decides to block an unwelcome candidate.

This happens, for instance, if one of the authorities which can nominate a judge does not act. This was the case of Czech President Václav Klaus who refused to nominate a new candidate for the Constitutional Court, and complicated (2011–13) or even severely restricted (2003–05) the functioning of the Constitutional Court.[70] Similar examples have occurred in other European jurisdictions. Probably the most famous one is the refusal of the Polish President Duda to appoint three justices legitimately selected by Civil Platform's parliament in 2015. Duda justified the thwarting of the selection by pointing out that the previous government selected five justices, two prematurely, since their terms of offices were to finish only after the new parliamentary election (see below on premature appointment). According to PiS and Duda, this made the whole selection illegitimate. However, this step allowed PiS to swiftly fill five seats instead of the two they legitimately could according to the applicable constitutional norms.[71] The Constitutional Tribunal itself later confirmed that, thwarting the selection of three duly selected judges.[72] A different scenario played out in Albania, where in 2017–18 the government blocked the activity of the selection committee for judges and thus thwarted the appointment of new Albanian constitutional justices.[73]

[68] Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. Miami Inter-Am. L. Rev. 28 (1987).

[69] *See infra* Section 2.3.

[70] However, we must add that classifying President Klaus's actions as court-packing is not uncontroversial. *See also* David Kosař & Ladislav Vyhnánek, *The Czech Constitutional Court*, *in* Constitutional Adjudication: Institutions 119 (Armin von Bogdandy, Peter Huber, & Christoph Grabenwarter eds., 2020).

[71] *See* Sadurski, *supra* note 37, at 65–8.

[72] *See* Zoll & Wortham, *supra* note 66; Xero Flor w Polsce sp. z o.o. v. Poland, App. No. 4907/18, Eur. Ct. H.R., May 7, 2021, https://hudoc.echr.coe.int/fre?i=001-210065.

[73] *Meta Blames Majority for Non-Functioning of Constitutional Court*, Albanian Daily News (Sept. 16, 2019), www.albaniandailynews.com/index.php?idm-35519&mod=2.

c) Forced vacation

The Polish Law and Justice party, in its effort to capture the Polish judiciary although it did not enjoy a constitutional supermajority, has also resorted to other innovative court-packing methods. 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 a forced vacation. This technique obviously does not immediately end a judge's term of office, but it allows political leaders, with the help of a court president, to prevent such judge from sitting at hearings and deciding cases. Biernat's example shows that he was effectively sidelined and de facto suspended from judicial office for the last months of his term.[74] Hence, the size of the Polish Constitutional Court was reduced, albeit temporarily.

d) Benching

Another creative technique with a similar effect is the benching of judges, which is their de facto suspension. An example of this technique can once again be found in Poland. In 2017, Polish Minister of Justice Zbigniew Ziobro retroactively questioned the legality of the selection of three Constitutional Tribunal justices who had, since 2010, executed their mandate unchallenged.[75] Although these allegations of illegalities during the 2010 selection process were clumsy and clearly intended to get rid of the anti-government justices on the Constitutional Tribunal, another panel of the Constitutional Tribunal, controlled by pro-Kaczyński judges, removed these three justices from their respective panels, arguing that they might be biased in constitutional review cases where the Minister of Justice himself was a party to the proceedings. The fact that in practice the Minister of Justice (acting as a General Prosecutor) very rarely initiates a constitutional review and his role is merely formal did not affect the Constitutional Tribunal's opinion.

The newly appointed pro-governmental President of the Constitutional Tribunal, Julia Przyłębska, yet again kept these three justices in the "penalty box" until the very end of their mandates.[76] Apart from Poland, benching has been applied also in Latin America. Take, for example, the case of the benching of the recalcitrant Supreme Court of Venezuela judge Frankline Arrieche by President Hugo Chávez.[77] In both cases, the size of the court was decreased temporarily without the immediate creation of a new vacancy, which distinguishes this technique from swapping techniques discussed in the next section.

3.3. The swapping strategy: Replacing sitting judges

The swapping strategy is different from the enlarging and emptying strategies. It does not alter the composition of the court through a change of its size. In contrast to the

[74] Zoll & Wortham, *supra* note 66; Kosař & Šipulová, *supra* note 13.
[75] Ziobro falsely argued that these justices had been selected in en bloc rather than separate elections.
[76] Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* (Sydney Law School Research Paper No. 18/01, 2018), https://ssrn.com/abstract=3103491.
[77] Taylor, *supra* note 4.

previous two strategies, which relied on quantitative changes, the replacement of sitting judges changes the composition of the court in qualitative terms. By swapping judges, political leaders not only select their nominees for the court but also get rid of "disobedient" judges. The swapping of judges can be achieved through a plethora of various techniques ranging from abusive impeachment and disciplining of judges to forced resignations, golden parachutes, and premature appointments. For the sake of complexity, we must also include inherently reprehensible techniques such as violent attacks against judges.

a) Introduction or reduction of a mandatory retirement age

One of the most common and most frequently implemented techniques which allowed the executive power to get rid of recalcitrant judges and fill the empty seats with their own nominees in recent decades is the legislative shortening of the term of office. This technique has several variations.

Many European jurisdictions, for example, have introduced a mandatory retirement age for judges,[78] which in turn offers governments an elegant, seemingly legitimate method of shortening judicial terms of office. From this perspective, the introduction or reduction of a mandatory retirement age is a wolf in sheep's clothing. While ostensibly pursuing various laudable aims (such as increasing the efficiency of the judiciary, creating working opportunities for young lawyers, cleaning the system of communist-era judges who are allegedly discredited by service for the previous regime, etc.), such legislation leads to large-scale shortening of the term of office of hundreds of judges and allows the executive to pack the courts, especially the apex courts, where older judges naturally sit in higher numbers.

An example of such a step is Orbán's reform of 2012 which reduced the mandatory retirement age of Hungarian judges from seventy to sixty-two years.[79] According to available sources, this step allowed Orbán to free 274 judicial positions, mostly at higher courts.[80] The Court of Justice of the European Union (CJEU) reviewed the reform and found it to be in violation of EU law.[81] However, the CJEU's judgment arrived too late, only once the targeted judges had already been removed from office.[82] The European institutions learned their lesson from the Hungarian case and reacted much faster when Jarosław Kaczyński attempted to adopt a similar reform in 2017, reducing the retirement age for Polish judges from seventy to sixty-five.[83] The European Commission immediately initiated infringement proceedings before the CJEU, which first issued an order suspending the application of the domestic law in question,[84] and

[78] Maria Popova, Politicized Justice in Emerging Democracies (2012).

[79] Tomás Gyulavári & Nikolett Hős, *Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts*, 42 Indus. L.J. 289 (2013); Uladzislau Belavusau, *On Age Discrimination and Beating Dead Dogs: Commission v. Hungary*, 50 Common Mkt. L. Rev. 1145 (2013).

[80] Gábor Halmai, *The Early Retirement Age of the Hungarian Judges*, *in* EU Law Stories: Contextual and Critical Histories of European Jurisprudence 471, 482–3, 486–8 (Fernanda Nicola & Bill Davies eds., 2017).

[81] *See further* Case C-286/12, Eur. Comm'n v. Hungary, ECLI:EU:C:2012:687 (Nov. 6, 2012).

[82] Halmai, *supra* note 80.

[83] Zoll & Wortham, *supra* note 66; Sadurski, *supra* note 11.

[84] *See further* Case C-619/18, Eur. Comm'n v. Poland, ECLI:EU:C:2019:531 (June 24, 2019).

subsequently found Kaczyński's reform to be in violation of EU law.[85] This prompt reaction helped to prevent the premature retirement of at least some Polish judges[86] and, most importantly, restored the President of the Polish Supreme Court, Małgorzata Gersdorf, to her position.

However, neither Orbán nor Kaczyński invented this technique. It was used as early as in 1977 in Bangladesh, when an ordinance was passed bringing the retirement age for judges down from sixty-five to sixty-two years with immediate effect, which led to the instant removal of several justices.[87] More recently, in 2019, Bolsonaro's administration tabled a proposal for lowering the retirement age for judges, with a view to providing new nominations to the Brazilian Supreme Court.[88] So it has become a truly global phenomenon.

b) The removal of life tenure or shortening the limited term

A variation on this technique is the removal of life tenure, which introduces a mandatory retirement age for judges in those systems that have not previously recognized it. Such reform may be legitimate, but if it is adopted abruptly without any temporary provisions for sitting judges, its effect is essentially the same as the reduction of the retirement age. On the other hand, an example of an obviously legitimate abolition of life tenures is the British Judicial Pensions Act of 1959, which introduced a mandatory retirement age for judges (seventy-five years), but targeted only newly appointed judges—the last judge serving under life tenure was Lord Denning, who resigned from his post in 1982 at the age of eighty-three.[89] For the sake of completeness, in those jurisdictions where judges are appointed for a limited term, it is enough to shorten this term. Given that in most countries judges of general courts enjoy either life tenure or tenure until they reach the mandatory retirement age, this technique would be applicable primarily to judges of constitutional tribunals or of special courts, who are typically appointed for only a limited period.

c) Vetting

A different technique that also targets a large number of judges is vetting, which occurs typically in countries undergoing regime transition (i.e. the vetting of judges

[85] *See further id.* (in relation to the Supreme Court); Case C-192/18, Eur. Comm'n v. Poland, ECLI:EU:C:2019:924 (Nov. 5, 2019) (in relation to general courts' judges).

[86] Petra Bárd & Anna Sledzinska-Simon, *On the Principle of Irremovability of Judges Beyond Age Discrimination: Commission v. Poland*, 57 Common Mkt. L. Rev. 1555 (2020).

[87] Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, *in* Judicial Independence: The Contemporary Debate 590, 607 (Shimon Shetreet & Jules Deschênes eds., 1985).

[88] Katya Kozicki & Rick Pianaro, *From Hardball to Packing the Court: "PEC do Pyjama" and the Attempt to Attack the Brazilian Supreme Court*, *in* Democracy 2020: Assessing Constitutional Decay, Breakdown, and Renewal Worldwide 59 (Tom Gerald Daly & Wojciech Sadurski eds., 2020), www.iacl-democracy-2020.org/ebook.

[89] Clare Dyer, *Lord Denning, Controversial "People's Judge," Dies Aged 100*, Guardian (Mar. 6, 1999), www.theguardian.com/uk/1999/mar/06/claredyer1. We are not saying though that only this type of abolition of life tenures is legitimate. A staggered system when sitting judges leave the bench gradually in future without the guarantee to stay for life might work too.

for their participation in and allegiance to the previous regime) as a part of lustration processes.[90] The transitional vetting procedures targeting judges are largely perceived as legitimate, even by the international community.[91] A typical example of such vetting was forcing all judges from the former GDR to reapply for their jobs after the reunification of Germany[92] and the Czech Lustration Law.[93] A newer and more problematic example of vetting is the Ukrainian Lustration Act, adopted after the fall of Viktor Yanukovych's regime.[94] An obvious case of lustration legislation being misused to get rid of recalcitrant judges well after the fall of a totalitarian regime is the Macedonian case of the removal of Constitutional Court chief justice Trendafil Ivanovski.[95]

Some literature,[96] especially from post-communist countries, suggests that in states that failed to vet their judges for pragmatic reasons (too few judges overall, functioning courts needed to help with the transition, etc.), lustration keeps reemerging as a wild card used by politicians (e.g. in Poland and Slovakia) to damage public confidence in the courts and to delegitimize them.[97] The assessment of whether the use of lustration and vetting amounts to court-packing is thus extremely difficult and requires careful sequencing and contextual reading of every case. The very same observation is valid for any other transitioning technique such as the retention of judges or their re-appointment after the fall of a non-democratic regime.[98]

d) Abusive disciplining

A more individualized type of swapping strategy is the abusive disciplining of judges or the threat thereof. Such purges of judges appear mostly in relation to successful or unsuccessful coups d'état. In other words, political leaders choose to punish judges by means of disciplinary proceedings when they feel threatened by their decisions.[99] While typical of semi-authoritarian and authoritarian regime leaders,

[90] Robertson, *supra* note 12; Neil Siegel, *The Anti-Constitutionality of Court-Packing*, Balkanization (Mar. 26, 2019), https://balkin.blogspot.com/2019/03/the-anti-constitutionality-of-court_36.html.

