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## BOOK REVIEW

### THE SUPREME COURT'S LEGITIMACY DILEMMA

LAW AND LEGITIMACY IN THE SUPREME COURT. By Richard H. Fallon, Jr. Cambridge, Mass.: Harvard University Press. 2018. Pp. xii, 221. \$39.95.

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#### I. INTRODUCTION

Legitimacy is a complex and puzzling concept. But in legal discourse, we have an intuitive sense that *illegitimate* means something more than erroneous or incorrect. The term signifies something absolutely without foundation and perhaps ultra vires. So when a government institution or organization lacks legitimacy, it may no longer be worthy of respect or obedience.

Given this intuition, it is striking how many commentators — including prominent constitutional scholars, a former Attorney General, and current members of Congress — have recently questioned the legitimacy of the United States Supreme Court.<sup>1</sup> Indeed, some critics suggest

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<sup>1</sup> See, e.g., Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018, 3:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html> [<https://perma.cc/AK82-BAMD>] (suggesting that absent reform, political partisanship “will predictably destroy the court’s legitimacy in the coming decade”); Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, the Supreme Court’s Legitimacy Is in Question*, SACRAMENTO BEE (Oct. 5, 2018, 10:50 AM), <https://www.sacbee.com/opinion/california-forum/article219317565.html> [<https://perma.cc/89DR-9TJR>] (discussing “the cloud over the court’s legitimacy”); Peter Hasson, *Democrats Attack Supreme Court’s Legitimacy After Kavanaugh Confirmation*, DAILY CALLER (Oct. 6, 2018, 6:20 PM), <https://dailycaller.com/2018/10/06/democrats-supreme-court-illegitimate-kavanaugh/> [<https://perma.cc/X9H6-5BFE>] (noting that Senators Feinstein, Blumenthal, and Markey have questioned the Court’s legitimacy); Justin Wise, *Holder: Supreme Court’s Legitimacy Can Be Questioned After Kavanaugh Confirmation*, THE HILL (Oct. 8, 2018, 8:03 AM), <https://thehill.com/homenews/administration/410356-holder-supreme-courts-legitimacy-can-be-questioned-after-kavanaugh> (reporting that former Attorney General Eric Holder tweeted that “[w]ith the confirmation of Kavanaugh and the process which led to it, (and the treatment of Merrick Garland), the legitimacy of the Supreme Court can justifiably be questioned”).

that the situation is so bad as to warrant extreme measures: it may be time to rethink life tenure,<sup>2</sup> take away broad swaths of federal jurisdiction,<sup>3</sup> impeach Justices,<sup>4</sup> disobey Supreme Court decisions,<sup>5</sup> or — most commonly — “pack” the Court with additional members.<sup>6</sup>

For those who study the federal judiciary, this onslaught is jarring. Although the Supreme Court has been subject to attacks in the past, recent decades have been a period of relative calm. Indeed, many court-curbing measures — including court packing and disobeying court orders — have been off the table since the mid-twentieth century.<sup>7</sup>

<sup>2</sup> See, e.g., Ian Ayres & John Fabian Witt, Opinion, *Democrats Need a Plan B for the Supreme Court. Here's One Option*, WASH. POST (July 27, 2018), <https://wapo.st/2mQH0pA> [<https://perma.cc/62VS-RXYL>] (advocating a statute setting “18-year terms . . . followed by life tenure” on a lower federal court).

<sup>3</sup> See Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy> [<https://perma.cc/5Y73-S85B>].

<sup>4</sup> See Ronald J. Krotoszynski Jr., Opinion, *The Case for Impeaching Kavanaugh*, N.Y. TIMES (Sept. 20, 2018), <https://nyti.ms/2Dhd29m> [<https://perma.cc/WG2G-SLBR>].

<sup>5</sup> See Mark Joseph Stern, *How Liberals Could Declare War on Brett Kavanaugh's Supreme Court*, SLATE (Oct. 4, 2018, 6:53 PM), <https://slate.com/news-and-politics/2018/10/brett-kavanaugh-confirmation-constitutional-crisis.html> [<https://perma.cc/WV22-AA9C>] (suggesting that there could be “massive liberal resistance” to the Supreme Court, including defiance of court orders).

<sup>6</sup> These calls initially came from scholars, but the idea has gained traction with a number of Democratic presidential candidates as well as former Attorney General Holder. See Jordain Carney & Rachel Frazin, *Court-Packing Becomes New Litmus Test on Left*, THE HILL (Mar. 19, 2019, 6:00 AM), <https://thehill.com/homenews/senate/434630-court-packing-becomes-new-litmus-test-on-left> [<https://perma.cc/7DX6-XHD5>] (noting support for or interest in court packing from Senators Elizabeth Warren, Kamala Harris, and Kirsten Gillibrand, as well as South Bend, Indiana, Mayor Pete Buttigieg and former Texas Representative Beto O'Rourke); Michael Scherer, “*Court Packing*” *Ideas Get Attention from Democrats*, WASH. POST (Mar. 11, 2019), <https://wapo.st/2J4MXxf> [<https://perma.cc/NT7F-7ZJW>] (noting Attorney General Holder's support for expanding the Court). For the scholarly endorsements, see, for example, MARK TUSHNET, *THE SUPREME COURT: PUTTING COURTS ON THE PROGRESSIVE AGENDA* (forthcoming 2019) (on file with author); David Faris, *Democrats Must Consider Court-Packing When They Regain Power. It's the Only Way to Save Democracy*, WASH. POST (July 10, 2018), <https://wapo.st/2L3hHOC> [<https://perma.cc/377Z-2KAN>]; and Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE BLOG (Oct. 15, 2018), <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court> [<https://perma.cc/F2BE-GJWU>]. Professors Daniel Epps and Ganesh Sitaraman have called for major structural changes. See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. (forthcoming 2019) (manuscript at 16–17, 19, 25) (on file with author) (proposing a “Supreme Court Lottery,” under which the Court would consist of all 180 appellate court judges, who would be randomly selected to serve on the Court for two-week periods, and a “Balanced Bench,” which would encompass a fifteen-member Court, with five members chosen by Democrats, five chosen by Republicans, and the remaining five selected by the first ten); see also Carney & Frazin, *supra* (noting presidential candidates Representative O'Rourke and Mayor Buttigieg support the “Balanced Bench” idea). The “Balanced Bench” proposal faces significant challenges under the Appointments Clause. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .”).

<sup>7</sup> See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 467, 488–517 (2018) [hereinafter Grove, *Judicial Independence*] (describing the historical development of these norms).

But things seem to have changed — and in very short order. We do not have to look far to see why: critics point to defects in the judicial appointments process. In 2016, the Republican-controlled Senate refused even to hold hearings on Judge Garland, President Barack Obama’s nominee to fill the seat left open after Justice Scalia passed away.<sup>8</sup> Thus, critics argue, President Donald Trump’s subsequent nominee Justice Gorsuch sits in a “stolen” seat.<sup>9</sup> The 2018 confirmation process for Justice Kavanaugh was said to be problematic in several respects: Republicans withheld information about the nominee’s service in the White House<sup>10</sup> and failed to adequately investigate charges of sexual assault;<sup>11</sup> and the nominee himself offered what many saw as openly partisan testimony in responding to the latter allegations.<sup>12</sup> Through these confirmation fights, the critique goes, Republicans used underhanded means to place a conservative majority on the Supreme Court, rendering the institution itself (and, presumably, its decisions) less legitimate.<sup>13</sup>

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<sup>8</sup> See Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, NBC NEWS (July 20, 2016, 9:33 AM), <https://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541> [<https://perma.cc/7TUY-UQCU>].

<sup>9</sup> E.g., Editorial, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://nyti.ms/2hiWxMV> [<https://perma.cc/7U9L-SBVU>]; see Chemerinsky, *supra* note 1 (“Rightly Democrats will always regard this as a stolen seat . . .”).

<sup>10</sup> See Seung Min Kim, *Trump to Withhold 100,000 Pages of Kavanaugh’s White House Records*, WASH. POST (Sept. 1, 2018), <https://wapo.st/2NAyBCd> [<https://perma.cc/LH64-JEZX>].

<sup>11</sup> See, e.g., Press Release, Senator Kamala Harris, Senator Harris Statement on Confirmation of Judge Brett Kavanaugh (Oct. 6, 2018), <https://www.harris.senate.gov/news/press-releases/senator-harris-statement-on-confirmation-of-judge-brett-kavanaugh> [<https://perma.cc/35RK-DCV7>] (“Senate Republicans used raw power to rush an unfit nominee onto the Supreme Court when the American people have more questions than answers . . .”).

<sup>12</sup> E.g., Matt Ford, *Brett Kavanaugh Is the Point of No Return*, NEW REPUBLIC (Oct. 6, 2018), <https://newrepublic.com/article/151597/brett-kavanaugh-confirmed-supreme-court-point-no-return> [<https://perma.cc/HVE6-6RN6>] (describing the comments as “[n]akedly partisan”); see also *Brett Kavanaugh’s Opening Statement: Full Transcript*, N.Y. TIMES (Sept. 27, 2018), <https://nyti.ms/2NItSCM> [<https://perma.cc/H6V9-CS97>] (“This whole two-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election, . . . revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups.”). Justice Kavanaugh later expressed regret for some of these statements. See Brett M. Kavanaugh, Opinion, *I Am an Independent, Impartial Judge*, WALL ST. J. (Oct. 4, 2018), <https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822> [<https://perma.cc/KRA6-4KY9>] (“I know that my tone was sharp, and I said a few things I should not have said.”).

<sup>13</sup> Moreover, some commentators suggest that several Justices (Justices Thomas, Alito, Gorsuch, and Kavanaugh) are less legitimate, because they were placed on the bench by a President and/or confirmed by senators who did not represent a majority of the populace. See Michael Tomasky, Opinion, *The Supreme Court’s Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://nyti.ms/2CubpnF> [<https://perma.cc/2V95-D3LB>]. Notably, these claims of illegitimacy extend far beyond the Supreme Court, because they call into question the Electoral College and the U.S. Senate. I therefore bracket these arguments. To the extent these issues undermine the legitimacy of the Supreme Court, my concerns about the Court’s “legitimacy dilemma” apply here as well.

Critics argue that this “constitutional hardball”<sup>14</sup> deserves a response in kind, including even previously unthinkable structural reforms such as court packing.<sup>15</sup> But — crucial to the analysis here — many critics also suggest that the Supreme Court itself may be able to ward off these court-curbing efforts and the attacks on the Court’s legitimacy. One or more Justices could moderate their jurisprudence in order to preserve the Court’s public image.<sup>16</sup> Commentators point to *National Federation of Independent Business v. Sebelius*<sup>17</sup> (*NFIB*), where Chief Justice Roberts reportedly switched his vote on the individual mandate in order to safeguard the Supreme Court’s reputation.<sup>18</sup>

What should we make of the charges of illegitimacy? And would the suggested court-curbing “solutions” restore, or further undermine, the

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<sup>14</sup> Cf. Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920 (2018) (defining “constitutional hardball” as “political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings” (omission in original) (quoting Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004))).

<sup>15</sup> See *supra* notes 2–6 and accompanying text.

<sup>16</sup> See Barry Friedman, Opinion, *The Coming Storm over the Supreme Court*, N.Y. TIMES (Oct. 8, 2018), <https://nyti.ms/2IN5WZm> [<https://perma.cc/ZR5R-U5SC>] (noting that “justices . . . [have] rolled over” in response to previous court-curbing threats); *id.* (“Chief Justice John Roberts clearly understands the political implications of a court out of step with the populace. Though his views are profoundly conservative, the chief justice nonetheless has done an admirable job of moderating the impact of his colleagues on the right, even voting ‘left’ himself at critical moments, as he did to uphold President Obama’s health care plan and to limit law enforcement searches of cellphone records.”); Scott Lemieux, *Brett Kavanaugh’s Confirmation Means Democrats Won’t Trust the Supreme Court. That’s Dangerous for Democracy*, NBC NEWS (Oct. 7, 2018, 4:50 AM), <https://www.nbcnews.com/think/opinion/brett-kavanaugh-s-confirmation-means-democrats-won-t-trust-supreme-ncna917456> [<https://perma.cc/Q5XC-3XTV>] (“[T]he fate of the Supreme Court rests in the hands of Chief Justice John Roberts. If Roberts — as he did in refusing to vote to strike down the Affordable Care Act — remains the median (albeit not centrist or swing) vote and backs away from repeated conflicts with the next Democratic Congress and president, the nine-justice equilibrium might remain.”); see also J. Stephen Clark, *President-Shopping for a New Scalia: The Illegitimacy of “McConnell Majorities” in Supreme Court Decision-Making*, 80 ALB. L. REV. 743, 745 (2017) (“For its part, the Court could try to avoid rendering 5–4 decisions that depend on the vote of a Justice who owes his or her seat to the kind of President-shopping that McConnell has now pioneered.”). In a related vein, Professor Cass Sunstein has urged that the Court could preserve its reputation by issuing narrow (“minimalist”) decisions. See Cass R. Sunstein, Opinion, *Kavanaugh Confirmation Won’t Affect Supreme Court’s Legitimacy*, BLOOMBERG (Sept. 30, 2018, 8:00 AM), <https://www.bloomberg.com/opinion/articles/2018-09-30/kavanaugh-confirmation-won-t-affect-supreme-court-s-legitimacy> [<https://perma.cc/6EXA-UKSJ>].

<sup>17</sup> 567 U.S. 519 (2012).

<sup>18</sup> *Id.* at 575 (opinion of Roberts, C.J.) (upholding the individual mandate under Congress’s taxing power); JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 221–22, 233–48 (2019) (detailing, in a chapter entitled “A Switch in Time,” how Chief Justice Roberts switched his vote); Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), <https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law> [<https://perma.cc/R9RU-4FBF>] (noting that although it is “not known why” Roberts switched his vote, “[a] chief justice, he is keenly aware of his leadership role” and “sensitive to how the court is perceived by the public”); *supra* note 16.