[91] *See* Venice Comm'n, Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine (June 19, 2015), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)012-e; Polyakh & Ors. v. Ukraine, App. No. 58812/15, Eur. Ct. H.R., https://hudoc.echr.coe.int/fre?i=001-196607; Konstantsin Dzehtsiarou, *Lustration in Ukraine: Political Cleansing or a Tool of Revenge?*, Verfassungsblog (June 26, 2015), https://verfassungsblog.de/lustration-in-ukraine-political-cleansing-or-a-tool-of-revenge/.

[92] Blankenburg, *supra* note 14.

[93] Kosař & Šipulová, *supra* note 13.

[94] Yuliya Zabyelina, *Lustration Beyond Decommunization: Responding to the Crimes of the Powerful in Post-Euromaidan Ukraine*, 6 State Crime J. 55 (2017).

[95] *See further* Ivanovski v. Macedonia, App. No. 29908/11, Eur. Ct. H.R., https://hudoc.echr.coe.int/fre?i=001-160219.

[96] David Kosař, *The Least Accountable Branch*, 11 Int'l J. Const. L. 234, 250–5 (2013); Kosař & Šipulová, *supra* note 13.

[97] Kosař, *supra* note 93.

[98] Donald P. Kommers, *Autonomy Versus Accountability: The German Judiciary*, *in* Judicial Independence in the Age of Democracy: Critical Perspectives From Around the World 131, 132–3 (Peter H. Russell & David M. O'Brian eds., 2011); David Kosař, Perils of Judicial Self-Government in Transitional Societies (2016).

[99] Generally, abusive disciplining might lead to various sanctions against a judge, including reprimand, salary deductions, transfer to a different court, and removal.

abusive disciplining was also frequently employed by young and backsliding European democracies. Selective disciplining was widespread in Slovakia in the 2010s.[100]

The most extreme example is the widespread abuse of disciplinary proceedings by the Polish government since 2017.[101] The troubling aspect of Kaczyński's employment of disciplinary proceedings against judges who opposed his judicial reforms is that he uses the newly established disciplinary chamber of the Supreme Court, packed by judges appointed by the Law and Justice government. The archetype of intimidation of judges by the government is the case of Waldemar Żurek, a spokesperson for the former National Council of the Judiciary, who faced disciplinary proceedings because, after his transfer to a newly established section of the court which he understood as a personal vendetta, he refused to continue judging.[102] In a different case, judge Dorota Lutostanska faced disciplinary proceedings after she appeared at the celebration of 100 years of Polish independence wearing a T-shirt with the inscription "Constitution." The case of another Polish judge, Alina Czubieniak, shook the judicial ranks even more profoundly. Czubieniak faced disciplinary prosecution after she had issued a decision that a mentally disabled man, charged with the harassment of a nine-year-old girl, had not been secured the right to a fair trial.[103] Polish misuse of disciplinary proceedings went so far that a couple of judges were subjected to disciplinary proceedings for sending a preliminary question to the CJEU.[104] Similar threats of abusive disciplining of judges exist also in Romania.[105]

e) Abusive impeachment

A variation on disciplinary proceedings is abusive impeachment, most frequently used in Latin America. For example, in Bolivia the 1992 impeachment of several Constitutional Tribunal justices was a direct retaliation against the Tribunal justices who dared to rule against the President's attempt to be re-elected for a third consecutive term of office.[106] Similarly, Venezuelan President Hugo Chávez repeatedly used

[100] Kosař, *supra* note 96.
[101] Katarzyna Gajda-Roszczynialska & Krystian Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, 12 Hague J. Rule L. 451 (2020).
[102] *See* Żurek v. Poland, App. No. 39650/18, Eur. Ct. H.R. (pending).
[103] Piotr Mikuli, *Attacking Judicial Independence Through New "Disciplinary" Procedures in Poland*, I•Connect Blog (Apr. 9, 2019), www.iconnectblog.com/2019/04/attacking-judicial-independence-through-new-disciplinary-procedures-in-poland; Marek Strzelecki, *Poland Starts to Discipline Judges Criticizing Court Reforms*, Bloomberg (Sept. 11, 2018), www.bloomberg.com/news/articles/2018-09-11/poland-starts-to-discipline-judges-who-criticized-court-reforms.
[104] Laurent Pech & Patryk Wachowiec, *1460 Days Later: Rule of Law in Poland R.I.P. (Part I)*, Verfassungsblog (Jan. 13, 2020), https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-i/; Laurent Pech & Patryk Wachowiec, *1460 Days Later: Rule of Law in Poland R.I.P. (Part II)*, Verfassungsblog (Jan. 15, 2020),https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-ii/. *See also further* Joined Cases C-558/18 and C/563/18, Miasto Łowicz v. Prokurator Generalny, ECLI:EU:C:2020:234 (Mar. 26, 2020).
[105] *See* Madalina Moraru & Raluca Bercea, *The Asociaţia "Forumul Judecătorilor din România" Case: The First Episode of the Romanian Rule of Law Saga Before the Court of Justice of the European Union*, 18 Eur. Const. L. Rev. (2022).
[106] Helmke, *supra* note 55.

impeachment against recalcitrant judges.[107] In May 2021, El Salvador's Legislative Assembly, controlled by Nayib Bukele's party, removed five justices of the Supreme Court's Constitutional Chamber on its very first day in office.[108] Examples of controversial impeachment can also be found in consolidated democracies, but they date back several centuries like the 1804 attempt to impeach the US Supreme Court Justice Samuel Chase for ideological reasons.[109] However, abusive impeachment has also been employed in Asia, where President Duterte of the Philippines used it in 2018 to remove his vocal critic, Chief Justice Maria Lourdes Sereno.[110] The Rajapaksa government in Sri Lanka did the same in 2013, when it successfully impeached its Chief Justice.[111]

f) Abusive criminal prosecution

In some cases, political leaders go even further and, instead of disciplining, opt for the abusive criminal prosecution of judges. This technique is, again, typical for non-democratic regimes. For instance, the Czechoslovak communist regime successfully prosecuted several judges for disregarding socialist legality in their decision-making and not following the orders of the Communist Party,[112] primarily to spread fear among judges and tame them. More recently, Hugo Chávez used criminal prosecution against three judges of the Supreme Court of Venezuela to exert pressure on them and to impress upon them how to decide on the applicability of a referendum.[113]

Most frequently, however, the criminal prosecution technique has been abused against judges in the aftermath of failed coups d'état. A fitting example is the widespread purge of thousands of judges following the 2016 unsuccessful coup in Turkey.[114] In the wake of the coup, the Turkish government declared a state of emergency, allowing the Council of Ministers to adopt various decree-laws.[115] Dozens of judges and judicial officials were arrested, and many of those judges still remain in detention. The European Court of Human Rights (ECtHR) found the detention of Turkish judges to be in violation of the European Convention on Human Rights and

[107] Taylor, *supra* note 4.

[108] José Ignacio Hernandez, *The Mass Removal of Constitutional Judges in El Salvador: A New Case of Constitutional Authoritarian-Populism*, I•Connect Blog (May 14, 2021), www.iconnectblog.com/2021/05/the-mass-removal-of-constitutional-judges-in-el-salvador-a-new-case-of-constitutional-authoritarian-populism/.

[109] Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 Rutgers L. Rev. 725 (2010).

[110] A.F. Tissa Fernando, *Procedure for Removal of Superior Court Judges in Sri Lanka and the Issue of "Quis Custodiet Ipsos Custodes?,"* 39 Cth. L. Bull. 717 (2013).

[111] David Steelman, *Judicial Independence in a Democracy: Reflections on Impeachments in America and the Philippines*, 9 Int'l J. Ct. Admin. 1 (2018).

[112] Vorel et al., *supra* note 33.

[113] Taylor, *supra* note 4.

[114] Tarik Olcay, *Firing Bench-Mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members. Case Note*, 13 Eur. Const. L. Rev. 568 (2017).

[115] *See* Turk. Const. 1982, art. 121, para. 3 (setting out the authority to issue decree-laws in the state of emergency follows).

stressed that the state of emergency did not give the government carte blanche to undertake arbitrary detentions and violations of human rights commitments.[116]

A second scenario in which political leaders often resort to abusive prosecution is a retaliation against a particular decision, or a preemptive deterrence of judges. Such examples abound all over the world. Take the trial of five Malay judges in 1988 for making decisions against the interests of the standing government;[117] the prosecution in 2002 of Ukrainian judges who attempted to open a criminal investigation against President Kuchma;[118] Chavez's threat to prosecute Supreme Court justices of the electoral chamber in 2004;[119] or the case of the President of the Polish Constitutional Tribunal, who was threatened with criminal prosecution after he refused to accept the additional three justices chosen by the Law and Justice government whose nomination the Tribunal had found to be unconstitutional.[120]

g) Abusive dismissal

Another swapping technique is the abusive dismissal of a judge using a procedure different from impeachment, criminal prosecution, or disciplinary proceedings. Such non-standard removal is unacceptable in democratic countries, and we can find examples of its use mainly in authoritarian and totalitarian regimes. For instance, in 1969 the Egyptian government dismissed a large number of judges for their refusal to join the ruling political party by means of a combination of the removal of judges and the reorganization of the judicial system, leading to the dismissal of 189 judges in a reappointment process.[121] Other examples of arbitrary dismissals can be found especially in the Americas.[122] In 1999 Hugo Chávez removed 190 judges for various reasons.[123] Only five years later, he also removed the vice-president of Venezuela's Supreme Court.[124] In 2005, the interim Haitian President, Boniface Alexandre, formally "retired" five Supreme Court judges before any had completed their ten-year

[116] *See further* Hakan Baş v. Turkey, App. No. 66448/17, Eur. Ct. H. R, https://hudoc.echr.coe.int/fre?i=001-201761.

[117] Geoffrey Robertson, *Malaysia: Justice Hangs in the Balance*, Ctr. for Independence Judges & lawyers, No. 22, at 8 (Oct. 1988),www.icj.org/wp-content/uploads/2013/10/CIJL-Bulletin-22-1988-eng.pdf.

[118] Iryna Budz, *What Prevents Ukrainian Judiciary From Becoming Truly Effective and Independent?*, VOX Ukraine (July 24, 2019), https://voxukraine.org/en/what-prevents-ukrainian-judiciary-from-becoming-truly-effective-and-independent/.

[119] Taylor, *supra note* 4.

[120] Dariusz Mazur & Waldemar Żurek, *So-called "Good Change" in the Polish System of the Administration of Justice*, RuleOfLaw.pl (Oct. 6, 2017), https://ruleoflaw.pl/so-called-good-change-in-the-polish-system-of-the-administration-of-justice/.

[121] *See* Adel Omar Shefil, *Attacks on the Judiciary: Judicial Independence Reality of Fallacy*, 6 Y.B. Islamic & Middle E. L. at xxxi (1999–2000); Shams Al Din Al Hajjaji, Form of Reform: Judicial Reform in Egypt: Lesson from the Developed Countries (2016) (unpublished Ph.D. dissertation, Univ. Cal., Berkley) (on file with authors).

[122] Aníbal Pérez-Liñán, Barry Ames, & Mitchell A. Seligson, *Strategy, Careers, and Judicial Decisions: Lessons from the Bolivian Courts*, 68 J. Pol. 284 (2006); Castagnola, *supra* note 19.

[123] Taylor, *supra* note 4.

[124] *Id.*

terms.[125] In 2014, the ruling coalition of President Gutierrez in Ecuador by a simple majority in Congress removed all thirty-one justices of the Supreme Court.[126]

The recent development in Turkey demonstrates that abusive removal of judges can also be found within the Council of Europe. The very first decree adopted by Recep Tayyip Erdoğan's regime in the state of emergency in 2016 allowed the Constitutional Court to dismiss any of its members for being linked to a terrorist group.[127] The interpretation of the provision's constitutionality raises some controversy.[128] However, the Constitutional Court arbitrarily dismissed two judges, Alparslan Altan and Erdal Tercan, for their alleged links to a terrorist organization and barred them from the judicial profession.[129]

h) Forced resignation

In contrast, forced resignation belongs to swapping techniques which are more difficult to discern. It again typically occurs Latin America, especially in unstable political regimes where the political leaders feel threatened by the rising opposition.[130] For instance, in 2004, Hugo Chávez forced three justices of the electoral panel of the Venezuelan Supreme Court to resign, threatening them with removal or criminal prosecution.[131] A year later, in 2005, Evo Morales forced most of the Bolivian Supreme and Constitutional court judges to resign. A similar technique was used in Argentina.[132] Another famous example comes from Bolivia, where President Melgarejo stopped paying the salaries of Supreme Court justices for so long that he forced the whole Supreme Court, apart from its chief justice, to resign.[133] Political leaders may use various threats to force the resignation, such as blackmailing judges with threats against their family members, cutting salaries, retirement benefits or other monetary perks, or interfering with their property rights.

i) Golden parachute

The executive sometimes also tries to use the carrot rather than the stick to get the desired result. A typical example is "voluntary" resignation triggered by offering judges a "golden parachute." Such a parachute may include promotion to a higher court, to executive office, or even to an international organization. Sometimes this may take the form of another safe job or even financial benefits. Political leaders may also attempt to motivate judges to resign prematurely by the promise of higher pensions. It is simply the carrot side of the stick of forced early retirement by law. This technique

[125] Kevin Costello, *Supreme Court Politics and Life Tenure: A Comparative Inquiry*, 71 Hastings L.J. 1153, 1166 (2020).
[126] Castagnola, *supra* note 19.
[127] Decree-Law no. 667 on Measures to be Taken under the State of Emergency (July 23, 2016) (Tur.).
[128] Olcay, *supra* note 114.
[129] *Id.*
[130] Castagnola, *supra* note 19.
[131] Taylor, *supra* note 4.
[132] Castagnola, *supra* note 19.
[133] Gretchen Helmke & Julio Ríos-Figueroa, Courts in Latin America (2011).

is again difficult to identify, but it has been successfully implemented in Argentina[134] as well as in Poland.[135] Examples are, however, easy to find in other regions too. In 1965, Arthur Goldberg resigned from the US Supreme Court and accepted President Johnson's appointment as the Ambassador to the United Nations, vacating the seat for Johnson's close friend Abe Fortas.[136] The insidious character of this technique is that the only safeguard against it is the moral integrity of the judges who are offered the golden parachute.

j) Premature appointment

Another technique which does not rely on the resignation of judges yet still gives the executive an opportunity to select its own candidate is premature appointment. Some governments, aware that they may lose impending elections, attempt to secure friendly, aligned courts by the premature appointment of new judges, when judges whose mandate is soon to end are still in office (we call them "lame duck judges").

A premature appointment was made, for instance, in Poland in 2015 when Civic Platform government selected two Constitutional Tribunal justices to replace "lame duck judges" whose mandates were to end only after the 2015 parliamentary election, which Civic Platform eventually lost. This preemptive (and later confirmed as unconstitutional[137]) election of judges by the lame duck government was clearly motivated by the fear of losing the elections and responded to growing public support for the populist Law and Justice party. However, this strategy backfired badly. Instead of skewing the composition of the Constitutional Tribunal, this "original sin"[138] instigated (and also partly legitimized) Kaczyński's vendetta against Civic Platform after the elections.[139] That said, the illegitimate nature of this technique is often difficult to identify due to the existence of constitutional conventions, various unwritten norms and practices, and gentlemen's agreements that determine how far in advance new judges can be selected to replace "lame duck judges."

[134] Castagnola, *supra* note 19.

[135] Ewa Siedlecka, *Sędzia Andrzej Wróbel odchodzi z Trybunału Konstytucyjnego: PiS obsadzi kolejne miejsce*, Gazetta Wyborcza (Jan. 25, 2017), http://wyborcza.pl/7,75398,21289466,sedzia-andrzej-wrobel-odchodzi-z-trybunalu-konstytucyjnego.html. Note that the resignation of Andrzej Wróbel, Justice of the Polish Constitutional Tribunal, in January 2017 allowed the governing "Law and Justice" party to appoint its eighth Justice (a swing justice in US parlance, see Enns & Wohlfarth, *supra* note 26) and gain the majority on the fifteen-member Tribunal.

[136] David A. Kaplan, *The Reagan Court: Child of Lyndon Johnson?*, N.Y. Times (Sep. 4, 1989), www.nytimes.com/1989/09/04/opinion/the-reagan-court-child-of-lyndon-johnson.html.

[137] Polish Const. Tribunal, Case no. 34/14 (Dec. 3, 2015).

[138] Lech Garlicki, *Disabling the Constitutional Court in Poland*, *in* Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015 at 63, 65–6 (Andrzej Szmyt & Bogusław Banaszak eds., 2016). *See also* Aleksandra Gliszczyńska-Grabias & Wojciech Sadurski, *The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)*, 17 Eur. Const. L. Rev. 130 (2021).

[139] We discuss Kaczyński's vendetta under the thwarting of the selection process in Section 3.2 above.

k) Use of violence and physical attacks

The crudest technique forcing judges to resign is (the threat of) violence. Explicit violence therefore typically follows a court decision that directly threatens the executive or the leading political party. Several regimes in Africa and Latin America have employed this technique, particularly as retaliation for the prosecution of senior executives or members of the police and militia. A fitting example is 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 parliamentary elections.[140] Similarly, Idi Amin's regime kidnapped and assassinated the first Chief Justice of the Ugandan Supreme Court, Benedict Kiwanuka.[141] Violent attacks against judges took place also in Madagascar following the review of the 2001 presidential elections.[142] There are many similar examples in the histories of Guatemala, El Salvador, and Colombia, whose judiciary was riddled with numerous judicial murders between 1979 and 1991.[143]

Judges typically face violence also during constitutional revolutions and regime change. For example, the fall of the dictatorship of Fulgencio Batista in Cuba and the rise to power of Fidel Castro in 1959 led to the almost complete renewal of the judicial ranks, as many upper middle-class judges fled into exile even before the revolution. This allowed Castro to secure a completely loyal Supreme Court very soon after he assumed power.[144]

4. Can court-packing be legitimate?

What makes court-packing so tempting for political leaders? The plethora of examples in the previous section have four common determinants. First, compared to other court-curbing measures, court-packing often does not incapacitate the courts, but turns them into a powerful weapon. This was well illustrated by empirical research which showed how consistently the packed Polish Constitutional Tribunal supported Kaczyński's policies[145] and how the US Supreme Court polarized towards conservativism.[146] Second, court-packing has immediate results. Political leaders who decide to pack the courts swiftly achieve a friendly majority and a decisive shift in the ideological inclination of the packed court. It is one of the few legal techniques which can lead to an immediate

[140] Mariana Llanos et al., *Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases*, 23 Democratization 1236 (2015).

[141] *Remembering Benedicto Kiwanuka*, Judiciary Insider, No. 11 (Sept. 2018), http://judiciary.go.ug/files/publications/JudiciaryInsiderIssue11webversion.pdf.

[142] Llanos, *supra note* 140.

[143] Int'l Comm'n Jurists, Justice for Justice: Violence Against Judges and Lawyers in Colombia 1979–1991 (July 1992), www.icj.org/wp-content/uploads/2013/05/Colombia-violence-against-judges-and-lawyers-thematic-report-1992-eng.pdf.

[144] Nuno Garoupa & Maria A. Maldonado, *The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America*, 19 Cardozo J. Int'l & Comp. L. 593 (2011).

[145] Sadurski, *supra* note 11.

[146] Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 Cal. L. Rev. 1 (2020). *See also* Varol, Pellegrina, & Garoupa, *supra* note 5 (on Turkey).

change of the bench. Third, it is difficult to reverse, as newly appointed judges are protected by judicial independence. We have repeatedly seen how difficult it is to re-establish removed judges in their office, even under pressure from international and supranational courts.[147] For instance, despite the favorable judgment of the CJEU, which found the abrupt lowering of the mandatory retirement age for Hungarian judges to be in violation of EU law,[148] the dismissed judges were not allowed to re-join the judicial ranks immediately and they could not be reinstated in their previous leading administrative positions (such as presidents and vice-presidents of courts).[149] Finally, we argue that court-packing is actually less conspicuous than court-curbing practices, as many of its techniques are not easily recognizable or rely on norms of forbearance.[150]

But what makes court-packing a particularly interesting phenomenon to study is the thin line which divides legitimate and illegitimate reconstructions of the bench. History has shown us that court enlargement or large-scale judicial purges might sometimes be justified, or even necessary, and may increase rather than reduce courts' legitimacy. For instance, no one really questioned the legitimacy of purges within the judiciaries in CEE after the fall of the communist regimes. Scholars actually more often lamented the fact that these purges should have been wider.[151] Increasing and reducing the size of courts in the wake of the end of authoritarian and military regimes took place also in Latin America, and some of these examples of court-packing were also not perceived as illegitimate, at least initially.[152] Yet, how can one distinguish between the legitimate and illegitimate examples of court-packing? And can changes in courts' composition that qualify as court-packing ever be legitimate?

The current debate surrounding the calls for enlargement of the US Supreme Court give us a good example of how complicated and fragmented the underlying normative understanding of court-packing is. Since World War II, court-packing has not been debated in any consolidated democracy with such a level of urgency[153] and with so many strong voices advocating its implementation as in the United States in the early 2020s. The passing of Ruth Bader Ginsburg gave President Donald Trump a rare window of opportunity to significantly strengthen his conservative majority at the Supreme Court just a few weeks before the presidential elections which he eventually lost. Proponents of court-packing not only argue for a politically balanced court, but also cite a string of Supreme Court case law arguing that its very legitimacy is at risk, as it is too influenced by partisan politics.[154]

[147] Sometimes, it works though. For instance, judge of the Ukrainian Supreme Court Oleksandr Volkov was reinstated after the ECtHR's judgment in *Volkov v. Ukraine*. Oleksandr Volkov v. Ukraine, App. No. 21722/11 (Jan. 9, 2013), https://hudoc.echr.coe.int/fre?i=001-115871.

[148] Case C-286/12, Eur. Comm'n v. Hungary, ECLI:EU:C:2012:687 (Nov. 6, 2012).

[149] Halmai, *supra note* 80.

[150] Steven Levitsky & Daniel Ziblatt, How Democracies Die (2018).

[151] *See supra* text accompanying notes 90–8.

[152] Daly, *supra note* 10.

[153] One of the rare occasions was the attempt by German Chancellor Adenauer to force Federal Constitutional Court justices to resign by reason of a conflict over joining the European Defence Community in 1953. Georg Vanberg, *Establishing Judicial Independence in West Germany: The impact of Opinion Leadership on the Separation of Powers*, 32 Comp. Pol. 333, 345 (2000).

[154] Doerfler & Moyn, *supra* note 147. *See also* Richard Mailey, *Court-Packing in 2021: Pathways to Democratic Legitimacy*, 44 Seattle U. L. Rev. 35 (2020).