Court's status? Perhaps most pressing, can the Court itself take steps to preserve (or restore) its legitimacy?

Enter Professor Richard Fallon's *Law and Legitimacy in the Supreme Court*.<sup>19</sup> Few publications come upon the legal scene at a more essential time. With characteristic analytical clarity, Fallon dissects the term "legitimacy" and gives us a vocabulary and framework for thinking about claims of illegitimacy. Fallon divides legitimacy into three categories: sociological legitimacy, moral legitimacy, and legal legitimacy. Sociological legitimacy depends on an external perspective: Does the public view the legal system and its institutions as worthy of respect and obedience (p. 21)? Moral legitimacy is an inherently normative concept, focusing on whether people *should* treat a legal regime or its institutions as worthy of respect and obedience; for example, by virtually any measure, the Nazi regime in Germany was not a morally legitimate government (pp. 21, 24). Finally, legal legitimacy depends on an internal perspective. Thus, a Supreme Court decision is legally legitimate if the Justices use interpretive methods that are generally accepted within the legal culture (pp. 35–36).

The heart of Fallon's analysis — and the central contribution of the book — is his evaluation of Supreme Court decisionmaking. To be sure, an analysis of judicial decisions only makes sense if the Court operates in a legal system that is sociologically and morally legitimate (pp. 83–87). Accordingly, Fallon asserts, as important preliminary steps, that the U.S. constitutional system is externally legitimate (pp. 23, 29). But Fallon then turns to the internal (legal) legitimacy of Supreme Court opinions.<sup>20</sup> From this vantage point, Fallon offers us a novel and exciting way to think about both constitutional interpretation and judicial decisionmaking. Rather than offer another interpretive method, Fallon steps back and gives us a formula for evaluating the legal legitimacy of various existing approaches to constitutional interpretation (pp. 142–48). In Fallon's view, many different interpretive methods may be legitimate (p. 131). But a Justice should apply her preferred approach consistently across cases, with candor and in good faith (pp. 129–32, 142–48).<sup>21</sup>

<sup>19</sup> RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018).

<sup>20</sup> Under Fallon's analysis, a legally legitimate decision is also typically morally legitimate, although that will not always be the case. See *infra* notes 27, 30; section III.C, pp. 2269–72.

<sup>21</sup> Readers familiar with Fallon's work will recognize a number of the elements of this account (p. 215). See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008); Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975 (2009); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015); Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015); Richard H. Fallon, Jr., *Arguing in Good Faith About the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123 (2017). But even those who have

Building on Fallon's work, this Book Review Essay examines the recent attacks on the Supreme Court and the proposed solutions. I argue that in politically charged moments like today, the Court may face a legitimacy dilemma — one that the Justices cannot easily remedy themselves. This dilemma is twofold. Consider, first, the assertion that one or more members of the Supreme Court should modify their jurisprudence in order to preserve the Court's legitimacy. This argument underscores an important tension between the internal (legal) and external (sociological) legitimacy of the Supreme Court.<sup>22</sup> On the one hand, there is some evidence that Justices do in fact "switch" their votes in response to public pressure — that is, to preserve the Court's sociological legitimacy. The Justices may have done so in reaction to President Franklin Roosevelt's Court-packing plan and in the wake of the "massive resistance" to *Brown v. Board of Education*. On the other hand, there is reason to doubt that such "switches" are legally legitimate.<sup>23</sup> Assuming such changes occur (as political science and media accounts assure us they do<sup>24</sup>), the Justices do not have a consistent or principled approach, and they are most certainly not candid about "caving" to public pressure. To the contrary, the Justices (at least publicly) *deny* the influence of such external pressure. Thus, there is one legitimacy dilemma: in politically charged moments, the Justices may feel pressure to sacrifice the legal legitimacy of their judicial decisions in order to preserve the sociological legitimacy of the Court as a whole.

Much of this Review Essay will focus on this first legitimacy dilemma. But our current political moment exposes a second dilemma as well. To a considerable degree, the Supreme Court's sociological legitimacy depends on the behavior of political actors. Thus, as some political scientists have suggested, the President and the Senate can build the institutional reputation of the Court through their conduct in

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followed these interventions closely will find *Law and Legitimacy in the Supreme Court* a valuable synthesis and extension.

<sup>22</sup> Notably, Fallon's book does not focus on the tensions among the different types of legitimacy. But I argue that these trade-offs underscore the value of his typology. See *infra* section III.C, pp. 2269–72. But cf. David A. Strauss, Reply, *Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1861 (2005) (suggesting, in a thoughtful review of Fallon's earlier work, that "the term 'legitimacy' is not best understood as a tripartite notion"). Some earlier work has recognized that there may be a tension between legal and sociological legitimacy. See Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1473–74 (2007) (examining the possible tension between "the social legitimacy of the law as a public institution" and "the legal legitimacy of the law as a principled unfolding of professional reason," *id.* at 1473).

<sup>23</sup> See *infra* section III.B.2, pp. 2259–63; *infra* section III.B.3, pp. 2263–68.

<sup>24</sup> See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 47 (1998) (arguing that the Justices sometimes issue decisions "to protect the legitimacy of the Court").

the nomination and confirmation process.<sup>25</sup> But as recent events underscore, that same process can also undermine the Court's reputation. The Supreme Court's second dilemma is that there is very little it can do about the partisan maneuvering that occurs across First Street.

The Review Essay proceeds as follows. Part II introduces readers to Fallon's superb piece of scholarship. Part III is the heart of the Essay. Building on Fallon's work and drawing on political science research and history, the Essay argues that, in politically divisive moments like today, the Justices face a potential conflict between sociological and legal legitimacy. The Justices may not be able to preserve one form of legitimacy without sacrificing another. Part IV briefly discusses the Supreme Court's second legitimacy dilemma — that, to a large extent, its institutional reputation depends on the actions of the other branches of government. The Essay suggests that the best way to protect the Supreme Court's long-term sociological legitimacy may be to restore a certain level of moderation and good faith in Congress and the presidency.

## II. FALLON'S TYPOLOGY OF LEGITIMACY

Fallon's *Law and Legitimacy in the Supreme Court* is a tour de force. Throughout the book, Fallon displays a mix of realism and idealism that is emblematic of much of his earlier work.<sup>26</sup> Fallon insists that judicial decisions are — and must be — bound by law, even as he recognizes that the law may be influenced by many factors (text, history, precedent, and normative values) (pp. 89–96, 122). With this “big tent” approach to judicial decisionmaking, Fallon offers us a formula for evaluating the legal legitimacy of various interpretive methods.

### A. *A Theory of Legal Legitimacy*

To set the stage, Fallon emphasizes that the legal legitimacy of Supreme Court decisions depends in large part on the sociological and moral legitimacy of the surrounding legal system (pp. 83–87). Accordingly, at the outset, Fallon argues that the U.S. Constitution must be seen as legitimate by the public (pp. 22–35, 83–92). Drawing on legal positivism, Fallon concludes that the public does accept the Constitution as binding law (pp. 85, 89–92). Moreover, although the Constitution has flaws (and the original version had even greater defects, given its acceptance of slavery), Fallon asserts that the document is minimally morally

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<sup>25</sup> See James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 AM. J. POL. SCI. 139, 139–41 (2009) [hereinafter Gibson & Caldeira, *Confirmation Politics*] (arguing that during the confirmation proceedings for Justice Alito, his supporters emphasized his “judiciousness,” such as his qualifications and temperament, thereby building and reinforcing public assumptions that courts are different, *id.* at 140 n.2).

<sup>26</sup> See *supra* note 21.

legitimate (pp. 27, 29). Accordingly, the U.S. constitutional system deserves a measure of respect and obedience from the populace (pp. 31–32).

This discussion lays the groundwork for the remainder of the book. If the U.S. constitutional system is sociologically and morally legitimate, then Supreme Court decisions are legally (and morally) legitimate if they stay within the bounds of that scheme (pp. 98–102).<sup>27</sup> But the constitutional text is underdeterminate in many crucial respects (pp. 47–70). Accordingly, the Justices have considerable discretion in individual cases. Fallon argues that the scope and nature of this judicial discretion depend in large part on the actual practices of our legal system (pp. 89–92). As Fallon observes (and as any litigator well knows), our constitutional practice is “relatively fluid and open” (p. 91). Accordingly, Fallon reasons that Justices in our legal system may (legitimately) be guided by a mixture of sources and influences, including history, precedent, moral values, pragmatism, and even ideology (pp. 72–77, 91, 122). This generous list of acceptable interpretive sources sets the stage for Fallon’s “big tent” approach to legal legitimacy.<sup>28</sup>

Fallon assumes that interpretive method is a matter for each individual Justice to decide (p. 131). (Notably, throughout this Review Essay, I make the same assumption.<sup>29</sup>) That is, each member of the Court has the discretion to adopt an interpretive method that she views as most compelling. Under Fallon’s formula (which he dubs “Reflective Equilibrium Theory”), an interpretive approach is legally (and morally) legitimate as long as the Justice adopts a reliable and consistent method for dealing with historical evidence, makes reasonable moral judgments, and applies her approach consistently and in good faith across a range of cases (pp. 129–32, 142–48).<sup>30</sup> But these final requirements of

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<sup>27</sup> To a substantial degree, Fallon equates legal and moral legitimacy (pp. 36–38). Thus, in a legal system that is itself legitimate, “the moral legitimacy of decisions by the Supreme Court will normally depend on their legal legitimacy” (p. 36). But on rare occasions, the Court may face a trade-off between moral and legal legitimacy (p. 37). See *infra* section III.C, pp. 2269–72 (discussing Fallon’s argument that the Court faced such a conflict in *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

<sup>28</sup> Some readers will be very receptive to Fallon’s inclusive definition of relevant legal considerations. Others may bristle at this list, particularly those who believe that constitutional interpretation must be driven by original meaning. See *infra* note 108 and accompanying text (discussing originalism). But as I read Fallon, he is not saying that anyone must accept this pluralistic vision. Quite the contrary. First, he is emphasizing that, as a descriptive matter, our legal system *is* pluralistic. Second, and more fundamentally, Fallon is setting up his theory about interpretive theory (what we might call a “meta theory”). His goal is to identify a “meta theory” that will allow a Justice to choose from a number of different interpretive methods — originalism, common law constitutionalism, Thayerism, and so forth. To do that, Fallon needs to be inclusive on the front end. As will become apparent, Fallon argues that a Justice could (legitimately) choose an interpretive method that would rule out some of the considerations on this list.

<sup>29</sup> That is, I assume that each Justice may choose her own interpretive method. Whether or not that is normatively desirable, that has been our practice to date.

<sup>30</sup> Because Fallon largely equates the legal and moral legitimacy of Supreme Court decisions, the requirements listed here — such as candor, consistency, and good faith — could be considered

consistency and good faith are crucial (p. 130). A Justice must stick to her preferred method, even when it leads to results that she does not favor. “In appealing to a methodological premise in one case, a Justice . . . implicitly affirms his or her commitment to abide by that same premise in future cases, whatever conclusion it might yield . . .” (p. 130). Such consistency will make the Justice’s decisions more acceptable, at least within the legal community: “When the Justices adhere consistently to reasonable positions, we can respect their decisions, even if we think that both their methodological commitments and their substantive conclusions are ultimately mistaken” (p. 131).

To be sure, Fallon also insists that the Justices should not be dogmatic. Instead, each Justice should be open to modifying her interpretive approach in exceptional cases (pp. 126–27). But to prevent this exception from swallowing the rule of consistency, Fallon advocates a duty of candor: “A demand for publicity or candor in acknowledging a change of methodological view, and the reasons for it, would provide a significant safeguard against abuse” (p. 146).

Through this inclusive definition of legal legitimacy, Fallon aspires to bring together an increasingly divided legal community. One can see this overarching goal in Fallon’s discussion of originalism. However much we may dislike a particular interpretive method (as Fallon surely dislikes originalism<sup>31</sup>), we can see it as legitimate — and respect a Justice who adopts that interpretive approach and applies it consistently, with candor, and in good faith (p. 146). Thus, Fallon writes: “In an era of hermeneutic suspicion, Reflective Equilibrium Theory . . . encourages interpretive charity: it invites us to view our coparticipants in constitutional argument as proceeding in good faith” (p. 148).<sup>32</sup>

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a matter of both moral and legal legitimacy (pp. 36–38, 127–32, 142–48). For ease of exposition, this Review Essay focuses on legal legitimacy. This approach also makes it easier to discuss possible tensions between legal and moral legitimacy. See *infra* section III.C, pp. 2269–72 (noting Fallon’s argument about such a conflict in *Bolling v. Sharpe*). Moreover, I believe that candor, consistency, and good faith are often treated as important (if contested) elements of legal decisionmaking. See, e.g., David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38 (1987) (advocating “a strong presumption in favor of candor,” *id.* at 738); see also Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979) (suggesting that opinions should include all the grounds on which judges relied). For example, scholars often criticize Justices on the ground that they have inconsistently applied their preferred interpretive approach. See, e.g., Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1073 (2006) (criticizing Justices Scalia and Thomas on this ground).

<sup>31</sup> See, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13 (2001) (arguing that originalism does not “offer attractive prescriptions for how the Court ought to behave”).

<sup>32</sup> Notably, Fallon is not at all confident that any Justice reliably applies this approach, noting that it is “easy to identify apparent ‘flip-flops’ on methodological issues as Justices reach substantively congenial results in one highly salient case after another” (pp. 172, 168–74).

### B. Institutional and Political Constraint

In offering this constitutional theory, Fallon understands that the Justices work under conditions of institutional constraint. For example, a Justice is constrained by the views of her colleagues; issuing a decision requires at least a five-member majority. And under Fallon's approach, every Justice may have her own individual interpretive method. So what to do when the methods conflict? Fallon offers an important (albeit limited) caveat to the rule of consistency: "[A] Justice reasons in good faith as long as what she writes or joins is consistent with her actual substantive and methodological beliefs, even if her actual beliefs would permit her to go further or say more" (p. 152).<sup>33</sup> However, if a Justice "cannot justify an outcome consistently with methodological premises that she believes valid, then she cannot join" the opinion (p. 153).

Fallon also emphasizes that the Justices are constrained by the surrounding political environment (pp. 105, 109–14). The political branches have considerable (if disputed) power over the size, jurisdiction, and budget of the Supreme Court.<sup>34</sup> In some respects, such constraints serve a beneficial purpose by reminding the Court not to exceed its constitutional authority. As Fallon notes, "a judicial directive purporting to raise or lower interest rates solely for policy reasons or to invade Iran would not be recognized as legally authoritative" (p. 111).

But Fallon expresses uncertainty about how these political constraints may otherwise influence the Court. At one point, he acknowledges the possible tension between the internal (legal) legitimacy of Supreme Court decisions and the external (sociological) legitimacy of the Court itself. Under the threat of sanctions, "the Justices might feel externally constrained to adopt positions that they think constitutionally erroneous" (p. 111). Fallon asserts that "[t]his possibility . . . is an unhappy one" but insists that it is "inescapable. Any scheme of constraints necessarily risks fallibility in the constraining institutions that it employs" (p. 111).

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<sup>33</sup> For this reason, Fallon declines to "insist categorically that Justices should not ever join Court opinions unless they are prepared to endorse" all of the premises of those opinions (p. 153).

<sup>34</sup> Compare, e.g., CHARLES L. BLACK JR., *DECISION ACCORDING TO LAW* 18 (1981) ("Congress does have very significant power over the courts' jurisdiction."), and John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204 (1997) (urging that "Congress's authority is substantial"), with JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 25, 34–38 (2009) (emphasizing Congress's inability to interfere with the Supreme Court's role in overseeing its judicial inferiors through direct appeal or through the use of supervisory writs), Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 233–34 (1985) (urging that Congress can remove Supreme Court appellate jurisdiction over federal claims only if inferior federal courts retain jurisdiction), and Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1083 (2010) (arguing that Congress may not remove jurisdiction for an improper purpose). This is only a small sample of the debate surrounding congressional control over federal jurisdiction.

Although Fallon does not return to this point in his discussion of legal legitimacy, I believe that he has put his finger on an important tension. Moreover, the tension between legal and sociological legitimacy is likely to be at its apex during times like our current political moment, when there are deep divides — both in the country and on the Court. I contend that during such politically charged moments, the Justices may not be able to protect the Court’s sociological legitimacy without sacrificing the legal legitimacy of their decisions (or vice versa). This tension, I argue, is the heart of the Supreme Court’s legitimacy dilemma.

### III. THE TENSION BETWEEN SOCIOLOGICAL AND LEGAL LEGITIMACY

To understand the tension between sociological and legal legitimacy, we need a better grasp of the former. Why does the Supreme Court’s external legitimacy even matter? Political scientists agree: The judiciary has no army; it must rely on others to obey its decrees. Government officials and the general public are more likely to comply if they view the Court as “legitimate” — that is, as an institution that does and should have the power to affect legal rights and obligations.<sup>35</sup> It is particularly crucial that those who *disagree* with a given decision view the Court as legitimate; such disappointed individuals will respect the adverse ruling if they view the institution itself as authoritative. Thus, political scientists have a refrain: “Legitimacy is for losers.”<sup>36</sup>

But what happens when the same group turns out to be the “loser” in case after case? Both political science research and history suggest that such situations are likely to be risky for the Court. Moreover, this

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<sup>35</sup> See, e.g., Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) (“For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy . . . .”); Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCHOL. 675, 675 (2008) (“[P]ublic approval of the judiciary, particularly the U.S. Supreme Court, is especially important. . . . [The] Court does not possess the budgetary power of Congress or the enforcement power of the President.”). The Court itself has recognized as much. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“[T]he Court . . . cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy[,] . . . in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”). Notably, in analyzing the Court’s sociological legitimacy, one might consider its support among government officials, legal elites, the general public, or some combination thereof. The political science literature presumes that the Court needs support from the general public (and, as *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, reflects, so do at least some Justices). See also *infra* notes 55–56 (discussing how Justice Kagan has also underscored the importance of public support). Accordingly, this Review Essay also presumes that the Court needs some amount of public support to function effectively.

<sup>36</sup> E.g., James L. Gibson et al., *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC’Y REV. 837, 839 (2014) (“Legitimacy is for losers, since winners ordinarily accept decisions with which they agree.”).

research also suggests that the Justices can best preserve the Court's sociological legitimacy — and ward off any attacks — by moderating their jurisprudence, at least in some cases. But as I argue below, such changes may not be legally legitimate.

#### A. *The Current Risk to the Court's Sociological Legitimacy*

In some ways, it is surprising that the Supreme Court was not already under attack. Party polarization has increased dramatically since the 1990s, with the Republican Party growing more conservative and the Democrats moving closer to their progressive base.<sup>37</sup> Meanwhile, the Court has addressed some of the most divisive issues in American politics: affirmative action,<sup>38</sup> abortion,<sup>39</sup> campaign finance,<sup>40</sup> gun rights,<sup>41</sup> and same-sex marriage.<sup>42</sup> Although Gallup polls suggest that the Court's public approval rating has dropped,<sup>43</sup> the overall level of confidence in the Court has nonetheless remained reasonably high, particularly as compared to Congress and the President.<sup>44</sup> Thus, even in

<sup>37</sup> See Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219, 219–20 (2005) (“By the end of the 1980s, partisanship in Congress had risen dramatically and has remained at a high level ever since.”); Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 POL. SCI. Q. 5, 6 (2001) (noting that in the 1990s, “the stark partisan polarization among the parties’ politicians . . . accelerated”).

<sup>38</sup> See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214–15 (2016) (upholding the university’s program); *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (upholding a law school program); see also *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003) (striking down an undergraduate program).

<sup>39</sup> See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2312–18 (2016) (striking down a Texas law that required doctors who performed abortions to have “admitting privileges” at a nearby hospital, and facilities where abortions were performed to adhere to certain rules for “surgical centers”); *Gonzales v. Carhart*, 550 U.S. 124, 132, 168 (2007) (upholding a federal ban on late-term abortions); *Stenberg v. Carhart*, 530 U.S. 914, 921–22, 945–46 (2000) (invalidating a state ban on late-term abortions).

<sup>40</sup> See *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (striking down provisions of the Bipartisan Campaign Reform Act of 2002).

<sup>41</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008) (holding that the Second Amendment protects an individual right to possess a handgun in the home for purposes of self-defense); see also *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (concluding that this constitutional right applies to the states through the Fourteenth Amendment).

<sup>42</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605–07 (2015) (holding that the Constitution protects same-sex marriage).

<sup>43</sup> See *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/TPQ6-6XBR>] (showing that in 2001, 62% of Americans approved of the way that the Supreme Court was doing its job, and 29% disapproved, while in 2019, 51% approve, and 40% disapprove).

<sup>44</sup> See *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/D5HF-6L6U>] (showing public approval for Congress has fallen dramatically since 2001 and currently stands around 26%); Jeffrey M. Jones, *Trump, Congress Job Approval Mostly Steady Amid Shutdown*, GALLUP (Jan. 15, 2019), <https://news.gallup.com/poll/245990/trump-congress-job-approval-mostly-steady-amid-shutdown.aspx> [<https://perma.cc/4V9P-4G9N>] (reporting that the President’s and Congress’s approval ratings were 37% and 20%, respectively, during the government shutdown and were close to those percentages beforehand as well).

this polarized era, the Court has largely retained its reputation with the public.

There is an intense debate among political scientists about the source of the Supreme Court's sociological legitimacy. Many scholars argue that the Court enjoys broad "diffuse support" from the public.<sup>45</sup> Under this view, the public generally sees the Court as distinct from the political branches, trusts the Court to make reasonable decisions, and treats its decisions as authoritative, regardless of the ideological valence of a specific ruling.<sup>46</sup> But other scholars have recently challenged this vision. The challengers argue that members of the public tend to support the Court if it rules "their way" in salient cases.<sup>47</sup> That is, "individuals grant or deny the Court legitimacy based on the ideological tenor of the Court's policymaking."<sup>48</sup>

This Review Essay does not seek to weigh in on this debate. For my purposes, it is important that both camps agree on two things. First, even advocates of diffuse support acknowledge that public support is sticky but movable. A series of "adverse" decisions can lessen the Court's support among a particular group.<sup>49</sup> Second, and relatedly, both camps also agree that the Court's public image may be influenced by its

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<sup>45</sup> Political scientists differentiate "specific support" (support for a single Court action) from "diffuse support" (long-term support, regardless of the Court's actions). See Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357, 370 (1968).

<sup>46</sup> See JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 61–62 (2009) ("Although the American people are severely divided on many important issues of public policy, when it comes to the institution itself, support for the Court has little if anything to do with ideology and partisanship. Liberals trust the Court at roughly the same level as conservatives; Democrats and Republicans hold the Supreme Court in similar regard." *Id.* at 61.); James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OPINION Q. 622, 634–37 (2016) (offering empirical findings to support the conventional view that diffuse support is "sticky," *id.* at 623); see also David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 782 (2012) (noting that some studies suggest the Court enjoys diffuse support "[e]ven in an era of political polarization").

<sup>47</sup> See Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633, 634 (1998) (arguing that "under some conditions the Court's actions may threaten its reservoir of goodwill"); Neil Malhotra & Stephen A. Jessee, *Ideological Proximity and Support for the Supreme Court*, 36 POL. BEHAV. 817, 819 (2014) (reporting that individuals "who are ideologically closest to the Court's position tend to exhibit the highest levels of trust and approval"); see also Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 416 (2015) (finding that public attitudes can be changed by "a single, albeit salient, case").

<sup>48</sup> Bartels & Johnston, *supra* note 35, at 185.

<sup>49</sup> See GIBSON & CALDEIRA, *supra* note 46, at 43 ("[O]ver the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution's legitimacy in the eyes of disaffected groups."); see also *id.* (noting that support for the Court among African Americans has declined in recent decades).

decisions in salient cases, at least over time.<sup>50</sup> Accordingly, if the Supreme Court repeatedly issues “conservative” (or “progressive”) decisions in high-profile cases, its institutional reputation will eventually decline with the “loser” group.<sup>51</sup>

Until recently, “diffuse support” scholars have insisted that there is no reason to worry about this potential risk to the Court’s sociological legitimacy. After all, with swing Justices (like Justices O’Connor and Kennedy), the Supreme Court has reliably issued a mix of “progressive” and “conservative” decisions in salient cases.<sup>52</sup> In the past fifteen years, although progressives may have disliked the Court’s rulings on issues such as gun rights and campaign finance, they had good reason to cheer the jurisprudence on same-sex marriage and affirmative action; conservatives could do the reverse.<sup>53</sup> That is, there have been no repeat “losers.” But this research also suggests that if the Court’s decisions in high-profile cases begin to point in only one direction, the “losers” might over time see little reason to treat the Court as a legitimate source of authority.

Notably, Justice Kagan thoughtfully articulated this potential “legitimacy deficit” during a speech in October 2018 (as the confirmation hearings for Justice Kavanaugh were winding down). She stated that “[p]art of the court’s legitimacy depends on people not seeing the court in the way that people see the rest of the governing structures of this country.”<sup>54</sup> The Justice went on: “It’s been an extremely important thing for the court that in the last 40 years, starting with Justice . . . O’Connor and continuing with Justice Kennedy, there has been a person who

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<sup>50</sup> See James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 206–07 (2014) (finding that “[i]ndividuals seem to keep a running tally . . . , crediting the Court” for “a pleasing decision and subtracting” for “a disagreeable decision” and thus, that “the Court’s diffuse support could suffer once some accumulated threshold level of dissatisfaction is reached”).

<sup>51</sup> To be clear, I prefer not to label Court decisions as “conservative” or “progressive.” I believe that most decisions are far more complex than those categories allow. Nevertheless, the discussion here focuses on public perceptions of the Court, and I do not doubt that many members of the public understand the Court in those binary terms.

<sup>52</sup> See Gibson & Nelson, *supra* note 50, at 208 (“[E]ven if the revisionist view is the correct one, . . . a permanent diminution of support for the Court is unlikely to occur in practice . . . . [T]he Court’s decisions in recent terms [have] been nearly half liberal and half conservative, giving everyone — regardless of their ideology — some decisions . . . to like.”).

<sup>53</sup> The Court’s abortion decisions have been a mixture of “conservative” and “progressive” victories. See cases cited *supra* note 39; see also David Fontana, *Cooperative Judicial Nominations During the Obama Administration*, 2017 WIS. L. REV. 305, 326.

<sup>54</sup> Sophie Tatum, *Justice Kagan Worries About the “Legitimacy” of a Politically Divided Supreme Court*, CNN (Oct. 5, 2018, 10:06 PM), <https://www.cnn.com/2018/10/05/politics/supreme-court-elena-kagan-legitimacy/index.html> [<https://perma.cc/9CRS-Q93G>] (“Speaking at a Princeton University conference, Kagan warned that a politically divided court could jeopardize its legitimacy.”).

found the center,” whose votes were hard to predict.<sup>55</sup> Justice Kagan questioned whether the Court would continue to be seen as “impartial and neutral and fair” in this “divided time,” absent a swing Justice.<sup>56</sup>

*B. The Legal Legitimacy of Switches in Time*

Political science research suggests that, in our polarized era, the Supreme Court has maintained its sociological legitimacy because it has reliably issued a mix of conservative and progressive decisions in high-profile cases. This research thus indicates that the current Court can best preserve (or restore) its public reputation if one or more members moderate their jurisprudence — that is, become “swing” Justices.