But voices calling for justified, "good" court-packing resonate also in Europe as a response to illiberal attacks on the Central and Eastern European (CEE) judiciaries. Even otherwise moderate scholars who believe that responding to the violation of democratic norms with another violation leads to erosion of the entire system now argue that there are rare occasions "when the only way to save the democracy is to fight fire with fire."[155]

However, the current debate is too heavily influenced by the American scholarship that responds to a very specific US context. The US Supreme Court Justices enjoy life tenures with no mandatory retirement age, which gives politicians a rather small window of opportunity to change the Court's composition and bring it closer to the electoral majorities. This unique feature, coupled with strong judicial review and an unpredictable practice of strategic resignations,[156] significantly raises the stakes and attractiveness of court-packing. Moreover, the polarization of the Supreme Court in recent years has concentrated the previously diffused debate and intertwined views on strong judicial review with those on the legitimacy of court-packing.[157] In other words, traditional critics of judicial review have been transformed into strong proponents of ideologically motivated court-packing, aiming to control the Supreme Court instead of curtailing its institutional powers.[158] Many US proponents in fact openly rationalize the enlargement of the Supreme Court as a means to "prevent the erosion of democracy,"[159] by changing the ideological oversight of the Supreme Court which "has been complicit in and partially responsible for the degradation of American democracy."[160]

These unique considerations, however, do not translate well to other regions. This is particularly visible in Europe where scholars theorize about how to unpack and legitimize the courts once Orbán's and Kaczyński's rule is over.[161] These debates are not very often framed as a court-packing problem, since these leaders merged several other methods of controlling the courts. However, it is the court-packing and its eventual undoing that troubles legal and political scholars who theorize about

[155] Jan Werner-Müller, *Democrats Must Finally Play Hardball*, Project-Syndicate (Sept. 25, 2020), www.project-syndicate.org/commentary/democrats-must-fight-on-ruth-bader-ginsburg-replacement-by-jan-werner-mueller-2020-09.

[156] Tomothy M. Hagle, Strategic Retirements: A Political Model of Turnover on the United States Supreme Court, 15 Pol. Behaviour 25 (1993). For a comparative analysis of strategic resignations, see Castagnola, *supra* note 19.

[157] William G. Ross, *Presidential Commission on the Supreme Court of the United States, Testimony of William G. Ross*, White House (June 20, 2021), www.whitehouse.gov/wp-content/uploads/2021/08/Professor-William-G.-Ross.pdf.

[158] Ross, *supra* note 158; Samuel Moyn, *Presidential Commission on the Supreme Court of the United States*, White House 2 (June 30, 2021), www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf; Neil Siegel, *Presidential Commission on the Supreme Court of the United States*, White House 17–20 (July 20, 2021), www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf; Daniel Epps, Presidential Commission on the Supreme Court of the United States, White House 1–11 (July 20, 2021), https://ssrn.com/abstract=3888490.

[159] *Supra note* 2, at 77.

[160] Michael J. Klarman, Presidential Comm'n on the Sup. Ct. U.S., *Court Expansion and Other Changes to the Court's Composition*, White House 12–13 (July 20, 2021), www.whitehouse.gov/wp-content/uploads/2021/07/Klarman-Testimony.pdf.

[161] *Debate: Restoring Constitutionalism*, Verfassungsblog, https://verfassungsblog.de/category/debates/restoring-constitutionalism/ (last visited Jan. 23, 2023).

future development once the current oppositions win the elections in Hungary and Poland.[162] Can the future governing majorities legitimately resort to court-packing in order to reduce the effects of previous court-packing? And, if so, which court-packing strategy would be acceptable? Are some court-packing techniques more legitimate than others?

In order to answer these questions, we need to have a better normative theory of court-packing and its objectives, which contains a clear benchmark that would justify why certain strategies and techniques can by way of exception be seen as legitimate while others are not.

In the following sections, we therefore first discuss the meta-goals of court-packing typically invoked by existing scholarship, and reject them as too vague and contradictory. Instead, using the comparative advantage of mapping various court-packing examples all over the world, we propose to proceed in two steps. First, we suggest abandoning the noble but vague meta-goals that block the debate, and instead focusing on pragmatic rationales for court-packing invoked in practice. Second, we divide the question when there is a "just cause" for court-packing from the "means question," that is how to execute just court-packing to keep it legitimate. By doing so, we propose a prospective mid-level theory of legitimate court-packing resting on two dimensions: *when* court-packing is pursuing a legitimate aim (*ius ad bellum* of court-packing) and *how* to execute it legitimately (*ius in bello* of court-packing). We furthermore stress that even legitimate court-packing still posits significant dangers. To tackle these dangers, we propose a legitimacy algorithm reflecting the cost–benefit analysis of individual court-packing techniques, conditioning them by stringent deliberative and procedural criteria.

4.1. From meta-goals to two dimensions of court-packing legitimacy

The rich scholarship and debates on court-packing frequently engage with the question of legitimacy, typically invoking the following meta-goals that court-packing aims to meet: the rule of law (including judicial independence),[163] separation of powers,[164] democracy,[165] social responsiveness,[166] public confidence in the courts,[167] and the well-functioning of the judiciary.[168]

[162] *Id. See also* Armin von Bogdandy & Luke Dimitrios Spieker, *Restoring the Rule of Law Through Criminal Responsibility*, Verfassungsblog (Dec. 10, 2021), https://verfassungsblog.de/restoring-the-rule-of-law-through-criminal-responsibility/.

[163] Charles G. Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 Case W. Res. L. Rev. 911, 916 (2006).

[164] Braver, *supra note* 8.

[165] Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 Harv. L. Rev. 1, 1 (2020); Klarman, *supra* note 161.

[166] Owen M. Fiss, *The Right Degree of Independence*, *in* Transition to Democracy in Latin America: The Role of the Judiciary 55, 56–8 (Irwin P. Stotzky ed., 1993). On the general idea of "responsive law," see Philippe Nonet and Philip Selznick, Law & Society in Transition: Toward Responsive Law 73–114 (2001).

[167] Caldeira, *supra* note 30; Cushman, *supra* note 30; Alex Badas, *Policy Disagreement and Judicial Legitimacy: evidence from the 1937 Court-Packing Plan*, 48 J. Legal Stud. 377 (2020); Thomas M. Keck, *Court-Packing and Democratic Erosion*, *in* Democratic Resilience: Can the United States Withstand Rising Polarization? 141 (Suzanne Mettler, Robert Lieberman, & Ken Roberts eds., 2022).

[168] John Ferejohn & Larry Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 963–4 (2002).

However, all these meta-goals are notoriously ambiguous and often contested concepts, whose relationship to court-packing is empirically unclear and at best disputed. As a result, all of these meta-goals are typically invoked by both the supporters and the critics of court-packing. This is most visible in the case of the rule of law, which is used by opponents of court-packing primarily to undermine both the legitimacy and legality of bench alterations.[169] According to some scholars, the very idea of court-packing contravenes the spirit of the rule of law[170] and its individual principles—including judicial independence, which is inevitably in tension with the concept of court-packing.[171] The rule of law itself is nevertheless a loaded and very context-dependent term that can hardly be reduced to questions of legality. After all, it is the violation of the rule of law norms which ironically justifies many calls for "good court-packing"[172] in transitional settings or, in European liberal discourse, calls for unpacking post-Orbán and post-Kaczyński judiciaries. Similar considerations apply to judicial independence as one of the rule of law principles, as it is invoked by anti-court-packing[173] as well as pro-court-packing[174] camps. The invocations of the rule of law and judicial independence thus gridlock the debate on legitimate court-packing.

The same problem permeates the invocation of the separation of powers. On the one hand, there is a long tradition of rejecting court-packing as an attack on the separation of powers,[175] which clashes with the ability of the courts to serve as an effective check against the executive and legislative power.[176] On the other hand, the opposite camp actually invokes court-packing as a constraint, arguing that it is judicial supremacy that conflicts with the separation of powers principle.[177] The reference to "democracy" does not get us any further, as it is too dependent on differences between its thick and thin understandings.

[169] Christopher Kang, *Perspectives on Supreme Court Reform*, White House 3 (July 20, 2021), www.whitehouse.gov/wp-content/uploads/2021/07/Kang-Testimony.pdf; Klarman, *supra* note 161.

[170] Braver, *supra* note 8.

[171] Barry Cushman, *Court-Packing in Context*, White House 3 (July 20, 2021), www.whitehouse.gov/wp-content/uploads/2021/10/Professor-Barry-Cushman.pdf; Jeff Sheshol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court*, White House 3 (July 20, 2021), www.whitehouse.gov/wp-content/uploads/2021/08/Jeff-Shesol-1.pdf; Ross, *supra* note 158; Noah Feldman, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, White House 2 (Jun. 30, 2021), www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf; John Malcolm, Perspectives on Court Reform, White House 2 (July 20, 2021), www.whitehouse.gov/wp-content/uploads/2021/07/Malcolm-Testimony.pdf; Siegel, *supra* note 159.

[172] Presidential Comm'n on the Sup. Ct. United States, *supra* note 2, at 75–6.

[173] Cushman, *supra note* 172; Feldman, *supra note* 172; Ross, *supra* note 158.

[174] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 Yale L.J. 18, 27 (2019); Weill, *supra note* 31; Thomas Keck, *The Supreme Court Justices Control Whether Court-Packing Ever Happens*, Wash. Post (Nov. 19, 2018), www.washingtonpost.com/outlook/2018/11/19/supreme-court-justices-control-whether-court-packing-ever-happens/; Danielle Root & Sam Berger, *Structural Reforms to the Federal Judiciary*, Ctr. Am. Progress (May 8, 2019), www.americanprogress.org/issues/courts/reports/2019/05/08/469504/structural-reforms-federal-judiciary; Levy, *supra note 53*; Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 Mich. L. Rev. 1361 (2022).

[175] Ever since the refusal of FDR's plan in 1937; Cushman, *supra note* 172.

[176] Ross, *supra* note 158; Malcolm, *supra* note 172.

[177] See the departmentalist scholarship discussed in Braver, *supra note* 8, at 2791.

Legitimate court-packing can also be presented as an example of good governance[178] or a restoration of the ideological balance in the courts. The argument is particularly frequent in bipartisan countries such as the United States, where proponents of court-packing largely copy the arguments of critics of a strong constitutional review and the alleged resulting democratic deficit.[179] The threat of legitimate court-packing, according to some, helps to keep judges constrained so that they do not move too far away from majority public opinion.[180]

Such threats thus may ensure socially responsive judicial review[181] or the broader goal of a well-functioning judiciary apt to provide timely and substantially just decision-making. The social responsiveness of courts is, however, also vehemently rejected as a form of politicization, tying courts too closely to the partisan politics and preferences of the ruling majorities. This is particularly so in European countries, which perceive the courts as a strictly legal and apolitical institution. The US discourse is more fragmented.

Like social responsiveness, the restoration of public confidence often resonates in the pro-court-packing camp. Nevertheless, the relationship between court-packing and public confidence is also very hazy. Scholars disagree on the sensitivity of the public to court-packing. Siegel, for example, conditions the public legitimacy of courts by their visible independence from political branches of power,[182] and Caldeira understood the US Supreme Court as extraordinarily dependent on public confidence, leading to strategic behavior by the justices.[183] Feldman, on the other hand, perceives public confidence as less fragile, arguing that the public actually cares and knows very little about courts and that the law–politics dichotomy is merely a myth.[184] Empirical evidence is similarly confusing. Calls for greater public confidence motivated the systemic lustration of judges in 2014 in Ukraine, after the fall of Viktor Yanukovych's regime.[185] On the other side of the continuum, public polls clearly show a decline in public confidence in the packed and rigged Polish courts post 2017.[186] In the United States, public polls showed general support for delaying Bader Ginsburg's replacement at the Supreme Court, but the polls in support of the Democrats in their court-packing

[178] Siegel, *supra* note 159.

[179] Aaron Belkin, *Take Back the Court*, White House (Aug. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Aaron-Belkin.pdf.

[180] Denis Galligan, *Principal Institutions and Mechanisms of Judicial Accountability*, *in* Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century 31 (Rudolf V. Van Puymbroeck eds., 2001). *Cf.* Mak, *supra* note 203, at 730, 734; Klarman, *supra* note 161; Kang, *supra note* 170.

[181] Letter from Rosalind Dixon to Bob Bauer and Cristina Rodriguez, Co-Chairs, Presidential Commission on the Supreme Court of the United States 10–11 (June 25, 2021), www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf.

[182] Siegel, *supra* note 159.

[183] Gregory A. Caldeira, *Neither the Purse, nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 Am. Pol. Sci. Rev. 1209 (1986).

[184] James L. Gibson, Gregory A. Caldeira, & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 Am. Pol. Sci. Rev. 343 (1998); Feldman, *supra note* 173.

[185] Zabyelina, *supra note* 94.