Recent commentators have encouraged the Justices to follow (what they view as) the “example” of Chief Justice Roberts in *NFIB*: According to media reports, the Chief Justice believed that the Affordable Care Act’s individual mandate was unconstitutional.<sup>57</sup> But after a barrage of criticism declaring that a ruling against President Obama’s signature legislation would destroy the Court’s reputation, the Chief Justice opted to change his vote; he then relied on a “strained” theory that the mandate was valid under the federal taxing power.<sup>58</sup> All this, to protect the Court’s public image.

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<sup>55</sup> Daniel Politi, *Justice Kagan Fears Supreme Court Could Lose Legitimacy Without a Swing Justice*, SLATE (Oct. 6, 2018, 11:08 AM), <https://slate.com/news-and-politics/2018/10/justice-elena-kagan-fears-supreme-court-could-lose-legitimacy-without-a-swing-justice.html> [https://perma.cc/T73L-Z9Y5].

<sup>56</sup> *Id.*

<sup>57</sup> See *supra* note 18 and accompanying text.

<sup>58</sup> Crawford, *supra* note 18 (asserting that the Chief Justice’s tax rationale was “strained” and had been “uniformly rejected” by the lower courts). In a recent book, Joan Biskupic provides evidence to support this theory, although she carefully notes that it is unclear why the Chief Justice changed his vote. See BISKUPIC, *supra* note 18, at 221–22, 233–48 (detailing the Chief Justice’s change in a chapter entitled “A Switch in Time” and noting that he may have been concerned about the health care business, had “a sudden new understanding of the congressional taxing power,” or worried “about the legitimacy and legacy of the Court,” *id.* at 248). Notably, in keeping with the political science assumption that “legitimacy is for losers,” those who disagreed with the outcome of *NFIB* were the most critical of the Chief Justice’s alleged switch. See Christenson & Glick, *supra* note 47, at 415; see also Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1626–27 (2013) (noting that opponents of the decision suggested that *NFIB* should have less precedential value if the Chief Justice “switched his vote . . . largely for political or institutional reasons”). Biskupic further asserts that Chief Justice Roberts initially voted to uphold the Medicaid expansion in the Affordable Care Act and then later changed his position (although she does not claim the latter change was motivated by institutional concerns). See BISKUPIC, *supra* note 18, at 222, 239–40. Meanwhile, Justices Kagan and Breyer reportedly “switched” their positions on the Medicaid expansion — from upholding to striking down the measure — to secure the Chief Justice’s own “switch” on the individual mandate. See *id.* I focus on the story about the Chief Justice’s (alleged) “switch” as to the individual mandate for two reasons. First, that example has been frequently invoked by commentators. See *supra* note 18 and accompanying text. Second, as I emphasize in the text, my goal is *not* to demonstrate that any Justice *did* switch in *NFIB*, but to tee up the theoretical question whether any such switch is legally legitimate. For similar reasons, I also do not weigh in on whether — as some commentators have asserted — the Chief Justice has already begun to moderate his jurisprudence to protect the Court’s institutional reputation. Cf. Greg Stohr, *Hold*

In other politically charged moments, the Justices are said to have changed their positions to protect the Court. That is, one or more Justices may have voted in a way that they deemed legally incorrect in order to safeguard the Court's public reputation. To be clear, I do not seek to show that in any of these cases, a Justice *did* in fact "switch" his vote. Personally, I am skeptical of the story that Chief Justice Roberts voted against conscience in *NFIB* (as apparently is Fallon).<sup>59</sup> Instead, I offer these examples to tee up a central question of this Review Essay: Is such a "switch" legally legitimate? I argue that, even in our open and fluid legal practice, there is good reason to doubt the legal legitimacy of "switches" to protect the Court.

*I. Historical Examples. —*

(a) *The New Deal and Court Packing.* — In the wake of the stock market crash of 1929 and in the midst of the Great Depression, President Roosevelt promised to usher in a new "economic constitutional order."<sup>60</sup> He offered the nation a "New Deal." The Supreme Court, however, proved to be a substantial obstacle to President Roosevelt's progressive agenda. Thus, after a series of losses in 1935 and 1936,<sup>61</sup> the President proposed an extraordinary judicial reform: a plan to pack the Supreme Court with up to six additional members.<sup>62</sup> In his fireside chat on March 9, 1937, President Roosevelt informed the country that "new blood" was needed, because the Court was "acting not as a judicial body, but as a policy-making body" in invalidating federal and state laws.<sup>63</sup> "[W]e must take action to save the Constitution from the Court and the Court from itself."<sup>64</sup>

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*the Revolution: Roberts Keeps Joining High Court Liberals*, BLOOMBERG (Mar. 1, 2019, 4:00 AM), <https://www.bloomberg.com/news/articles/2019-03-01/hold-the-revolution-roberts-keeps-joining-high-court-liberals> [<https://perma.cc/US9S-GWKC>].

<sup>59</sup> Notably, Fallon does not discuss the stories suggesting that the Chief Justice changed his vote in *NFIB*. But he applauds the Chief Justice's decision in that case as a "conspicuous example of judicial restraint reaching across an evident ideological divide" (p. 165).

<sup>60</sup> Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), in *1 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 742, 752 (1938).

<sup>61</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (invalidating the Bituminous Coal Conservation Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (holding unconstitutional provisions of the National Industrial Recovery Act).

<sup>62</sup> Under the plan, the President could appoint one Justice for each member over seventy years of age (who did not retire within six months) — for a possible total of fifteen members. FRANKLIN D. ROOSEVELT, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES: TRANSMITTING A RECOMMENDATION TO REORGANIZE THE JUDICIAL BRANCH OF THE FEDERAL GOVERNMENT, H.R. DOC. NO. 75-142, at 9-10 (1937).

<sup>63</sup> President Franklin D. Roosevelt, Fireside Chat (Mar. 9, 1937), in AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/209434> [<https://perma.cc/3MTK-SWU9>]. Although President Roosevelt initially claimed that the proposal was designed to improve judicial efficiency, he soon acknowledged that the real purpose was to alter the future course of the Court's decisions. See *id.*

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

Although there was opposition in Congress, there was also considerable support for the Court-packing plan, and it seemed likely to pass the heavily Democratic Congress.<sup>65</sup> But soon after the plan was announced, the Supreme Court issued a series of decisions upholding state and federal economic regulations.<sup>66</sup> To be sure, there is considerable debate over the reason for the Court's change in direction.<sup>67</sup> The Justices voted to uphold at least one of these laws (in *West Coast Hotel v. Parrish*<sup>68</sup>) two months before the Court-packing plan was announced.<sup>69</sup> But many scholars have argued that the Court's overall change in direction was at least in part a reaction to public pressure, and particularly President Roosevelt's plan.<sup>70</sup> Indeed, the critical vote in these cases — that of

<sup>65</sup> WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 82–162 (1995) (describing the debates over the Court-packing plan and stating that “[d]espite all the antagonism . . . it still seemed highly likely in the last week of March [1937] that FDR’s proposal would be adopted,” *id.* at 141). *But see* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 224–26 (1994) (doubting that the bill could have overcome a Senate filibuster).

<sup>66</sup> *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 578–98 (1937) (upholding provisions of the Social Security Act); *Helvering v. Davis*, 301 U.S. 619, 639–46 (1937) (same); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390–400 (1937) (upholding a state minimum wage law for women).

<sup>67</sup> *See* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 229 (2009) (noting that “scholars continue to fight over whether the Court ‘switched’ under pressure”).

<sup>68</sup> 300 U.S. 379.

<sup>69</sup> *See id.* at 386, 400; Cushman, *supra* note 65, at 226–27 (“*West Coast Hotel v. Parrish* . . . was actually voted on by the Justices in conference [in December 1936].” *Id.* at 227). It appeared to many that Justice Owen Roberts had “switched,” because (not long before) he had voted to strike down a similar state law. *See* *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936).

<sup>70</sup> There are other external explanations. The Court may have been motivated to change course by President Roosevelt’s decisive victory in 1936, or by the visible and overwhelming impact of the Depression on the economic life of the country. Some argue that the Court switched in response to such external factors (and particularly the Court-packing plan). *See, e.g.*, JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 141–43 (1938) (“It seems probable . . . that all the justices realized that their only chance to save the Court lay in more self-reversals. . . . [I]f the Court balked [on the Wagner Act or the Social Security Act], the court bill would surely pass.”); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 19 (1996) (arguing that the Court “blinked” in response to the Court-packing plan); LEUCHTENBURG, *supra* note 65, at 177 (noting that many observers “find Roberts’s contention that he did not switch unpersuasive” and that “at the time, no one doubted that the Court, and more particularly Justice Roberts, had crossed over”). President Roosevelt, for his part, insisted that his “frontal attack” on the Court led to its change in direction. Franklin Delano Roosevelt, *The Constitution Prevails*, COLLIER’S, Sept. 20, 1941, at 37–38 (“It would be a little naive to refuse to recognize some connection between these decisions and the Supreme Court fight . . . .” *Id.* at 38.). Others contest this assertion. *See* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 3–7 (1998) (challenging the view that the Court’s decisions were a “political response to political pressures,” *id.* at 4); Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 250–52 (1996) (reviewing LEUCHTENBURG, *supra* note 65) (arguing that “improved drafting of legislation and [better] legal advocacy” likely “played a critical role in Roberts’s switch,” *id.* at 250); Erwin N. Griswold, *Owen J. Roberts as a Judge*, 104 U. PA. L. REV. 332, 340–46 (1955) (insisting that “Roberts did not switch his vote to save the Court,” *id.* at 343).

Justice Owen Roberts — has been famously dubbed “the switch in time that saved the nine.”<sup>71</sup>

(b) *Brown and Interracial Marriage*. — One year after the Supreme Court’s 1954 decision in *Brown v. Board of Education*, a couple challenged Virginia’s ban on interracial marriage,<sup>72</sup> the same law that was later struck down in *Loving v. Virginia*.<sup>73</sup> *Naim v. Naim*<sup>74</sup> involved a white woman and a Chinese man<sup>75</sup> (who faced deportation if the marriage was declared invalid<sup>76</sup>). Notably, the Supreme Court at that time had mandatory appellate jurisdiction over the couple’s appeal; accordingly, the Court could not avoid the case by simply denying certiorari.<sup>77</sup>

Nevertheless, several members of the Court were determined to dispose of the case without reaching the merits. They were concerned that a decision in *Naim* might exacerbate the tensions surrounding *Brown*.<sup>78</sup> The Justices assumed that the Court had limited political capital; if the Court issued another major civil rights ruling, the Court would likely face (more) outright defiance of *Brown*.<sup>79</sup> Thus, Justice Frankfurter wrote an impassioned letter to his colleagues, urging that “moral considerations far outweigh the technical considerations in noting jurisdiction” over the appeal.<sup>80</sup> “The moral considerations are, of course, those raised

<sup>71</sup> FRIEDMAN, *supra* note 67, at 232 (“[P]undits at the time described the events in the spring of 1937 as ‘the switch in time that saved the nine.’”); *see also id.* at 551 n.345 (naming Thomas Reed Powell, Joseph Alsop, and Justice Fortas as possible originators of this or similar expressions).

<sup>72</sup> *Naim v. Naim*, 87 S.E.2d 749, 750, 754–56 (Va. 1955) (rejecting the plaintiffs’ challenge to Virginia’s ban on interracial marriage), *vacated and remanded*, 320 U.S. 891 (1955) (per curiam).

<sup>73</sup> 388 U.S. 1 (1967); *see id.* at 12 (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”).

<sup>74</sup> 87 S.E.2d 749.

<sup>75</sup> *Id.* at 750.

<sup>76</sup> *See* Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1432 & n.434 (2011) (noting that, absent a valid visa based on his marriage, Mr. Naim could be subject to deportation, although “[t]here is no record of Mr. Naim being deported from the United States”). The couple got married in North Carolina and then returned to their Virginia home. *See Naim*, 87 S.E.2d at 750.

<sup>77</sup> The Judiciary Act of 1925 had greatly expanded the Court’s certiorari jurisdiction. But the Act left in place mandatory jurisdiction over cases like *Naim*, which involved state court decisions upholding a state law against a federal constitutional challenge. *See* Pub. L. No. 68-415, § 1, 43 Stat. 936, 937–39.

<sup>78</sup> Notably, some defenders of school segregation had warned about (what they viewed as) the “danger” of interracial relationships. *See* JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 259 (2018) (“Examples abound where prominent southerners equated opposition to *Brown* with opposition to miscegenation.”).

<sup>79</sup> As Professor Michael Klarman has recounted, by November 1955 (when the Court first ruled in *Naim*), there was considerable resistance to *Brown*. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 314–15, 320 (2004) (recounting the opposition in 1954 and 1955, even before the March 1956 Southern Manifesto).

<sup>80</sup> Memorandum from Justice Frankfurter on *Naim v. Naim* (Nov. 4, 1955), in Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68

by . . . the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in" *Brown*.<sup>81</sup> According to Justice Frankfurter, if the Court reached the merits in the current political environment, it would have to uphold Virginia's ban on interracial marriage: "[T]o throw a decision of this Court other than validating this legislation into the vortex of the present disquietude would . . . very seriously . . . embarrass the carrying-out of the Court's [desegregation] decree."<sup>82</sup>

Several Justices objected to dismissing the couple's appeal. Justice Black drafted a dissent, which would have made clear that the Court indeed *had* jurisdiction and was required to hear the federal constitutional claim.<sup>83</sup> But ultimately, he relented.<sup>84</sup> Accordingly, the Court dismissed the couple's appeal, asserting that there was an inadequate record to consider the federal question.<sup>85</sup> A few months later, the couple again sought Supreme Court review, and the Court again rejected the appeal as "devoid of a properly presented federal question."<sup>86</sup> Countless commentators have described the Court's disposition in *Naim* as "specious," "ridiculous," and "wholly without basis in the law."<sup>87</sup>

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GEO. L.J. 1 app. d at 95–96 (1979); *see id.* at app. d at 95 ("So far as I recall, this is the first time since I've been here that I am confronted with the task of resolving a conflict between moral and technical legal considerations.").