[186] Flash Eurobarometer 489, Perceived Independence of the National Justice Systems in the EU Among the General Public (July 2021), https://europa.eu/eurobarometer/surveys/detail/2272.

plans had mixed results, fueling worries that court-packing might erode public respect for the Supreme Court.[187]

It is quite apparent that meta-goals of legitimate court-packing are not only vague, difficult to define, and context-dependent, but also often contradictory. We therefore move from the abstract level to more practical goals. Using the comparative advantage of our broad conceptualization, we propose a prospective mid-level theory of legitimate court-packing which allows us to create more general and clearer boundaries of legitimate and illegitimate court-packing without losing sight of deep theoretical debates.[188]

We build this mid-level theory of legitimate justifications of court-packing on the following normative considerations. First, we argue against evaluation of court-packing legitimacy that would require an imputation of intent to political leaders, as such a concept is inevitably based on subjective assumptions and could never aspire to having general applicability.[189] We argue that, irrespective of justifications and goals, court-packing inherently triggers several dangers. We therefore conceptualize it as a hardball technique that is problematic irrespective of whether the actors who implement it are generally seen as the good or the bad guys.

Second, for similar reasons, we also oppose any evaluation of court-packing that would base its legitimacy on the existence of other guarantees of judicial independence. In other words, the level of judicial autonomy, self-governance, or judicial independence cannot justify or retroactively legitimize court-packing as a practice.

Third, we also reject arguments for court-packing that rely merely on the legitimation achieved in hindsight, as they necessarily raise the questions of who should be the judge deciding whether the court-packing was legitimate, what the criteria of such assessment would be, or how to undo court-packing once packed judges actually prove to be loyal to their political nominators. Therefore, the subsequent behavior of packed judges is important for the overall evaluation of the quality of justice, but it cannot in itself justify court-packing as a policy.

Instead, we offer a forward-looking assessment and argue that while court-packing is always problematic, in some exceptional instances it can be legitimate and justified. This legitimacy rests on a set of stringent political criteria, such as democratic regime change, proportional reaction to previous court-packing, or democratic deliberation leading to multipartisan or expert consensus on the court-packing. Our conceptualization of legitimate court-packing is therefore a normative one. Instead of looking at formal rules or constitutional practices or conventions, which are necessarily

[187] Ross, *supra note* 158, at 6.

[188] Here we rely on the theory of "incompletely theorized agreements" (associated with Cass Sunstein) and on that of "overlapping consensus" (associated with John Rawls). *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733, 1739–40 (1995); John Rawls, Political Liberalism 133–72 (1993).

[189] For proponents of such approach, see Mark Tushnet & Bojan Bugarič, Power to the People 161–3, 177 (2021); Benjamin García Helgado & Raul Sanchez Urribarri, *Court-packing and democratic decay: A necessary relationship?* Global Constitutionalism 1–28 (2023).

context-dependent and vary across jurisdictions, we construct normative political criteria of legitimate court-packing.

The mid-level goals of legitimate court-packing require us to create a set of clear, forward-looking criteria to distinguish legitimate from illegitimate court-packing so that the latter can be exposed and ideally stopped at the very beginning. If these criteria are internalized and followed in practice, that should make court-packing actually less tempting to political leaders. Even if not, the signaling function of these criteria can at least mitigate the impact of illegitimate court-packing, mobilize opposition, and in some jurisdictions also increase the pressure from the international and supranational actors. If we look at the problem from the reverse angle, clear criteria for legitimate court-packing might prove to be a strong deterrent not only for politicians, but also for those judges who became complicit in it, by showing them that there is a way to get rid of them or to limit their influence legitimately.

The important caveat of our turn to a mid-level pragmatic theory of court-packing is that each court-packing justification carries with it some dangers of backlash. While some of these dangers are inherent in any court-packing (danger of cyclical repetition), others are context-dependent and may vary from one jurisdiction to another. We therefore argue that the conceptualization of court-packing legitimacy requires one to look both at *when* the court-packing is legitimate and at *how* to execute its techniques legitimately, eliminating as many risks as possible. This second dimension of legitimacy thus interacts with constitutional norms and internationally entrenched rules and practices, which narrow down the applicability of individual court-packing techniques in a funnel-like structure.

These two dimensions of legitimate court-packing have been already implicitly invoked by some scholarly works, most coherently by Tom Daly who proposed a five-pronged analytical framework of how to evaluate court-packing: its democratic context, articulated reform purpose, reform options (i.e. alternative policies at hand), reform process (deliberation on the policy), and risk of repetition.[190]

Our mid-level theory draws on this literature and develops it into two dimensions of court-packing legitimacy. With some exaggeration, we argue that our mid-level theory aims to capture both the *ius ad bellum* of court-packing (*when* it is justified), and the *ius in bello* of court-packing (*how* to execute these justified court-packing

[190] Daly, *supra* note 10. For cases of possible good court-packing, see papers in the International Association of Constitutional Law symposium: Oren Tamir, *"Good" Court-Packing in the Real World*, Int'l Ass'n Const. L. Blog (Apr. 2, 2022), https://blog-iacl-aidc.org/new-blog-3/2022/4/5/good-court-packing-in-the-real-world-z38xc Mark Tushnet, *Court-Packing: Four Observations on a General Theory of Constitutional Change*, Int'l Ass'n Const. L. Blog (Mar. 17, 2022), https://blog-iacl-aidc.org/new-blog-3/2022/3/17/court-packing-four-observations-on-a-general-theory-of-constitutional-change-6wskd Rosalind Dixon, *Court-Packing in Comparative Perspective*, Int'l Ass'n Const. L. Blog (Mar. 22, 2022), https://blog-iacl-aidc.org/new-blog-3/2022/3/22/court-packing-in-comparative-perspective-rzjbl David Kosař & Katarína Šipulová, *The Ius ad Bellum and Ius in Bello of Court-Packing*, Int'l Ass'n Const. L. Blog (Mar. 24, 2022), https://blog-iacl-aidc.org/new-blog-3/2022/3/24/the-ius-ad-bellum-and-ius-in-bello-of-court-packing-wghpw.

reforms so that they carry as few costs and dangers as possible).[191] We believe that the separation of these two dimensions brings more clarity in the assessment of court-packing dangers, and helps one to identify subsequent conditions placed on any of the mid-level justifications. We also move beyond the democratic context and offer a more generalized, forward-looking assessment, which does not rely on the effects of court-packing and frees the debate from the charges of bias and double standards levelled against the "good guys" and the "bad guys."

In what follows, we first discuss the *ius ad bellum* dimension, introducing the most common justifications of court-packing raised by practice and scholarship. Then, we organize individual justifications into a legitimacy algorithm which assigns them additional procedural and deliberative conditions, and address a categorization of court-packing techniques based on their interaction with other domestic and international rules and principles (the *ius in bello* dimension).

4.2. Mid-level justifications: The *ius ad bellum* of court-packing

The existing scholarship analyzing goals pursued by "good" court-packing[192] has generally accepted as legitimate the following five most common pragmatic mid-level justifications: (i) to ensure a smooth democratic transition, (ii) to eradicate widespread judicial corruption, (iii) to respond to previous illegitimate court-packing, (iv) to rebalance an unrepresentative court, and, finally, (v) to enhance the court's efficiency. We argue that careful analysis and differentiation of these typical mid-level justifications are the key to understanding under what conditions court-packing can be legitimate.

a) Democratic transition

The first mid-level justification, crucial for theorizing about court-packing, is to ensure a smooth democratic transition. A need to change personnel on the bench targets predominantly those transforming societies in which judges played a significant role in violations of individual rights or simply helped to underpin the old regime's

[191] We are grateful for this metaphor to our colleague Jan Petrov. We would also like to note that we are aware of theoretical differences between how international law uses the concepts of *ius ad bellum* and *ius in bello*. In particular, *ius ad bellum* and *ius in bello* are totally separate questions in international humanitarian law, as the *casus belli* (e.g. self-defense, humanitarian intervention, or aggressive war) has zero impact on compliance with the separate *ius in bello* rules, while in the court-packing context it is sometimes difficult to distinguish these two stages and the justifications of court-packing thus interact with the "second-step" rules. Hence, we borrow the concepts of *ius ad bellum* and *ius in bello* only "narrowly." However, we still consider it a useful theoretical metaphor for a two-tiered approach to an analysis of the legitimacy of court-packing we propose.

[192] See, e.g., Zabyelina, *supra note* 94 (discussing the lustration of judges in Ukraine); Thomas M. Keck, *Court-Packing and Democratic Erosion*, *in* Democratic Resilience: Can the United States Withstand Rising Polarization? 141 (Suzanne Mettler, Robert Lieberman, & Ken Roberts, eds., 2021). For individual grounds, see references below. *See also* Tamir, *supra* note 186; Tushnet, *supra* note 186; Dixon, *supra* note 186; Kosař & Katarína Šipulová, *supra* note 186; Tom Daly, *Can "Good" Court-Packing be Justified to Repair Democratic Decay?*, Int'l Ass'n Const. L. Blog (Mar. 17, 2022), https://blog-iacl-aidc.org/new-blog-3/2022/3/17/can-good-court-packing-be-justified-to-repair-democratic-decay-tnets.

power.[193] Typically, calls for systemic court-packing after the transition are justified by judges' collaboration with the previous regime, their complicity in gross human rights violations, their dereliction of the judicial duty to decide independently and impartially, and sometimes even by their incompetence.[194] Latin American transitions from authoritarian to democratic regimes and the fall of communist regimes in CEE are typical examples of situations where we face the "regime-relative nature of judicial independence."[195] As non-democratic regimes often lack a judiciary insulated from political power, transitional requirements on judicial independence are also limited. Take, for example, the case of Czechoslovakia which, soon after the transition, implemented a whole set of measures aimed at ousting communist judges: judicial reappointments, retentions, disciplining, as well as lustration.[196] Yet, all these mechanisms, lustration included, are typically interpreted as legitimate[197] by reason of the total control that communist regimes held over domestic courts. The Lustration Act implemented in 2014 in Ukraine after the fall of Viktor Yanukovych's regime was more controversial, as it has been disputed whether this was a regime change. However, the vetting of Ukrainian judges, albeit to a great extent toothless, was still eventually endorsed by the international community.[198]

Similar examples are to be found also outside the CEE setting. After the Argentinian regime change in 1983, all the Supreme Court Justices appointed by the previous regime handed in their resignations—as was the typical practice in that country. Nevertheless, some scholars suggest that even without the historical practice, the new President Alfonsín could easily and legitimately have demanded that judges resign or impeached them, given that the previous military junta regime had used the courts to underpin its own government.[199]

The big caveat coming with regime change is that it relates exclusively to transitions from non-democratic regimes,[200] as the doctrine of limited judicial independence does not stretch to situations where any other regime type has overthrown a democratic regime. For instance, court-packing after the 1948 communist coup d'état in Czechoslovakia was not legitimate as it was not part of transition to a democratic regime. In other words, the relative character and specificity of regime-related

[193] Robertson, *supra* note 13; Kosař, *supra* note 96; Siegel, *supra* note 159.

[194] *See* Blankenburg, *supra* note 14; David Dyzenhaus, Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order (2003); Hakeem Yusuf, Transitional justice, Judicial Accountability and the Rule of Law (2010); Kosař, *supra* n.96.

[195] Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. Miami Inter-Am. L. Rev. 57 (1993).

[196] Kosař & Šipulová, *supra* note 13.

[197] Marcos Zunino, Jan van Zyl Smit, & Christina Murray, *Special Processes for the Reassessment and Removal of Judges in the Context of Constitutional Transitions: Strengthening the Rule of Law* (Bonavero Inst. Hum. Rts. Oxford, Research Workshop, May 10–11, 2019).

[198] Venice Comm'n, *supra* note 91; Polyakh & Ors. v. Ukraine, App. No. 58812/15, Eur. Ct. H.R., https://hudoc.echr.coe.int/fre?i=001-196607; Dzehtsiarou, *supra* note 91. *See also* Maria Popova, *Can a Leopard Change Its Spots? Strategic Behaviour Versus Professional Role Conception During Ukraine's 2014 Court Chair Elections*, 42 Law & Pol'y 365 (2020).

[199] Fiss, *supra* note 196.

[200] For the classification of non-democratic regimes and longitudinal data on almost all world countries, see, e.g., Varieties of Democracy (V-Dem), www.v-dem.net (last accessed Jan. 23, 2023).

court-packing then follows a logic similar to that of other legal concepts hidden under the umbrella of a transitional rule of law.[201]

b) Widespread judicial corruption

The second typical justification is the eradication of widespread judicial corruption that permeates the whole judiciary. We thus do not have in mind isolated cases of corruption, but only cases of a systemic proportion which cannot be simply solved by regular disciplinary proceedings. Recent examples of court-packing include several where accountability for the corrupt behavior of judges was translated into broader vetting measures, or other political attacks against courts. For instance, the ECtHR delivered a judgment in *Xhoxhaj v. Albania*, a case addressing the impact of radical accountability tools introduced in 2017 in Albania in order to tackle widespread corruption practices among judicial ranks. After the initiation of a vetting procedure, which was supported by the Venice Commission,[202] five out of nine Constitutional Court justices were dismissed, and three others resigned.[203] One of the dismissed judges appealed to the Strasbourg Court, but the ECtHR held that the need to cleanse the Albanian judiciary prevailed over inferences with judicial independence.[204]

The arguments of supranational bodies for systemic vetting and retention actually significantly resemble traditional transitional justice narratives. European bodies based the legitimization of court-packing techniques on public interest and public security, arguing that (i) dismissals are proportionate to serious ethical violations committed by incriminated judges, and (ii) the fight against corruption both increases public trust in the justice system and adds up to a greater protection of individual rights.[205]

c) Previous illegitimate court-packing

The third frequently used justification is a response to previous illegitimate court-packing. By illegitimate court-packing we mean court-packing that would not pass the algorithm put forward in Section 4.3. Retaliation for past inferences with judicial independence is a common moral and political justification behind publicly announced court-packing plans. Previous illegitimate court-packing is therefore one of the considerations driving the theorizing about what should, for example, happen in Poland once Kaczyński's regime is brought down. Would it

[201] Ruti Teitel, Globalizing Transitional Justice: Contemporary Essays 149–64 (2014).

[202] Venice Comm'n, Albania: Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors, Opinion no. 868/2016 (2016),www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)036-e; Tilman Hoppe, *Money Talks. The ECtHR Is Getting Rid of Corrupt Judges*, Verfassungsblog (Mar. 5, 2021), https://verfassungsblog.de/money-talks/.

[203] Hoppe, *supra* n.203.

[204] Xhoxhaj v. Albania, App. No. 15227/19, Eur. Ct. H.R. (Feb. 9, 2021), https://hudoc.echr.coe.int/fre?i=001-208053.

[205] *Id.*

be legitimate to oust illegitimately appointed Constitutional Tribunal "quasi-judges"?[206] Or should they be balanced out by new justices and the size of the Tribunal expanded?

Similarly, the current development in the United States puts the criterion of illegitimate court-packing under an even stricter test. Trump's appointments of conservative justices Neil Gorsuch and Amy Coney Barrett met stark criticism because they allegedly violate the constitutional convention that in a presidential election year the US Senate can confirm a Supreme Court justice only with bipartisan support.[207] As a result, several scholars advocated court-packing in order to rebalance the Supreme Court and protect it from deep polarization.[208] Neil Siegel, for example, called on the political branches to execute self-restraint and argued that the only scenario that would legitimize court-packing would be "the 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."[209] Other opponents stressed the risk of slipping into an endless cycle of court-packing retribution, where each government trumps the previous one by expanding or emptying the courts.[210] An overview of Latin American episodes of court-packing suffices to demonstrate that this fear is not unsubstantiated. After all, the cyclical increase and decrease in the Argentinian Supreme Court's bench has been a dominant feature of domestic politics since the 1950s.[211]

d) Unrepresentative court

The fourth mid-level justification—to rebalance an unrepresentative court—is even more controversial. As already indicated above, this argument underlines the current US discussions on the reform and potential court-packing of the Supreme Court by Biden's administration in order to balance ideologically a too polarized Supreme Court. Some of the voices advocating the expansion of the Supreme Court actually delve more deeply than the Gorsuch/Barrett dispute and build on slowly strengthening doctrinal opposition to judicial review as such.[212] Many commentators point to how negatively the Court has intervened in electoral rights and gerrymandering, has created an

[206] This is now even more complicated, as two out of three "quasi-judges" illegitimately elected in December 2015 have died and been replaced by new judges under the "standard process." *See* Gliszczyńska-Grabias & Sadurski, *supra* note 138. The fact that all three seats were illegitimately stolen by Kaczyński from the previous government remains though. The question is thus to what extent the doctrine of the "fruit of the poisonous tree" applies in this context.

[207] Weill, *supra note* 31.

[208] Ian Millhiser, *Let's Think About Court-Packing*, Democracy: J. Ideas, No. 51 (2019), https://democracyjournal.org/magazine/51/lets-think-about-court-packing-2/; Werner-Müller, *supra* note 156.

[209] Siegel, *supra* note 159.

[210] David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. Legis & Pub. Pol'y 949 (2019); Jeff Schesol, *The Case Against Packing the Court*, New Republic (Oct. 14, 2020), https://newrepublic.com/article/159691/case-against-packing-supreme-court.

[211] Helmke, *supra* note 55; *see also* Section 3.1.

[212] Epps & Sitaraman, *supra note* 175; Ross, *supra* note 158.

impetus for corruption, and has been a powerful ally in Trump's battles to strengthen the already unbalanced executive power at Congress's expense.[213]

Yet, there is no clear consensus, either in the United States or globally in constitutional democracies, on the extent to which courts (at least those that exercise judicial review) should reflect the polarization of opinions and ideas in the political arena or society as a whole. On the contrary, the separation of powers theory might suggest otherwise and prevent any abrupt changes in courts' composition in order to proportionally reflect the current political or societal mood. Moreover, these ideological views in society will necessarily shift in time, and courts cannot be prisoners of political tinkering whenever such a change occurs. Apart from voices suggesting that ideologically motivated court-packing will necessarily trigger a cycle of retaliation,[214] or that the actual results of ideological balancing are dubious at best,[215] we might argue that there could be other mechanisms, such as broadening of the selection criteria for new judges which are better suited to bringing various ideological polarizations of courts closer to the society. Therefore, while calls for a more ideologically balanced court might seem legitimate and sound, they do not arise out of a unified normative understanding which, in comparison with the previous three justifications of court-packing, increases the threshold for their implementation.

However, the rebalancing of unrepresentative courts might be based on many grounds other than ideology. Countries with particularly significant racial or ethnic disparities between the composition of the bench and the population, coupled with dark historical legacies attached to these ethnic (Rwanda) or racial (South Africa) cleavages, might have a legitimate interest in interfering in courts' composition and rebalancing the bench in order to secure a more representative judiciary. A specific representativeness consideration emerges in new states established by secession or dissolution, such as in the case of the division of federal Czechoslovakia into two separate states. Another potential example might be a hypothetical secession of Catalonia from Spain, where the new, national composition of the judiciary might be invoked in order to tackle potential biases. Similarly, the representative criterion might also involve geographic distribution (a fitting example in future might be Canada), religious dividing lines (which motivated Recep Erdogan's attempt to clear the courts of Kemalists), or proxy criteria such as where the justices went to a law school (such as in the United States). Even more controversially, we can argue for gender representation on courts, particularly with the growing understanding that it is important to have both female and male judges on the bench.[216]

Nevertheless, this representation ground comes dangerously close to standard court-packing rhetoric we saw invoked by European populist leaders, who justified a significant reshuffling of the bench by the creation of opportunities for a younger

[213] Epps & Sitaraman, *supra note* 175; Ross, *supra* note 158.
[214] Shesol, *supra* note 50.
[215] Moyn, *supra* note 159.
[216] The literature on gender representation in the judiciary is vast. For summary of the arguments, see Sally J. Kenney, Gender and Justice: Why Women in the Judiciary Really Matter (2013); Rosemary Hunter, *More Than Just a Different Face? Judicial Diversity and Decision-Making*, 68 Current Legal Prob. 119 (2015).

generation of judges. It is important to note that any representative rebalancing invites controversies similar to ideological repolarization. There is no overarching agreement on the extent to which courts' composition should reflect the cleavages existing in society. Moreover, any shifts in courts' composition motivated by such unrepresentativeness will always need to address the risk of partisan politicization.

e) Efficiency

Finally, political leaders justifying court-packing plans often invoke the efficiency rationale. For some commentators, this cause has been tainted since FDR's attempt to expand the Supreme Court in 1937, which relied on false claims about the Court's inefficiency. However, the efficiency rationale may be a pragmatic consideration for many political leaders who have no intention of changing the ideological composition of courts. Consider the reform of the Czech Supreme Administrative Court,[217] and the 2019 expansion of the Irish Court of Appeal,[218] both motivated by addressing the excessive length of proceedings and the burgeoning caseload. Still, even pragmatic considerations and attempts to achieve faster and more dynamic courts may backfire or allow the ruling majority to entrench its position as a side-effect of the reform. The efficiency justification therefore increases the stakes and safeguards required for its legitimate implementation.

4.3. *Ius ad bellum* and *ius in bello* in practice: How to exercise court-packing legitimately

A just cause pursued by court-packing policy, however, merely tells us whether there is a sufficient ground to argue for an exceptional implementation of court-packing that could be legitimately pursued. The second dimension, the *ius in bello* of court-packing, analyzes *how* to execute court-packing legitimately. In other words, the *ius in bello* dimension explores the conditions of legitimate court-packing, what techniques are better suited to matching the declared aim, and what techniques are more problematic.

As we have already indicated above, legitimate court-packing is not devoid of dangers; instead, each mid-level justification inherently involves different costs and risks. Large-scale vetting of Ukrainian judges, condoned, albeit grudgingly, by the international community, is a fitting example of the fact that any, even legitimate, court-packing may easily go wrong. The same applies to initially "good" court-packing in Turkey and Argentina discussed by Tom Daly.[219] Daly therefore rightly recognizes that legitimate court-packing needs to be considered against its potential risks,[220] stressing the risk of repetition.

Based on our comparative overview of court-packing efforts, we have identified two more typical dangers, and thus we are working with three risks of court-packing: (i)

[217] Kosař & Šipulová, *supra* note 9.
[218] Irish Dep't Justice, Press Release, *Court of Appeal Numbers to Increase by 6*, Gov.ie (Mar. 22, 2019), www.justice.ie/en/JELR/Pages/PR19000085.
[219] Daly, *supra note* 10.
[220] *Id.*

the risk of cyclical court-packing, (ii) the risk of the partisan politicization of courts, and (iii) the risk of spreading fear among judges having to decide on politically salient issues.

The risk of cyclical court-packing dominates the arguments raised by court-packing critics,[221] referring to examples of Argentina and Venezuela. Fear of the normalization of court-packing and a tit-for-tat tactic resonates also in the US debate on the expansion of the Supreme Court.[222] Some US scholars point out that court-packing implemented in the current polarized atmosphere would pose unprecedented dangers, spiraling and essentially ballooning the Court's size to such an extent that its legitimacy would "pop,"[223] and potentially taking down the entire constitutional system.[224] If court-packing becomes cyclical then it will never lead to a new stable equilibrium. Instead, it will lead to a convention of tinkering with the size and the composition of the court whenever the opposition party wins elections.[225] For instance, Chilton, Epps, Rozema, and Sen have created a hypothetical model of partisan behavior after the eventual expansion of the US Supreme Court and argue that repeated partisan court-packing will probably occur, increasing the size of the Court to twenty-three judges within the next fifty years.[226]

In democratic countries, cyclical court-packing thus goes hand in hand with the partisan politicization of courts, which might, according to some scholars, limit the institutional separation of powers,[227] even more so if one considers the suggestion that the public has very limited willingness to punish incumbents via electoral retaliation for attacks on courts.[228]

Furthermore, court-packing endangers judicial decision-making in other ways. Some scholars argue that the looming risk of court-packing is a significant constraint on judicial behavior, reducing subjective judicial independence and the willingness of judges to decide on politically salient issues.[229] Court-packing may therefore lead to the self-constrained behavior of courts or their resignation on controlling the other two political powers. This is particularly troubling in transitioning and not yet consolidated democracies.