<sup>81</sup> *Id.* at app. d at 96; *see id.* at app. d at 95–96 ("Even if one regards the issue, as I do, of a seriousness that cannot be rejected as frivolous, I candidly face the fact that what I call moral considerations far outweigh the technical considerations in noting jurisdiction.").

<sup>82</sup> *Id.* at app. d at 96.

<sup>83</sup> *See* Hutchinson, *supra* note 80, at 65–66 (recounting how Justice Frankfurter worked closely with Justice Clark to craft language denying the appeal on jurisdictional grounds, but Justice Black circulated a dissent stating that "this record properly presents" a federal constitutional question and that he "would note jurisdiction and set the case for arguments").

<sup>84</sup> *See id.* at 66 (noting that Justice Black ultimately withdrew the dissenting opinion).

<sup>85</sup> *See* *Naim v. Naim*, 350 U.S. 891, 891 (1955) (per curiam) (vacating and remanding in light of the "inadequacy of the record . . . and the failure of the parties to bring here all questions relevant to the disposition of the case").

<sup>86</sup> *Naim v. Naim*, 350 U.S. 985, 985 (1956) (per curiam) ("The decision of the Supreme Court of Appeals of Virginia [following the initial vacatur and remand] leaves the case devoid of a properly presented federal question."). The Supreme Court of Appeals of Virginia had responded to the initial vacatur by simply reinstating its prior decision. *See* *Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956) (per curiam) (underscoring that the record was adequate in the case from the outset).

<sup>87</sup> *E.g.*, Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1790 (2005) (arguing that the Court "employ[ed] specious procedural objections in order to avoid a decision on the merits in *Naim v. Naim*"); Mark Tushnet, *The Warren Court as History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 1, 5 (Mark Tushnet ed., 1993) ("On entirely specious grounds the Court refused to consider the constitutional challenge. The Court invoked technical grounds to explain its refusal, and only an insider could appreciate that on the facts of *Naim*, those grounds were quite ridiculous."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) ("[I]n 1956 the Supreme Court dismissed an appeal in a case in which Virginia nullified a marriage . . . , a case in which the statute had been squarely challenged by the defendant, and the Court, after remanding once, dismissed per curiam on procedural grounds that I make bold to say are wholly without basis in the law.").

2. *Are Switches Legally Legitimate?* — Recent commentators have suggested that one or more members of the current Supreme Court should modify their jurisprudence in order to ward off the attacks on the Court — and thereby protect its sociological legitimacy.<sup>88</sup> There is some evidence that Justices have taken that approach in the past. But is it *legally* legitimate for a Justice to alter her decisions in order to protect the Court's public reputation? I argue here (and in the next section) that there are strong reasons to doubt the legal legitimacy of “switches in time.”

At the outset, let me be clear about two things. First, I draw here on Fallon's definition of legal legitimacy, which has both a descriptive and a normative element. At a descriptive level, the practices of the legal community (consisting of judges, lawyers, and legal commentators) indicate the range of legal sources and arguments that are acceptable for any Justice. In this respect, legal legitimacy has a sociological component; a Justice may draw only on legal sources that are deemed to be acceptable by the legal community. Presumably, by relying on such legal sources, the Justices can help ensure that their decisions will be seen as authoritative even by the “losers” (that is, those within the legal community who disagree with a given decision). At a normative level, once a Justice chooses her interpretive method — from among the range made acceptable by our legal community — she must apply that method consistently, with candor, and in good faith.

Second, I want to be clear about what I mean by a “switch.” Consider the story about Chief Justice Roberts's change in *NFIB*. The claim is that the Chief Justice believed that the individual mandate was unconstitutional, and yet voted the other way in order to preserve the Court's public reputation. Likewise, in the New Deal cases, commentators suggest that Justice Owen Roberts changed his vote — and opted to uphold New Deal legislation — to save the Court from President Roosevelt's Court-packing plan. And in *Naim v. Naim*, the Justices declined to hear a case where the Court had mandatory appellate jurisdiction on the (implausible) ground that the record was insufficient. In each case, one or more Justices are said to have ruled in a way that they believed to be legally *incorrect* (under their own chosen interpretive method) in order to protect the Court. In short, a “switch” is precisely the circumstance that Fallon signals (albeit briefly) in his book. Under the threat of sanctions, “the Justices might feel externally constrained to adopt positions that they think constitutionally erroneous” (p. 111).

Even in our open and fluid constitutional practice, it is difficult to justify such a change as legally legitimate. Our practice in many

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<sup>88</sup> See *supra* note 16.

respects condemns “switches” to protect the Court’s sociological legitimacy. The Justices not only fail to acknowledge such changes but also aim to deny that they have altered their votes in response to external pressure.<sup>89</sup> Indeed, there are indications that, in our legal culture, “impact on the Court” may not be an acceptable factor in legal analysis at all; that is, a Justice cannot consider such a factor consistently, with candor, and in good faith.<sup>90</sup>

Consider, for example, the ongoing debate about the reasons behind the “switch in time” of 1937. Why are commentators so captivated by that question? As a legal community, we seem to be uncomfortable with the possibility that any Justice may have changed his vote on the law in reaction to a proposed court-curbing measure. Indeed, in *West Coast Hotel v. Parrish* itself, Justice Sutherland “obliquely accused an unnamed justice”<sup>91</sup> of violating his oath of office by succumbing to external pressure.<sup>92</sup>

Justice Frankfurter, for his part, made it his mission to dispel any notion that Justice Owen Roberts had “switched” in *West Coast Hotel* or any other case.<sup>93</sup> Apparently at Justice Roberts’s urging, Frankfurter released a letter in which Roberts claimed to have changed his mind about social and economic legislation much earlier.<sup>94</sup> As Jeff Shesol

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<sup>89</sup> Some commentators have argued that the Justices’ failure to acknowledge a “switch in time” is important evidence that such a jurisprudential change did not occur. See Cushman, *supra* note 65, at 238 (emphasizing that “[b]oth Hughes and Roberts denied that political events or circumstances had anything to do with the way the cases were decided” and arguing that we should not simply dismiss this historical evidence). Another possibility is that, in the face of political attacks, a Justice may convince herself that the “right” legal answer is the one that protects the Court’s sociological legitimacy. Cf. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 935–39 (2016) (exploring “the possibility, associated with Sartre, that a person’s bad faith may be turned inward, so that she hides the truth from herself,” *id.* at 935). It would be challenging, if not impossible, to determine empirically whether or when this occurs.

<sup>90</sup> As discussed below, this point matters for those who may suggest that a Justice could consider “sociological legitimacy” as part of her constitutional analysis. See *infra* note 131.

<sup>91</sup> Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 481 (2001).

<sup>92</sup> See *W. Coast Hotel v. Parrish*, 300 U.S. 379, 401–02 (1937) (Sutherland, J., dissenting) (“If upon a question so important [as the validity of a statute] he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.”). For an exploration of the constitutional oath, see Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016).

<sup>93</sup> See Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955) (“It is time that this false charge against Roberts be dissipated by a recording of the indisputable facts.”).

<sup>94</sup> See *id.* at 314–15. There have even been debates about this letter. Compare Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 645–52 (1994) (asserting that “Justice Frankfurter presented his revisionist history . . . to preserve the role of the Court as a principled decisionmaker, a need that was particularly acute because of *Brown*,” *id.* at 625, but casting doubt on the veracity, and perhaps the existence, of the Roberts letter, *id.* at 645–52), with Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-forgery*, 142 U. PA. L. REV. 1985, 1985–86 (1994) (asserting that any suggestion that Justice Frankfurter “fabricated” the letter is “demonstrably false”).

writes, “The memo was no *mea culpa*. Writing in flat, impenitent prose, Roberts sought not to justify the switch but to deny it, contending that his position had remained perfectly consistent all along.”<sup>95</sup>

In publicizing the letter, Justice Frankfurter suggested that a judge who voted not on the law, but to protect his institution, would lack integrity. Thus, it was “ludicrous” to suggest that “a judge with the character of Roberts” may have changed his “judicial views out of deference to political considerations.”<sup>96</sup> Indeed, according to Justice Frankfurter, such “political considerations” were entirely out of place in the judiciary: “That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court.”<sup>97</sup> (Remarkably, Justice Frankfurter published these words just after orchestrating the denial of the first plea for relief in *Naim v. Naim*.<sup>98</sup>)

Moreover, as *Naim* illustrates, to the extent that the Justices “switch” their votes out of concern for the Court’s public reputation, they may compromise not only the legal but also the moral legitimacy of their decisions. Although Justice Frankfurter in *Naim* pointed to one powerful “moral consideration[]” — protecting *Brown*<sup>99</sup> — the Justices seem to have overlooked the strong moral reasons to *adhere* to the plain language of the jurisdictional statutes. *Naim* had tremendous implications — both for the couple who sought constitutional recogni-

<sup>95</sup> JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 413 (2010); *see also id.* (“In a three-page memorandum published posthumously in 1955, Roberts revealed the truth, as he saw it, behind the so-called switch.”).

<sup>96</sup> Frankfurter, *supra* note 93, at 313 (“It is one of the most ludicrous illustrations of the power of lazy repetition of uncritical talk that a judge with the character of Roberts should have attributed to him a change of judicial views out of deference to political considerations.”). Dean Erwin Griswold made a similar suggestion. *See* Griswold, *supra* note 70, at 340 (“[I]t is widely said that Roberts, frightened by the President’s Court-packing plan, flopped . . . . No one could say this with any understanding of Roberts.”).

<sup>97</sup> Frankfurter, *supra* note 93, at 313.

<sup>98</sup> *See* Hutchinson, *supra* note 80, at 64 (arguing, based on a review of Court records, that Justice Frankfurter was the “moving force behind the Court’s non-decision” in *Naim*). The Court’s first decision in *Naim* was issued in November 1955. *See* *Naim v. Naim*, 350 U.S. 891 (1955) (per curiam). Justice Frankfurter’s short essay on Justice Roberts was published the following month. *See* Frankfurter, *supra* note 93, at 311 (showing a publication date of December 1955).

<sup>99</sup> Memorandum from Justice Frankfurter on *Naim v. Naim*, *supra* note 80, app. d at 96. Justice Frankfurter believed (not implausibly) that a decision in *Naim* would undermine the implementation of *Brown*. Hutchinson, *supra* note 80, at 64. As we now know, there was massive resistance to *Brown* in any event. Indeed, on March 12, 1956, the very same day that the Court endeavored to protect *Brown* by denying the second claim for relief in *Naim*, a group of legislators published the “Southern Manifesto.” *See* *Naim v. Naim*, 350 U.S. 985, 985 (1956) (per curiam) (showing the decision was issued March 12); 102 CONG. REC. 4459–61 (1956) (statement of Sen. George) (presenting the Manifesto, which he called a “Declaration of Constitutional Principles,” *id.* at 4460, to Congress on March 12); *see also* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014) (exploring the Manifesto).

tion for their marriage and for Mr. Naim himself (who faced deportation). And a favorable decision in *Naim* could have protected many other interracial couples.<sup>100</sup>

To be clear, I do not mean to say that the Court's approach in *Naim* was normatively unjustifiable. As I underscore below (in section C), that is a challenging — and perhaps unanswerable — question. For now, my goal is to point out that, in seeking to preserve the Court's sociological legitimacy, the Justices may sacrifice the legal (and perhaps also the moral) legitimacy of their decisions. *Naim* thus powerfully illustrates the difficult trade-offs that Justices face in politically charged moments — as they feel the pull of competing types of legitimacy.

An additional point crystallizes the tension between legal and sociological legitimacy. As discussed, the political science literature indicates that, in our polarized era, the Supreme Court can best preserve its sociological legitimacy by issuing a mix of “conservative” and “progressive” decisions in salient cases.<sup>101</sup> Along the same lines, commentators suggest that one or more Justices can safeguard the Court's public reputation by modifying their jurisprudence in some number of cases. That is, a Justice should transform herself into a “swing Justice,” even if that does not accord with her preferred interpretive method.

But from the perspective of legal legitimacy, this suggestion creates a deeply troubling picture. Under this view, a Justice cannot focus on the case or controversy before her. Instead, she must be thinking strategically about the range of high-profile cases before the Court. She can vote in a “conservative” direction in one or more such cases only if she votes in a “progressive” direction in others. To put the point in concrete terms, the argument seems to go as follows: Although Chief Justice Roberts (allegedly) opted to “switch” in *NFIB* to uphold the Affordable Care Act's individual mandate, he could just as easily have switched in *Shelby County v. Holder*<sup>102</sup> to uphold a key provision of the Voting Rights Act.<sup>103</sup> Either way, the vote helped compensate for cases like *Citizens United*.<sup>104</sup>

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<sup>100</sup> A recent film vividly recounts the struggle of Richard and Mildred Loving (the couple in *Loving v. Virginia*). See *LOVING* (Big Beach and Raindog Films 2016).

<sup>101</sup> See *supra* section III.A, pp. 2251–54.

<sup>102</sup> 570 U.S. 529 (2013).

<sup>103</sup> Instead, the Chief Justice wrote the opinion for the Court striking down the preclearance provisions of the law. See *id.* at 556–57.