After a careful analysis of the potential benefits and costs of each mid-level goal of court-packing, we reorganized individual justifications into the legitimacy algorithm

[221] Braver, *supra note* 8.
[222] Some scholars also point out the danger that the normalization of court-packing in democratic regimes would further weaponize its use by authoritarian leaders. *See* Dixon, *supra* note 182; *see also* Presidential Comm'n on the Sup. Ct. United States, *supra* note 2.
[223] Braver, *supra note* 8, at 2748.
[224] Neil Siegel, *Some Notes on Court-Packing, Then and Now*, Balkinization Blog (Nov. 26, 2017), https://balkin.blogspot.com/2017/11/some-notes-on-court-packing-then-and-now.html.
[225] Epps & Sitaraman, *supra note* 175.
[226] Adam Chilton, Daniel Epps, Kyle Rozema, & Maya Sen, *The Endgame of Court-Packing* (Apr. 27, 2021), https://ssrn.com/abstract=3835502.
[227] *Supra* Presidential Comm'n on the Sup. Ct. United States, note 2, at 77.
[228] Amanda Driscoll & Michael Nelson, *The Minimal Costs of Court Curbing: Experimental Evidence from the United States* (Jan. 25, 2021), https://ssrn.com/abstract=3917007.
[229] Ross, *supra* note 158; Siegel, *supra* note 159.

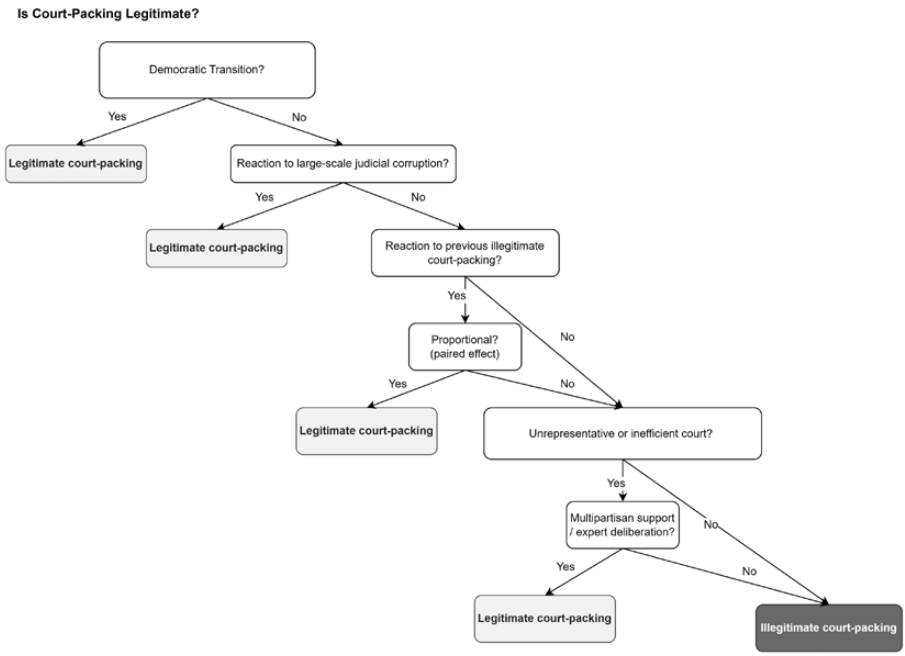

Figure 1. Legitimacy algorithm of court-packing. Source: authors.

(Figure 1), and assigned them further constraining deliberative and procedural criteria aimed at eliminating as many risks as possible.

The algorithm proceeds in four steps. The more dangers the goal pursued by court-packing triggers, the more constrained is political actors' option to legitimize it. Following this logic, the algorithm is divided into four questions: (i) is court-packing an integral part of a democratic transition?; (ii) does the court-packing address widespread patterns of judicial corruption?; (iii) does the court-packing in question react to previous illegitimate court-packing?; and (iv) does the court-packing aim to make the court more representative or efficient? The answers to these four questions determine whether court-packing meets the extraordinary political conditions for its legitimization and what additional requirements, such as proportionality and multipartisan support, must be met.

The first question of our legitimacy algorithm asks whether court-packing is one of the measures implemented in the wake of democratic transition. Democratic regime change typically allows governments plenty of room to maneuver in implementing policies which would not under normal circumstances qualify as consistent with the rule of law. Communist CEE judiciaries are the best example of how implicated non-democratic judiciaries might be in human rights violations committed by the regime, and how they might require thorough vetting or retention in order to purge the old elite and renew public trust in and commitment to rule of law principles. The dangers of transitional court-packing going awry are relatively small. Given the extraordinary

conditions, there is very little risk of repetition and the mere character of a transition renders the court-packing an exceptional tool accessible only in the transitional rule of law framework.[230] The exceptionality of transition also eliminates the fear of judges that they will have to face looming court-packing threats.

Therefore, if the country is actually undergoing a democratic transition, then we argue that the new political elite can implement court-packing devoid of any further conditions as part of transitional justice legislation. The discretion of the new political elite is—like other transitional justice policies—very great and, in line with transitional justice scholarship, does not require any further political conditionality.

Yet, we stress that the criterion relates only to transitions to democracy and its interpretation leaves little room for doubt, relying on established classifications of regimes by political science scholarship (e.g. V-Dem). It is, however, worth noting that this step is time-limited and transitional justification cannot stretch to cover too long a period. This was clearly visible in Hungary when Orbán first tried publicly to justify the general lowering of the retirement age for judges by de-communisation.[231] The justification, however, did not prove valid, as, in the over twenty years since the revolution, the majority of judges who had served under communist rule had already left the system and the rest had proved loyal to the new regime. It is worth mentioning that Orbán's government later abandoned the de-communization rhetoric, and in proceedings before the CJEU justified (unsuccessfully) its retirement-age-reducing mechanism only by the need to unify the varied retirement ages of public officials and to increase age diversity within the judiciary.[232] Similarly, the ECtHR made clear that a long time having lapsed since a democratic revolution makes lustration laws problematic.[233]

If the court-packing plan cannot be justified as a transitional measure, we move to the second step and ask if it addresses widespread judicial corruption. As examples of the recent corrupt behavior of judges have demonstrated, the implementation of accountability tools to rid the courts of deeply rooted corruption and patronage networks invites broad interferences in their composition. These broad interferences are generally supported by the international community.[234] Like regime change, large-scale corruption allows significant interferences into courts' composition in order to renew their independence and public confidence in them, but also to deter the repetition of corrupt behavior. Given the significance and scope of corruption requiring substantial reform of one branch of government, the techniques for tackling large-scale judicial corruption come very close to the discretion typically implemented as part of the transitional rule of law.[235] That means that political actors may legitimately aim for a technique leading to the removal of those judges where there is a reasonable

[230] Teitel, *supra* note 202.
[231] Belavusau, *supra* note 79; Dariusz Kałan, *A Private State: Viktor Orbán's National Post-Communism*, Klub Jagiellonski (July 1, 2019), https://klubjagiellonski.pl/2019/07/01/a-private-state-viktor-orbans-national-post-communism/.
[232] Case C-286/12, Eur. Comm'n v. Hungary, ECLI:EU:C:2012:687 (Nov. 6, 2012).
[233] Cynthia M. Horne, *International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context*, 34 Law & Soc. Inquiry 713 (2009).
[234] Venice Comm'n, *supra* note 203.
[235] Teitel, *supra* note 202.

suspicion of judicial corruption, such as an anomalous disparity between their property and income.

Like regime transition, the extraordinary character of large-scale corruption eliminates the majority of traditional court-packing dangers, particularly those related to repetition, normalization, or constraints on internal, subjective judicial independence. Yet, depending on the actors involved in the corrupt practices, court-packing justified by large-scale corruption might potentially lead to partisan polarization of the judiciary, particularly in two-party systems. However, compared to other justifications of legitimate court-packing dealt with below, its legitimate execution cannot be conditioned by multipartisan support, as corruption networks most frequently include both judges and politicians. Furthermore, while various expert opinions may be a helpful tool proving the righteousness of a government's claims, we argue that such a severe structural problem as the large-scale corruption of the judiciary should not tie the hands of political leaders, who often need to use the momentum of a robust coalition to push through an anticorruption reform.[236] We believe it to be sufficient that supranational bodies, the ECtHR included, have recently reaffirmed that interferences in judicial independence by harsh accountability mechanisms are possible in those jurisdictions which face widespread corruption networks.[237]

What may, on the other hand, significantly foster the legitimacy of such accountability mechanisms is the participation of retired foreign judges, particularly those who are domesticated (i.e. understand the culture, legal system, and language)[238] and who enjoy a high level of respect in the given jurisdiction,[239] in the vetting of domestic judges. A successful example of such employment of foreign judges was the appointment of Sir Anthony Hooper, a former Lord Justice of Appeal, as Chair of the Ukrainian Public Council of International Experts which was responsible for the post-Majdan screening of judicial candidates for the High Anti-Corruption Court as regards their integrity and ethics.[240]

If the court-packing strategy is not seen as in response to widespread judicial corruption, we move to the third step, where we ask whether court-packing responds to previous illegitimate court-packing. As we have already stated above, this step cannot rely on the subsequent behavior of packed judges, as such an approach would allow too much leeway for political leaders to normalize court-packing strategies and would depend on the problematic proving of how judges behave and what motivates the results of their decision-making. Instead, like the previous steps, responsive court-packing is

[236] Tamir, *supra* note 186.

[237] Venice Comm'n, *supra* note 203.

[238] *See similarly* Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 57 Colum. J. Transnat'l L. 283 (2019).

[239] *See similarly* Anna Dziendzic, *Foreign Judges of the Pacific as Agents of Global Constitutionalism*, 10 Global Const. 351 (2021); Anna Dziendzic, Foreign Judges in the Pacific (2021).

[240] *To Trust Is to Choose: International Experts Vetting Candidates for Public Office*, Verfassungsblog (Apr. 23, 2021), https://verfassungsblog.de/to-trust-is-to-choose/. Sir Anthony Hooper and other prominent foreign judges sitting on the Ukrainian Ethics Council (created in 2021) which was created to establish the compliance of a candidate for the position of a member of the High Council of Justice (the Judicial Appointment and Judicial Disciplinary Committee) with the criteria of professional ethics and integrity.

time-limited and should not be used to rectify any original illegitimate court-packing after a long period of time. However, given the inherent risk of spiraling into a series of court-packing plans, court-packing justified by a response to previous illegitimate tinkering with the bench is legitimate only if it is conditioned by its proportionality to the deleterious ramifications of the previous illegitimate court-packing. In other words, we ask whether the court-packing aims for a "paired effect," balancing out the results of the future illegitimate court-packing. For example, the appointment of five Polish Constitutional Tribunal justices by Kaczyński's government was clearly in retaliation for the previous illegitimate move of Civic Platform's executive prematurely to select two justices. Nevertheless, Kaczyński failed to execute his step proportionally, and instead of balancing or rectifying previous court-packing, he attempted to obtain an even greater advantage at the Tribunal by appointing five new justices. Similarly, if either Gorsuch's or Barrett's appointment to the US Supreme Court actually amounted to court-packing, Biden's administration would be able to expand the Supreme Court bench with a single judge.[241] More controversially, if both the refusal to vote on Merrick Garland and the Barrett appointment were examples of illegitimate court-packing, Biden's administration could legitimately increase the size of the Supreme Court by two justices. If such a "responsive" court-packing proposal is not proportional, it is illegitimate. The paired effect of the court-packing therefore serves as a bulwark against cyclical court-packing, since the proportional court-packing closes off the cycle and minimizes the threat of recurring retaliations. Unfortunately, the paired effect has its limits. When the previous court-packing affected the entire court, the proportional response is to pack the whole court, which again shows that cyclical court-packing might require different solutions.

Finally, if court-packing does not relate to any of the previous justifications, we proceed to the fourth step and ask whether it is in response to the unrepresentativeness or inefficiency of the court. Compared to previous mid-level justifications, these court-packing goals pose potentially the biggest risks, as they build on more general and frequent complaints and dissatisfaction with the courts. These seemingly honorable justifications often invoke partisan goals and serve as a mere façade. For that reason, we condition these mid-level justifications with a set of very stringent deliberative criteria: the ability of the political leader to secure multipartisan (or bipartisan) support, validation in a constitutional referendum (Turkey 2010), or (international) expert support.

In line with democratic considerations, it is difficult to eliminate strategies of court-packing if they follow the letter of the constitution and are executed, for example, by governments enjoying a constitutional majority. We can, however, constrain them by stringent deliberative conditions on the consensus achieved within the political sphere, the public arena, or the international expert arena in those fragmented

[241] We are, of course, aware that in cases similar to the US example, it might be difficult to come to an agreement about what the constitutional principle is and whether the act of executive was or was not constitutional. For that reason, we rely on our definition of court-packing, not on constitutionality, as our definition rests on more objective criteria to evaluate the effect of a given practice on the bench.

societies where the political spectrum whose actors previously curbed the judiciary would never agree to its rectification via court-packing. Multi-partisan or expert international deliberation also serves as a check to those court-packing efforts where the political spectrum or society is too polarized and where court-packing, even well-intentioned, might lead to even greater polarization.

Most other possible justifications (such as those invoked by the Polish and Hungarian governments before the CJEU, i.e. the need to unify the rules on age limits for mandatory retirement across society, or the harmonization of retirement pension schemes) simply do not meet the threshold necessary to legitimize such an intensive interference with judicial independence as court-packing.[242] To be sure, there are unique events, such as dissolution of the state, secession, reunification, or adding new state into a federation, which raise unique issues that require unique solutions. That said, it is important to bear in mind that even these unique constitutional moments can be exploited for political gains, and thus no irregular change of the composition of the court is purely technical.

Hence, our criteria for legitimate court-packing are stringent. However, the construction of an algorithm with a stringent test was a conscious decision on our part and reflects our definition of court-packing, which does not prohibit all changes to the composition of the apex courts. For example, it allows *pro futuro* gradual changes in courts' composition that do not give direct benefits to the sitting government. Given these considerations, we argue that the situations where political leaders need to resort to court-packing under our definition in order to rectify problems inside the judiciary are actually rare, with the exception of responding to previous court-packing.

Some authors therefore claim that court-packing should represent a means of last resort, considered against the backdrop of other available reforms,[243] or even that other court-curbing practices might be more appropriate.[244] This sits well with an understanding that even if court-packing pursues a legitimate aim, its individual techniques, their legality or constitutionality (i.e. the *ius in bello*) still need to be evaluated. There are actually several proposals on the table, both in the United States (expansion of the Supreme Court, introducing term limits for justices, jurisdiction stripping, the appointment of all appellate judges on circuit courts as Supreme Court justices so as to form random panels of nine)[245] and in Europe (the removal of packed judges,[246] the criminalization[247] or disciplining of judges packed by Orbán and Kaczyński based on a principle stemming from EU law[248]).

[242] Case C-286/12, Eur. Comm'n v. Hungary, ECLI:EU:C:2012:687 (Nov. 6, 2012); Case C-192/18, Eur. Comm'n v. Poland, ECLI:EU:C:2019:924 (Nov. 5, 2019); Case C-619/18, Eur. Comm'n v. Poland, ECLI:EU:C:2019:531 (June 24, 2019).
[243] Daly, *supra* note 10.
[244] Braver, *supra* note 8.
[245] Mark Tushnet, *What Kinds of "Supreme Court Reform" Could Rebalance the Supreme Court?*, Yale Univ. Press Blog (Oct. 7, 2020), http://blog.yalebooks.com/2020/10/07/what-kinds-of-supreme-court-reform-could-rebalance-the-supreme-court/ Epps & Sitaraman, *supra* note 175.
[246] *Debate: Restoring Constitutionalism*, *supra* note 162.
[247] Von Bogdandy & Spieker, *supra* note 163.
[248] *Debate: Restoring Constitutionalism*, *supra* note 162.

The core question to be pursued in the *ius in bello* dimension of court-packing, therefore, is how one is to evaluate the appropriateness of these alternative techniques. Even if a particular court-packing plan is eventually found to be legitimate according to our criteria, we cannot pretend that it does not interfere with judicial independence. In fact, opponents of legitimate court-packing often argue that any court-packing, including legitimate cases, would strengthen the view that courts are not impartial defenders of rights,[249] and that they appear more partisan[250] or downright politicized.[251] There is also no clarity on what effect court-packing will have on courts' decision-making, a factor which is relevant particularly for court-packing motivated by the ideological bias of courts.[252] Likewise, we cannot be sure that legitimate court-packing will not go awry. For instance, Daly claims that the overhaul of the Turkish Constitutional Court in 2012 and purges at the Argentinian Supreme Court in the 1980s are contexts in which court-packing was initially justifiable but has become inextricably captured by deep-seated or developing pathologies of the political system.[253]

The *ius in bello* of legitimate court-packing prompts us to look more deeply at tensions between court-packing and constitutional (or international) guarantees of judicial independence. We argue that any legitimate court-packing should impose the least stress on principles of constitutionality and judicial independence, and in order to do so, political leaders must carefully analyze which techniques from our taxonomy are most appropriate to meet their aims.

The question of techniques' appropriateness is closely related to another theoretical consideration, which is the relationship between the legitimacy and the constitutionality of court-packing. While our evaluation of court-packing and its legitimacy uses a higher level of abstraction, allowing us to create a legitimacy algorithm with universal applicability, we keep the logic of techniques' appropriateness context-based. We merely divide techniques into three very broad categories: (i) inherently reprehensible techniques (such as the threat of violence, interference in property rights, abusive removals, disciplining, or prosecution); (ii) hardball techniques (such as lustration) which require a political elite with very considerable discretion; and (iii) prima facie legitimate techniques, which might be on their own constitutional in character but may amount to court-packing on the basis of their effect.

As demonstrated in Figure 2, the scope of available techniques for the implementation of court-packing narrows down with the decreasing discretion enjoyed by political actors using four different legitimacy justifications. The first category, the inherently reprehensible court-packing technique, can never pass through the legitimacy funnel.

[249] Bojan Bugaric & Mark Tushnet, *Court-Packing, Judicial Independence, and Populism. Why Poland and the United States Are Different*, Verfassungsblog (July 11, 2020), https://verfassungsblog.de/court-packing-judicial-independence-and-populism/; Bojan Bugaric & Mark Tushnet, Power to the People: Constitutionalism in the Age of Populism (2021).

[250] Jasmine Aquilera, *"I Am Very Much Alive": Ruth Bader Ginsburg Discusses Her Health, the Late Justice Stevens and Court Packing*, Time (June 24, 2019), https://time.com/5634180/ruth-bader-ginsburg-supreme-court-justices-health/.

[251] Moyn, *supra* note 159.

[252] *Id.*

[253] Daly, *supra* note 10.

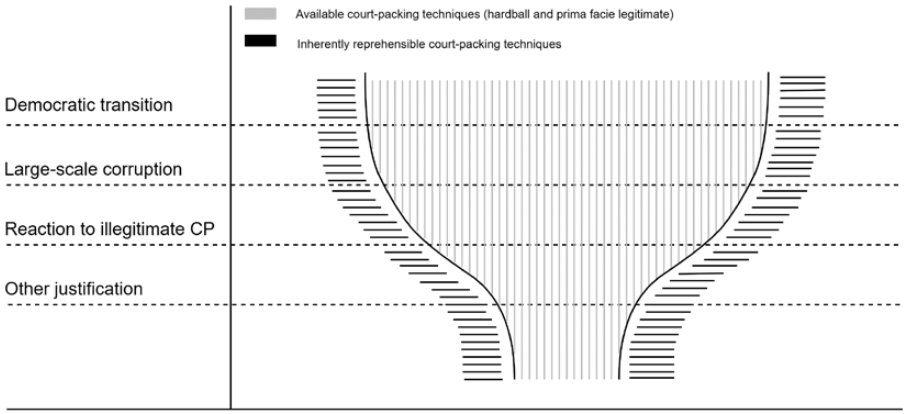

Figure 2. Diversification of court-packing techniques according to legitimate aims of court-packing. Source: authors.

The scope of available court-packing techniques of the second and third categories then narrows down, together with the stringency of the criteria required for different steps in the legitimacy algorithm. While transitional court-packing allows political leaders very wide discretion (in line with theories of transitional rule of law) and to resort to hardball techniques, the number of available techniques thins down the deeper we descend in the algorithm. The particular decision, however, still rests on a very careful evaluation of the compatibility of individual techniques with constitutional and international standards relevant for the given jurisdiction.

5. Conclusion

In this article, we have reconceptualized court-packing as a change of the composition of the existing court, which is irregular, actively driven, and creates a new majority at the court or restricts the old one. We divided existing court-packing techniques into three overarching categories—expanding, emptying, and swapping strategies—resulting in quantitative or qualitative changes in the court's composition. We also argued that, although it is necessary to acknowledge that court-packing may sometimes pursue legitimate aims, all three court-packing strategies carry dangers unless mitigated by a strict set of procedural and deliberative criteria.

The intensity of the US debate and an unprecedentedly large group of scholars and experts inclined to accept court-packing reform cloud the general consideration of court-packing as a legitimate practice. The mass of voices advocating court-packing builds on the normative consideration that the US judiciary is facing a democratic crisis which justifies any measure—court-packing included. However, our comparative analysis, and the repercussions of and dangers posed by court-packing abroad, show that its eventual implementation is a great deal more complex. The US debate is born out of the unique position of Supreme Court Justices, who are elected with

particularly strong guarantees of tenure and irremovability. This specific context, which increases the political stakes vested in judicial selection and introduces phenomena such as strategic judicial resignations, is particularly inapt as a starting point for conceptualizing court-packing at the global level.

In order to distinguish between legitimate and illegitimate court-packing, we therefore build on our comparative conceptualization. We forego loaded meta-debates on its relationship with the separation of powers, the rule of law, social responsiveness, or public confidence, and instead focus on pragmatic mid-level justifications of court-packing and practical contingencies of its implementation.

Our mid-level theory thus recognizes two core dimensions of legitimate court-packing: the *ius ad bellum* (the legitimate aim pursued by court-packing) and the *ius in bello* of court-packing (how to execute it legitimately). The *ius ad bellum* of legitimate court-packing builds on the following five mid-level justifications of legitimate court-packing: (i) to ensure a smooth democratic transition; (ii) to eradicate widespread judicial corruption, (iii) to respond to previous illegitimate court-packing; (iv) to rebalance an unrepresentative court; and, finally, (v) to improve a court's efficiency.

The *ius in bello* of court-packing informs us about the appropriate techniques for executing court-packing, singling out what we address as inherently reprehensible techniques (those, e.g., that openly violate constitutional and international rules). Based on the dangers and risks posed by each of these mid-level justifications of court-packing (cyclicality, the partisan politicization of courts, and spreading fear among judges having to decide on politically salient issues), we condition in our legitimacy algorithm respective justifications with the use of stringent procedural and deliberative criteria. The more dangers court-packing creates and the deeper we go in the legitimacy algorithm, the less discretion political leaders have to choose an appropriate technique of court-packing.

This mid-level theory therefore helps us to provide a general conceptualization of the legitimacy of court-packing. Such a nuanced analysis that is detached from the peculiarities of a given country or a used mechanism provides a unique tool for assessing the legitimacy of court-packing plans all over the world. We caution that many of the considerations we use to test the two dimensions of legitimacy rest on facts and evidence which need to be evaluated on a case-by-case basis. Our mid-level theory of court-packing legitimacy therefore invites other scholars to undertake in-depth empirical studies on individual examples of court-packing, examining in particular the "good" court-packing that did not turn "bad." Understanding their motivations, implementation, dangers, and effects will help to test our theory and bring new, much-needed understandings on its interaction with other constitutional rules and values.