<sup>104</sup> See *Citizens United v. FEC*, 558 U.S. 310 (2010). In their study of the public reaction to *NFIB*, Professors Dino Christenson and David Glick, both political scientists, offer up this image. See Christenson & Glick, *supra* note 47, at 406 (stating that “[a]s soon as the Court released its ruling upholding the individual mandate as a tax, some began speculating that Chief Justice Roberts had gone out of his way to avoid overturning the law in a strategic retreat”); *id.* at 406 n.2 (“‘Ken Tremendous[.]’ [a commentator on Twitter,] . . . immediately captured the strategic intuition by joking, ‘It would’ve been funny if Roberts’s majority decision had just said, ‘Here. Sorry about Citizens United.’””).

Such strategic (and secretive) vote trading is antithetical to the way in which many of us conceive of Supreme Court decisionmaking. (And, to repeat, I do not believe the Chief Justice would approach his job in this manner.<sup>105</sup>) As Fallon observes, it violates norms of our constitutional practice for the Justices to trade votes with one another (p. 103); it seems just as extraordinary for a Justice to strategically trade her own votes across cases. A Justice could no longer focus on what (according to her chosen interpretive method) was the correct legal answer in a given case; instead, prior to casting her vote, she would need to consider the mix of high-profile cases before the Court. Such vote trading would, at a minimum, violate norms of consistency, good faith, and candor. At the extreme, such a practice may even be at odds with the case or controversy requirement of Article III.<sup>106</sup>

3. *In Search of an Interpretive Theory?* — As the foregoing discussion suggests, there are good reasons to question the legal legitimacy of “switches.” Moreover, as I argue here, this legitimacy problem remains constant across a range of interpretive methods. Notably, my focus in this section is *legal* legitimacy; I discuss below (in section C) the difficult trade-off between legal and sociological legitimacy.

At the outset, we should recognize that under some interpretive theories, it is plainly legally illegitimate for a Justice to change her vote on the law to protect the Court. For example, under prominent versions of originalism, judges have an obligation to enforce the “original meaning” of constitutional provisions.<sup>107</sup> Such an approach should exclude consideration of modern-day public attacks on the Supreme Court.<sup>108</sup> Likewise, Professor Ronald Dworkin’s theory of law as integrity, which

<sup>105</sup> See *supra* note 59 and accompanying text.

<sup>106</sup> After all, under this strategic vision, to ensure the proper mix of “progressive” and “conservative” decisions, a Justice would sacrifice the constitutional claims of litigants in one case (like *NFIB*) to “enable” a constitutional decision in another case (like *Citizens United*).

<sup>107</sup> See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (underscoring that “two core ideas of originalist constitutional theory” are that “[t]he meaning of the constitutional text is fixed when each provision is framed and ratified” and that “the original meaning of the constitutional text should constrain constitutional practice”); see also, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 94 (rev. ed. 2014) (emphasizing that originalism today focuses on determining the “original meaning of the text”); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006). For a different conception of originalism, arguing that the “conventional” view is “mistaken” and that “[o]riginalism is not about the text,” see Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017).

<sup>108</sup> Although versions of new originalism give judges more leeway in crafting the correct solution for a given case, I am not aware of any existing theory that would authorize a judge to vote in a way she deemed legally *incorrect* in order to save the Court. Likewise, given our practice’s apparent rejection of the validity of switches, originalist approaches that take a more positivist turn — and argue for originalism on the ground that it is “our law” — should also forbid “switches.” See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); William Baude & Stephen E.

instructs judges to find the “right answer” to legal questions by relying on text, history, and “moral principles about political decency and justice,” would seem to preclude a judge from rejecting the “right answer” to preserve the Court’s reputation.<sup>109</sup> Indeed, it would be entirely out of character for Dworkin’s godlike Justice Hercules to cave to political pressure.<sup>110</sup>

But as the historical examples offered here illustrate, even Justices who have a less formalistic (or aspirational) approach to constitutional interpretation aim to deny “switches.”<sup>111</sup> Dean Erwin Griswold described Justice Owen Roberts as a “lawyer’s lawyer,” whose approach to constitutional analysis was careful, precedent driven, and pragmatic.<sup>112</sup> His approach resembled — or perhaps was an amalgam of — what commentators today might call pragmatism<sup>113</sup> and common law constitutionalism.<sup>114</sup> Justice Frankfurter, for his part, was heavily influenced by Professor James Bradley Thayer’s theory of deference to the political branches.<sup>115</sup> But Justice Frankfurter was not an across-the-board Thayerian; he was willing to invalidate legislation in certain

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Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817 (2015).

<sup>109</sup> RONALD DWORKIN, FREEDOM’S LAW 2–3, 10–11 (1996) (advocating a “moral reading,” *id.* at 2, of the abstract clauses of the Constitution); RONALD DWORKIN, LAW’S EMPIRE 266–71 (1986) (advocating the one-right-answer thesis although discussing criticisms); *see also* RONALD DWORKIN, JUSTICE IN ROBES 41–43, 133–34 (2006) [hereinafter DWORKIN, JUSTICE IN ROBES] (reiterating the moral reading and the “right answer” thesis).

<sup>110</sup> *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083–84 (1975) (introducing “Hercules,” “a lawyer of superhuman skill, learning, patience and acumen”); *see also* DWORKIN, JUSTICE IN ROBES, *supra* note 109, at 51 (continuing to invoke Hercules).

<sup>111</sup> Relatedly, Professor Philip Bobbitt’s inclusive approach does not seem to allow a Justice to switch from her view as to the correct legal answer. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982) (providing six modalities of constitutional argument).

<sup>112</sup> *See* Griswold, *supra* note 70, at 333 (opining that Attorney General William Mitchell suggested Justice Roberts for the position of Supreme Court Justice because, like Attorney General Mitchell, Justice Roberts was a “lawyer’s lawyer”); *id.* at 336–37 (“[Roberts] was just trying to decide cases [in a way that showed great respect for precedent]. . . . He was a lawyer doing a lawyer’s job . . .”).

<sup>113</sup> *See* RICHARD POSNER, HOW JUDGES THINK 230–50 (2008) (advocating pragmatism).

<sup>114</sup> *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 43–49 (2010) (articulating and defending common law constitutionalism).

<sup>115</sup> *See* MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES (1991); *see also* Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 349–51 (2013) (arguing that Justice Frankfurter’s deference was a form of popular constitutionalism). Notably, Professor Brad Snyder’s illuminating account relies in part on Justice Frankfurter’s private correspondence, which (as *Naim* illustrates) contradicted his public statements that the Supreme Court *cannot* (legitimately) take into account potential threats to its authority. *See id.* at 392. For my purposes, the public statements of the Justices matter far more. After all, I build here on Fallon’s framework for legal legitimacy, which emphasizes the requirements of candor and good faith. Under that framework, it is significant that the Justices are unwilling to openly acknowledge the influence of public pressure.

realms (particularly race discrimination, *Naim v. Naim* notwithstanding).<sup>116</sup> And in those decisions, Justice Frankfurter looked to a variety of interpretive sources, including constitutional text, structure, precedent, and historical development (“gloss”).<sup>117</sup> Yet even with these relatively fluid approaches, Justices Roberts and Frankfurter both insisted — at least publicly — that it was “out of bounds” for any Justice to change his vote on the law in order to preserve the Court’s reputation. Indeed, Justice Frankfurter declared that it was “*essential* to the effective functioning of the Court” that it “should *not* be amenable to [such] forces of publicity.”<sup>118</sup>

Are there interpretive theories that might accommodate “switches”?<sup>119</sup> At first glance, Professor Alexander Bickel’s call for

<sup>116</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186, 284–86 (1962) (Frankfurter, J., dissenting) (urging that although the Court should generally stay out of disputes involving state election laws, judicial intervention is appropriate in “cases involving Negro disfranchisement . . . [f]or here the controlling command of Supreme Law is plain and unequivocal,” *id.* at 285); see also *Lash*, *supra* note 91, at 465 (“Justice Felix Frankfurter advocated a political process model in which the Court generally deferred to the political branches except in situations involving equal access to the levers of political reform.”).

<sup>117</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”); Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 363–64 (1949) (noting Justice Frankfurter’s emphasis on *stare decisis*). For discussions of historical gloss, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1.

<sup>118</sup> Frankfurter, *supra* note 93, at 313 (emphasis added).

<sup>119</sup> Some readers might wonder about popular constitutionalism. At the outset, I should note that prominent versions of this concept have very little to do with judicial interpretation. Instead, the theory emphasizes that “the people” should have a say in what the fundamental law means. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) (“Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution.”). To the extent that theories of popular constitutionalism seek to inform judicial interpretation, those theories may call upon judges to take account of the public’s view in *discerning* the meaning of the law, not to “switch” from a judge’s view as to the proper meaning of the law. In that way, popular constitutionalism links up with the literature arguing that, as a descriptive matter, the Supreme Court follows majoritarian preferences. See FRIEDMAN, *supra* note 67, at 16 (“[J]udicial review . . . ratifies] the American people’s considered views about the meaning of their Constitution.”); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH* 3 (2006) (asserting that the Court has often “represented the views of a majority of Americans more accurately than the polarized party leadership in Congress”).

But in that event, depending on one’s definition of “the public” whose views are relevant to constitutional analysis, a popular constitutionalist approach could exacerbate the Supreme Court’s legitimacy dilemma. As noted, the modern Court can best preserve its sociological legitimacy by issuing a mix of “progressive” and “conservative” decisions in high-profile cases. But if popular constitutionalism taught that a slight majority of the American public leans progressive (as some commentators now suggest), Justices who looked to the public might repeatedly issue progressive rulings, rendering their decisions less legitimate to the conservative “losers.” *Cf. supra* note 13 (noting that some commentators suggest the Supreme Court’s conservative majority is out of step with

courts to exercise the “passive virtues”<sup>120</sup> seems like a good contender. According to Bickel, the Court can use jurisdictional devices (such as standing, the political question doctrine, and certiorari dismissals) to “stay[] its hand”<sup>121</sup> in some cases, so that it can play its full role in other cases, such as *Brown v. Board of Education*, without enduring too much political backlash.<sup>122</sup> Building on that idea, Professor Cass Sunstein suggests that judges can either decline to resolve a case or resolve it in a narrow (“minimalist”) fashion, if the judges worry that a decision might trigger “public outrage.”<sup>123</sup>

But it is important to recognize the limits of these theories. According to Bickel, the Justices do have “leeway” with respect to jurisdictional doctrines,<sup>124</sup> and, for that reason, Bickel’s approach has been heavily criticized as inviting the Court to act “lawlessly.”<sup>125</sup> (Notably, Bickel endeavors to justify *Naim v. Naim* on this ground.<sup>126</sup>) But in Bickel’s view, when the Supreme Court decides the merits of a case, it must act

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the American populace); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 116–26 (emphasizing that it can be challenging to determine when a Supreme Court decision reflects “majoritarian” preferences). By contrast, to the extent that popular constitutionalism is best understood as Thayerian deference, the implications would be different. See Snyder, *supra* note 115, at 349–50 (“link[ing] judicial restraint with popular constitutionalism,” *id.* at 349); *infra* note 136.

<sup>120</sup> See Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: Passive Virtues*, 75 HARV. L. REV. 40 (1961).

<sup>121</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 70 (2d ed. 1986).

<sup>122</sup> See *id.* at 69–72.

<sup>123</sup> See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 211–12 (2007); *id.* at 158 (establishing the article’s goal as addressing “the normative question of whether judges should attend to outrage, not the positive question of whether they do so”); see also Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 215 (2007) (suggesting “judges should care about public outrage out of respect for democracy” (emphasis omitted)).

<sup>124</sup> BICKEL, *supra* note 121, at 71 (“These are the techniques that allow leeway to expediency without abandoning principle.”).

<sup>125</sup> As Professor Henry Monaghan has underscored, Bickel’s theory “drew intense fire” for inviting the Court to act “lawlessly with respect to the Court’s jurisdictional doctrines.” Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 714 (2012); see also *id.* at 714–18 (recounting the critiques of Bickel).

<sup>126</sup> Bickel seeks to justify the Court’s action in *Naim* as a proper exercise of the “passive virtues” — primarily by equating the Supreme Court’s mandatory appellate jurisdiction with its certiorari review power. See BICKEL, *supra* note 121, at 126, 174 (stating that the Court’s appellate jurisdiction is only “supposedly mandatory,” *id.* at 126). Professor Gerald Gunther forcefully responds that Bickel’s approach cannot explain, much less justify, *Naim*. See Gerald Gunther, *The Subtle Vices of the “Passive Virtues” — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10–13 (1964) (arguing that “Bickel’s cavalier amalgamation of certiorari and appeal is a vast if not mischievous overstatement, in fact and in law,” *id.* at 11, and agreeing with others that the *Naim* ruling was “wholly without basis in the law,” *id.* at 12 (quoting Wechsler, *supra* note 87, at 34)); see also *supra* notes 125 (noting criticisms of Bickel’s passive virtues).

“on principle.”<sup>127</sup> In the same vein, Sunstein asserts that even a judge who is willing to consider “outrage” in fashioning the scope of a decision will “not be inclined to commit himself to an interpretation of the Constitution that he rejects as a matter of principle.”<sup>128</sup> Thus, whatever else one thinks of the “passive virtues,”<sup>129</sup> neither professor’s theory seeks to justify something akin to Justice Owen Roberts’s (alleged) “switch” from rejecting to upholding New Deal–era legislation or Chief Justice Roberts’s (again, asserted) “switch” in *NFIB*.

Moreover, the charges that Bickel’s theory invites “lawless” conduct, even with respect to jurisdiction, suggest that many in our legal community would be even more resistant to a theory that aimed to justify switches on the merits. As Sunstein observes, “the informal working theory of judges and lawyers” seems “to make it plausibly outrageous for judges” to modify their jurisprudence in any way in response to public “outrage.”<sup>130</sup>

Accordingly, at least under existing constitutional theory, there are strong reasons to doubt the legal legitimacy of “switches.”<sup>131</sup> But I also

<sup>127</sup> BICKEL, *supra* note 121, at 69–70 (maintaining that when the Court strikes down or validates legislative policy, it must “act rigorously on principle,” *id.* at 69); see Monaghan, *supra* note 125, at 714 (“Bickel fully agreed that decisions on the merits must be adequately principled . . .”).

<sup>128</sup> Sunstein, *supra* note 123, at 169; see also *id.* at 172 (“If a judicial ruling would compromise the Court’s own role in the constitutional structure, it may well make sense to exercise the passive virtues or to proceed in minimalist fashion.”); *id.* at 177–78 (“In rare but important cases, it is appropriate for judges to decline to resolve certain issues, or to rule narrowly and shallowly . . .”). At one point, Sunstein seems to come close to defending a “switch.” He suggests that a Justice may concur in a judgment, even if the decision is at odds with his view of the law. See *id.* at 169. But, in that event, Sunstein advocates a duty of candor: the judge must signal to the public his actual legal views. See *id.* (stating that the judge “would have to spell out, with some particularity,” his views in a concurring opinion). Accordingly, Sunstein does not aim to justify the secretive “switches” that certain members of the Supreme Court are said to have made.

<sup>129</sup> See *supra* notes 125–26 (noting the criticisms of Bickel’s theory).

<sup>130</sup> Sunstein, *supra* note 123, at 164 (“Many and probably most judges and lawyers believe that public outrage is neither here nor there, and that judges’ solemn duty is to interpret the Constitution as they see fit . . .”).

<sup>131</sup> The discussion here focuses on existing constitutional theory. In a forthcoming essay (responding to Fallon’s book), Professor Gillian Metzger suggests that one might construct an interpretive theory that would allow a judge to consider the Court’s institutional reputation on the front end — as part of a constitutional claim. See Gillian E. Metzger, *Considering Legitimacy*, 17 *GEO. J.L. & PUB. POL’Y* (forthcoming 2019) (book review) (manuscript at 8–14) (on file with author) (suggesting that “concerns about preserving public support for the Court fall within the bounds of reasonable constitutional adjudication,” although noting such an approach is “controversial”). In that event, the Court’s sociological legitimacy would already be built into the constitutional analysis; a Justice would not need to “switch” to protect the Court. As Metzger acknowledges, it seems doubtful that any Justice would implement such an approach with candor — announcing that she, the Justice, considered “impact on the Court” in determining whether the Constitution requires the recognition of same-sex marriages, permits affirmative action, or allows Congress to demand that individuals purchase health insurance. See *id.* at 16 (“[T]he real problem . . . may be that [considering sociological legitimacy] requires the Justices to violate the norms of judicial candor.”). For that reason, the approach does not seem to satisfy Fallon’s criteria for legal legitimacy. Moreover, given the lack of candor, it would be hard to know if a Justice adopted such an interpretive method.

want to raise a prudential concern about why one might be wary of a Justice altering her decisions to protect the Court.<sup>132</sup> A Justice may not be very adept at predicting the reaction of the public or the political branches;<sup>133</sup> accordingly, she might vote against conscience in the “wrong” cases. Indeed, a Justice may tend to overestimate the likelihood of political backlash, particularly if she is worried about the future of her institution. Concerns about backlash could have led the Court to rule differently on one person, one vote;<sup>134</sup> prayer in public school; desegregation remedies;<sup>135</sup> and even *Brown v. Board of Education* itself.<sup>136</sup>

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In any event, particularly given the rise of formalism in the judiciary, it seems likely that many judges today would decline to adopt such an approach.

<sup>132</sup> Notably, these same considerations would also counsel against an interpretive method that took sociological legitimacy into account on the front end. See *supra* note 131.

<sup>133</sup> See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 16–17 (2006) (doubting the capacity of judges to reliably predict the reactions of Congress or the public to their decisions).

<sup>134</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); see also *Baker v. Carr*, 369 U.S. 186, 237 (1962) (finding such claims to be justiciable). As Professor Barry Friedman recounts, Justice Frankfurter (erroneously) anticipated an extremely negative public reaction. See FRIEDMAN, *supra* note 67, at 267–70 (noting that Justice Frankfurter warned in his *Baker v. Carr* dissent that judicial intervention would “hurt the Court,” *id.* at 268, but that in fact, “progress was remarkably quick,” *id.* at 269); see also *Baker*, 369 U.S. at 267, 277–80 (Frankfurter, J., dissenting) (arguing that the reapportionment lawsuits should have been dismissed as nonjusticiable and warning that “[d]isregard” of such limits “may well impair the Court’s position” by undermining “public confidence in its moral sanction,” *id.* at 267).

<sup>135</sup> The Court’s decisions striking down public school prayer and ordering busing to desegregate schools were highly unpopular. See Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 68–70, 77 (Nathaniel Persily et al. eds., 2008) [hereinafter PUBLIC OPINION]; Michael Murakami, *Desegregation*, in PUBLIC OPINION, *supra*, at 18, 34–36; see also Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900–10 (2011) [hereinafter Grove, *Structural Safeguards*] (discussing how these decisions prompted jurisdiction-stripping efforts).

<sup>136</sup> Cf. KLARMAN, *supra* note 79, at 292 (noting that the Justices were “unenthusiastic about confronting” the school segregation issue). One final point on constitutional interpretation: A Thayerian approach would not authorize “switches.” But that approach might, as a practical matter, be one way out of the “legitimacy dilemma” articulated here. As noted, the modern Court may best retain its sociological legitimacy if it issues a mix of “progressive” and “conservative” decisions in high-profile cases. See *supra* note 119. The Court effectively did this over the past several decades, in large part because there was a “swing Justice” who voted in varying ways. But a Thayerian approach might get the Court to the same result *if* the mix of legislation before the Court was itself “progressive” and “conservative.” By upholding all (or virtually all) government action, the Court would presumably give some victories to “conservatives” and some to “progressives.” I do not dwell on this point, however, because it is not clear that we have ever had a truly Thayerian Justice, and it seems very clear that no member of the current Court fits that category. For powerful defenses of a deferential approach, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9, 154 (1999); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 4 (2006).

C. *A Quandary: The (Unappealing) Choice Between Sociological and Legal Legitimacy*

The foregoing analysis has important implications for recent commentary questioning the legitimacy of the Supreme Court — and inviting one or more Justices to “fix” the “legitimacy deficit” by moderating their jurisprudence. These commentators have not been precise about what they mean by “legitimacy,” but it seems clear that they are questioning the Court’s sociological legitimacy. What these commentators have not recognized is that their proposed solution — a change in jurisprudence — could create a “legitimacy deficit” of its own. Under current constitutional law and theory, it does not appear to be *legally* legitimate for a Justice to vote in a way she deems legally incorrect in order to preserve the Court’s public reputation.

Relatedly, this Review Essay’s account underscores the value of Fallon’s typology of legitimacy. When we stop talking about “legitimacy” in the abstract and understand the different ways in which the concept is invoked, we can begin to examine (possible) tensions among the types of legitimacy. Fallon, for example, argues that the Justices faced a trade-off between legal and moral legitimacy in *Bolling v. Sharpe*,<sup>137</sup> where the Court invalidated public school segregation in Washington, D.C. (p. 37).<sup>138</sup> He suggests that the “legal case for *Bolling* was weak” but that the Court’s decision was justified by the moral imperative of ending segregation (p. 37). When scholars argue that the Court’s disposition in *Naim* was justified, they seem to be suggesting that the Court properly chose sociological legitimacy over legal legitimacy.<sup>139</sup>

How often does the Supreme Court face such a “legitimacy trade-off”? Fallon suggests that cases pitting legal against moral legitimacy are “anomalous” (p. 38). Perhaps so. But our history suggests that the tension between legal and sociological legitimacy may be more common. To be sure, it is difficult to answer this empirical question, because the Justices do not acknowledge “switching” their votes. I have discussed several (debatable) episodes. Others might point to, for example, the Court’s backtracking on the procedural protections for suspected

<sup>137</sup> 347 U.S. 497 (1954).

<sup>138</sup> *Id.* at 499–500.

<sup>139</sup> Cf. Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 822 (2011) (noting that many scholars argue that “the Court wisely decided to bide its time . . . rather than rushing headlong into a fight that it could not win”); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2017 (2005) (stating *Naim* has not been understood to “exemplify how the Court should go about its daily business” but was “a rare accommodation that principle made with pragmatism for the ultimate purpose of vindicating *Brown*’s promise”).

Communists in the 1950s,<sup>140</sup> as well as decisions on abortion,<sup>141</sup> the flag salute and Pledge of Allegiance,<sup>142</sup> and affirmative action.<sup>143</sup>

In cases of conflict between sociological and legal legitimacy, the Justices face a challenging (and unappealing) normative choice. To put the conflict in stark terms, let's assume for a moment that Justice Owen Roberts did in fact "switch" his vote in the New Deal cases. It may be that his decision preserved (or restored) the Court's sociological legitimacy long enough that the Court could then issue groundbreaking rulings such as *Brown*. Conversely, consider the consequences if the Court had *not* changed direction in 1937. President Roosevelt's Court-packing plan would likely have been enacted,<sup>144</sup> and this structural transformation might have dealt a severe, perhaps even permanent, blow to the Court's sociological legitimacy going forward. Such a damaged Court

<sup>140</sup> See, e.g., Neal Devins, Essay, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1343 (2006) (arguing that after Congress came — "as Chief Justice Warren put it — 'dangerously close' to enacting" jurisdiction-stripping legislation, "[t]he Court relented" (quoting EARL WARREN, THE MEMOIRS OF EARL WARREN 313 (1977))); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 432–37 (2005) (describing "the apparent Frankfurter-Harlan retreat," *id.* at 435); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 196 (2002) (noting that the "Supreme Court tempered its prior positions in a series of decisions that might be called a second 'switch in time,' at least creating the appearance that it was backing away from the earlier controversial decisions").

<sup>141</sup> See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 203–04 (2005) (noting Justice Kennedy's switch in *Planned Parenthood v. Casey*, albeit without speculating as to why Justice Kennedy changed his view). Interestingly, the joint opinion in *Casey* stated that the Court best retains its legitimacy by *not* "surrender[ing] to political pressure." 505 U.S. 833, 867 (1992); see also *id.* at 865–66 ("The Court's power lies . . . in its legitimacy . . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.").

<sup>142</sup> See Jeffrey S. Sutton, *Barnette, Frankfurter, and Judicial Review*, 96 MARQ. L. REV. 133, 142–43 (2012) (noting that the Court's "rapid switch" from *Minersville v. Gobitis*, 310 U.S. 586 (1940), to *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943), may have been a response to criticism). In *Barnette*, the Court overruled *Gobitis* and held that students in public schools could opt out of the flag salute and recitation of the Pledge of Allegiance. See 319 U.S. at 642.

<sup>143</sup> See *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 314–15 (2013); BISKUPIC, *supra* note 18, at 265–68 (reporting that several Justices planned to invalidate the Texas affirmative action program in this 2013 case but switched after seeing an explosive draft dissent by Justice Sotomayor).

<sup>144</sup> Scholars agree that the "switch in time" had an important impact on the political debates over the plan. See FRIEDMAN, *supra* note 67, at 226–27 ("The Court's apparent change of direction [in *West Coast Hotel* and two weeks later in *NLRB v. Jones & Laughlin Steel Corp.*] was a major turning point for the plan, and everyone knew it." *Id.* at 227.); LEUCHTENBURG, *supra* note 65, at 142–43 (arguing that Justice "Roberts' 'somersault' [in *West Coast Hotel*] gravely damaged the chances of the Court plan," *id.* at 143); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 283 (2017) ("The case for the plan was further undercut by the purported 'switch in time' of Justice Owen Roberts on the constitutionality of New Deal legislation . . .").

may not have had the institutional capital to issue *Brown*, *Loving*, or other civil rights decisions that many of us celebrate today.

When I present the choices in these terms, I suspect that many readers have the impulse to say that there must be an *answer* — a way out of the Supreme Court's legitimacy dilemma. One of my goals is to suggest that, at least under current constitutional theory, there is no such answer.<sup>145</sup>

That is not to say that it would be impossible to construct a theory — perhaps a “meta theory” of legitimacy that would guide judges in resolving trade-offs among types of legitimacy.<sup>146</sup> Perhaps Fallon's book and this Review Essay will encourage such efforts. But I do want to offer some cautionary notes for scholars who take up that task. First, it would not be easy to construct a theory that could be administered by the Supreme Court, given its institutional limitations. As I have suggested, the Justices may not be very adept at figuring out when the Court's sociological legitimacy is sufficiently threatened to create a conflict.<sup>147</sup> Second, it may be particularly challenging (absent a significant — and, to my mind, unappealing — change in norms of judicial practice) to construct a theory that could be applied with consistency, candor, and in good faith. It is difficult to imagine a Justice saying openly to a litigant, “The government has violated the Constitution. But we cannot rule in your favor, because the consequences for our institution might be too great.”<sup>148</sup>

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<sup>145</sup> That is, no theory purports to *authorize* a switch. I have suggested that a truly Thayerian approach might be a way out of the dilemma, depending on the mix of legislation before the Court. But no Justice follows that deferential approach. See *supra* note 136. That is likely because, as Fallon aptly notes, “a strictly deferential approach” would lead to (what are for many of us) unthinkable results, including upholding school segregation in *Brown* (pp. 162–63).

<sup>146</sup> For some, the theory might build on the idea of “judicial statesmanship.” See Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1349 (2010) (“Judges turn to judicial statesmanship when the resources of legal craft have been exhausted.”); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 993 & n.183 (2008) (suggesting that the “conflict avoidance” in a case like *Naim* “may be the path of statesmanship,” *id.* at 993).

<sup>147</sup> See *supra* notes 131–36. These institutional limitations would also seem to make it hard for judges to take sociological legitimacy into account at any stage of the constitutional analysis. See *supra* notes 131–32.

<sup>148</sup> The Supreme Court came perhaps closest to doing so in *Giles v. Harris*, 189 U.S. 475 (1903). There, the Court declined to order a remedy in a case alleging racial discrimination in voting, see *id.* at 482, 487–88, in part because “[t]he bill import[ed] that the great mass of the white population intend[ed] to keep the blacks from voting . . . [and i]f the conspiracy and the intent exist[ed], a name on a piece of paper [would] not defeat them. Unless [the Court was] prepared to supervise the voting in that State by officers of the court, it seem[ed] . . . that all that the plaintiff could get from equity would be an empty form,” *id.* at 488. That decision is not considered one of the Court's finer moments (to put it mildly). See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 297, 299–308 (2000) (offering a riveting account of *Giles* and stating that “*Giles* permit[ted] the virtual elimination of black citizens from political participation in the South” and for many years was “airbrushed out of the constitutional canon,” *id.* at 297); see also Pamela S.

In sum, in politically charged moments, the Justices may face a trade-off. A steadfast commitment to legal legitimacy may put at risk the Court's sociological legitimacy. Conversely, a steadfast commitment to sociological legitimacy may lead a Justice to compromise the legal legitimacy of her own rulings. That is, I argue, a serious legitimacy dilemma.

#### IV. AN EXTERNALLY IMPOSED DILEMMA

There is no easy answer to the Supreme Court's first legitimacy dilemma. But the current Court faces a second dilemma as well — one that the Justices also cannot resolve themselves, because it has an external cause. The partisan actions of the President and the Senate have damaged the Supreme Court's public reputation.

Notably, this legitimacy problem represents a shift. Historically, confrontations between the Supreme Court and the political branches have typically been ignited by Supreme Court decisions. Thus, President Roosevelt sought to “pack” the Court, because it was invalidating his New Deal programs. After the Supreme Court in *Brown* sought to put a stop to school segregation, “[t]hroughout the South, governors and gubernatorial candidates called for defiance of court orders.”<sup>149</sup> And political actors of all stripes have, at various times, fought for jurisdiction-stripping legislation to combat Court decisions that were out of step with that group's political base.<sup>150</sup>

In sharp contrast, the current attacks on the legitimacy of the Supreme Court are not the result of its decisions (although critics are clearly concerned about future decisions). Instead, critics emphasize a preliminary issue: how the Justices came to be placed on the Court. Commentators are particularly troubled by the Supreme Court seat that they believe was “stolen” from Judge Garland.<sup>151</sup> Such defects in the judicial appointments process have, critics suggest, undermined the sociological legitimacy of the Supreme Court.<sup>152</sup>

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Karlan, Tribute, *From Logic to Experience*, 83 GEO. L.J. 1, 2 (1994) (“*Giles v. Harris* . . . gave Southern racists a green light to disenfranchise black citizens.”).

<sup>149</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE* 78 (2d ed. 2008).

<sup>150</sup> See Grove, *Structural Safeguards*, *supra* note 135, at 888–916 (describing how, in the late nineteenth and early twentieth centuries, progressives opposed the judiciary's probusiness rulings and sought to strip jurisdiction over cases involving corporations; and how in the late twentieth and early twenty-first centuries, conservatives sought to strip jurisdiction over civil rights issues such as abortion, busing, school prayer, and same-sex marriage); see also *id.* (demonstrating that political supporters of the judiciary repeatedly used the “veto gates,” *id.* at 881, of the Article I lawmaking process to block such court-curbing legislation).

<sup>151</sup> See *supra* notes 8–9 and accompanying text.

<sup>152</sup> As Professors Neal Devins and Lawrence Baum observe in their recent work, “[t]he rise of ideology in judicial appointments” has already “had spillover effects in voter attitudes toward the Court.” NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN*

Although a judicial nominee can certainly control his or her own behavior during the confirmation process, the Supreme Court as a whole can do very little about the partisan maneuverings in the White House and the Senate. Thus, we come to the Court's second legitimacy dilemma: its institutional reputation may suffer as a result of partisan fights largely outside of its control.<sup>153</sup>

External causes call for external solutions. But many of the solutions offered to "fix" the Court's current legitimacy deficit may do more harm than good. That is, these solutions may simply increase the partisan squabbling that has damaged the Court's reputation. As noted, critics most commonly call for court packing. Commentators argue that as soon as Democrats control the House, Senate, and presidency, they should expand the Supreme Court by adding two (or more) Justices.<sup>154</sup> Such packing, the argument goes, would "fix" the wrongdoing of Senate Republicans and restore the former balance on the Court.

There are a few difficulties with these arguments. First, notions like "fix" and "restore" presume a clear normative baseline of "wrongdoing." To progressives, it may be clear that the Republican-controlled Senate in 2016 acted disgracefully in refusing to hold hearings on an eminently qualified jurist. But to many conservatives, the delay on Judge Garland was justified by prior Democratic wrongdoing — including the abolition

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DIVISIONS CAME TO THE SUPREME COURT 156 (2019). Political scientists seem to disagree on whether the public prefers a politicized appointments process. But these scholars agree that a polarized process is likely to have a detrimental impact on the Court's sociological legitimacy. Compare Gibson & Caldeira, *Confirmation Politics*, *supra* note 25, at 139–41 (arguing that during the confirmation proceedings for Justice Alito, his supporters emphasized his "judiciousness," such as his qualifications and temperament, thereby reinforcing public assumptions that courts are different from the political branches), with Brandon L. Bartels & Christopher D. Johnston, Research Note, *Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 PUB. OPINION Q. 105, 113 (2012) ("A large share of the public fails to differentiate the Court from politics. . . . If large segments of the public *prefer* a political appointment process, then their representatives in government will be less bound to norms of objectivity[, and t]o the degree that the process then becomes more visibly politicized, [the dynamic will impact public perceptions of the Court well beyond the appointment process.]").

<sup>153</sup> That is not to say that the Justices are incapable of doing anything to respond to court-curbing attempts. For example, in 1937, Chief Justice Hughes sent a letter to Senator Burton Wheeler, which sought to refute President Roosevelt's (initial) claim that his Court-packing plan would improve judicial efficiency. See Letter from Charles Evans Hughes, Chief Justice, to Burton K. Wheeler, U.S. Senator (Mar. 21, 1937) *reprinted in* S. REP. NO. 75-711, app. c at 40 (1937) (stating that "[t]he Supreme Court [was] fully abreast of its work" and that "[a]n increase in the number of Justices . . . would impair [the Court's] efficiency"). But Chief Justice Hughes was unwilling to weigh in on "any [other] question of policy" surrounding the plan. *Id.* Indeed, he suggested that there was a norm against such judicial intervention. See *id.* ("I do not speak of any other considerations in view of the appropriate attitude of the Court in relation to questions of policy."). Notably, by the time Chief Justice Hughes sent this letter, President Roosevelt had already changed the major argument for the Court-packing plan. See *supra* note 63 and accompanying text (noting that President Roosevelt initially emphasized judicial efficiency but on March 9, 1937, made clear that the goal was to change the future decisions of the Court).

<sup>154</sup> See *supra* note 6 and accompanying text.

of the filibuster for lower court judicial nominations,<sup>155</sup> and perhaps even going back to the rejection of Judge Bork.<sup>156</sup> I do not seek to weigh in on which narrative is more accurate; I suggest only that what qualifies as “wrongdoing” and “restoration” depends tremendously on one’s perspective.<sup>157</sup>

Second, and relatedly, we should keep in mind the political science teachings about sociological legitimacy. In our polarized political climate, the Court has maintained its public reputation in large part because it has issued a mix of “progressive” and “conservative” decisions in high-profile cases. But court packing by Democrats seems unlikely to restore that “balanced” Court. Instead, it seems more likely that the Court would transform into an institution that reliably issued “progressive” rulings in salient cases. Many in the legal community might be happy with that result. But it is important to recall that “legitimacy is for losers.”<sup>158</sup> It is crucial that those who *disagree* with the Court’s decisions view the institution as legitimate. It seems doubtful that conservatives today would view a Court “packed” by progressives as any more legitimate than the “losers” in 1937 would have viewed a fifteen-member “Roosevelt Court.”

Instead, it seems likely that conservatives would launch attacks on the Supreme Court (much like those we hear from progressives

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<sup>155</sup> See 159 CONG. REC. S8417–18 (daily ed. Nov. 21, 2013); Grove, *Judicial Independence*, *supra* note 7, at 516 (describing how Republicans argued that the abolition of the filibuster was an effort to “pack” the lower federal courts and how “after taking over as majority party, Senate Republicans continued to cite this ‘court-packing’ episode to justify blocking other nominations — including that of Merrick Garland”).

<sup>156</sup> As Professors Josh Chafetz and Mark Tushnet have separately recognized, it is difficult to determine which side “started it.” See Josh Chafetz, Essay, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 130 (2017) (underscoring that arguments from history and precedent often involve a “political choice” and that there is tremendous disagreement about whether a given action is “unprecedented”); Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 485–86, 485 n.23 (2018) [hereinafter Tushnet, *Pirate’s Code*] (emphasizing the “[i]t all started when he hit me first” dynamic, *id.* at 485 n.23, and stating that “Republicans trace unfair partisanship in Supreme Court nominations to 1987 and the Bork nomination; Democrats respond by pointing to the filibuster against Abe Fortas’s nomination . . . and so on and on,” *id.* at 485).

<sup>157</sup> See, e.g., Tushnet, *Pirate’s Code*, *supra* note 156, at 485–86 (underscoring the “deep partisanship,” *id.* at 486, behind arguments about norm violations by the other side). Indeed, scholars today debate whether Republicans or Democrats have engaged in “hardball” to a greater degree. Compare Fishkin & Pozen, *supra* note 14, at 918, 929, 933–34 (arguing that, as a general matter, Republicans have played “hardball” to a greater degree than Democrats, although noting that the story is more mixed with respect to judicial appointments), with David E. Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 COLUM. L. REV. ONLINE 207, 208 (2018) (contending “that it is not clear that Republicans have outpaced Democrats in playing constitutional hardball”).

<sup>158</sup> E.g., Gibson et al., *supra* note 36, at 839 (“*Legitimacy is for losers*, since winners ordinarily accept decisions with which they agree.”); *supra* section III.A, pp. 2251–54.

today) — demanding an end to life tenure, jurisdiction stripping, disobeying federal court orders, and perhaps even additional “packing.”<sup>159</sup> In that event, some members of the newly constituted Court might feel pressure to moderate their decisions — lest the Court seem too “one sided” to a substantial portion of the country. That would take us back to the first legitimacy dilemma: one or more members of the Court might compromise the legal legitimacy of their judicial decisions to preserve the sociological legitimacy of the Court.

I believe a better approach is to focus on the political process itself — and to look for ways to improve that process, at least in the long run. This point suggests the need for additional research and thinking. In law schools, we spend a good deal of time discussing the proper role of the judge. We spend far less, if any, time examining how a legislator or President should carry out her constitutional responsibilities. As Professors Vicki Jackson and Neil Siegel have suggested, such court-centrism ought to change; today, we need a “general account of the normative expectations of elected representatives in a constitutional democracy.”<sup>160</sup>

To be sure, some readers may assert that it is hopeless to construct an aspirational vision of a legislator. There seems to be an assumption among many that Congress is irredeemably broken.<sup>161</sup> But there is a deep irony here. As the discussion in Part III should make clear, many legal scholars have already adopted an aspirational vision of a judge — one that no judge can easily satisfy, at least not in all circumstances. Under existing constitutional theory, there are strong reasons to doubt that it is legally legitimate for a Justice to “switch” her vote to protect the Supreme Court’s reputation. Yet real-world Justices seem to have done precisely that on some (disputed) number of occasions. Perhaps what we need in law school is less aspirational thinking about judges and more aspirational thinking about legislators. After all, we need a standard before we can assess the extent to which any given lawmaker satisfies it.

Such a normative account seems particularly crucial in the context of the judicial appointments process. The recent confirmation fights

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<sup>159</sup> Cf. sources cited *supra* notes 2–6 (describing the current attacks).

<sup>160</sup> Vicki C. Jackson, *Pro-constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1722 (2016) (proposing to develop a normative account of “the aspirations and responsibilities of a ‘conscientious’ or ‘pro-constitutional’ legislator in the U.S. constitutional democracy”); see Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 115 (2018) (“[C]onstitutional law scholars might do for elected officials what they have long done for judges: contribute to the development of a constitutional role morality by identifying normative restraints on the discretion of politicians beyond the legal restrictions imposed by the Constitution and federal law.”).

<sup>161</sup> Cf. Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 387–90 (2009) (cataloging, and then disputing, the charges that Congress is “an increasingly dysfunctional and ineffective institution,” *id.* at 388).

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underscore the importance of restoring moderation and compromise in both the White House and the Capitol. To be sure, restoring (or building) norms is a long-term project. But I suggest that this is a project worth undertaking. The best way to protect judicial legitimacy going forward may be an increased emphasis on the proper role of a lawmaker.

#### V. CONCLUSION

Fallon's *Law and Legitimacy in the Supreme Court* is a masterful piece of scholarship — and a great service to the legal community. At a time when many individuals have begun to question the legitimacy of the Court itself, Fallon gives us a vocabulary and framework for evaluating these claims. But Fallon does something more: his work serves as a model for “interpretive charity.” Fallon encourages all members of the legal community to treat one another with mutual respect and concern. That is, we should view different legal arguments and interpretive methods — even those with which we strongly disagree — as, well, legitimate. In our deeply divided society, such a sentiment is desperately needed. My hope is that others will take up Fallon's call to “view our coparticipants in constitutional argument as proceeding in good faith” (p. 148).