PEOPLE'S PARITY PROJECT

PROTECTING WORKERS' RIGHTS AND DEMOCRACY FROM THE COURTS:

A PRACTICAL GUIDE TO COURT REFORM

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ABOUT PPP:

People's Parity Project is a movement of attorneys and law students organizing for a democratized legal system which values people over profits, builds the power of working people, and opposes subordination of any form. Together, we are dismantling a profession that upholds corporate power and building a legal system that is a force for justice and equity. Our work focuses on building power for working people in the civil legal system through organizing, policy innovation, political education, and solidarity.

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EXECUTIVE SUMMARY

The federal courts pose a threat to nearly every policy goal that is important to progressives. Whether the aim is expanding worker power, voting rights, racial justice, LGBTQ rights, abortion rights, or access to health care; preventing gun violence; addressing climate change or income inequality; or enacting debt relief, any of them would, if enacted, be at risk of being overturned by the federal courts.

Anyone who cares about progressive policy and the health of democracy must face this reality. Working to enact progressive legislation or regulations without taking steps to prevent the courts from nullifying those policies is like painting a masterpiece in a house that is on fire. Although putting down the paintbrush and picking up a fire extinguisher might feel like a distraction from the work, it's actually a necessity.

This report is intended to make the case to all progressives that they should support court reform to address two primary problems with the federal courts. The first is the fact that the current judiciary, particularly the Supreme Court, acts as a partisan policy-maker that amasses ever-growing amounts of power to itself, or, as Jamelle Bouie put it, "cement[s] Republican ideological preferences into the constitutional order."[1] The second is the problem that strong judicial review is fundamentally antidemocratic. Some reforms would also address other problems, such as unethical behavior by Supreme Court justices; the Court's increasing habit of deciding vital questions via its "shadow docket" without explanation or transparency; the disconnect between the Court's composition and election outcomes; and the asymmetrical difficulty for Congress to correct judicial misinterpretations of federal laws.

The report's arguments and examples center the labor movement, in part because that movement is explicitly about power and how people can build and wield it. Thus, judicial decisions about labor rights are particularly clear demonstrations of the Court's pattern of

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taking power away from people and assigning it to themselves. In addition, the labor movement's support for court reform will be crucial to any effort to enact it. The historic level of public support for unions and energy behind union organizing and strikes in recent years means now is the right time for the labor movement and other progressives to unite behind the goal of reforming the courts.

The report begins, in Part I, by showing that the Supreme Court has long been antidemocratic, in the sense that it has regularly struck down democracy- and equality-enhancing laws and policies enacted by elected officials, while leaving in place policies that benefit the wealthy and trample on the rights of less-powerful minorities. The Court's long hostility toward the labor movement illustrates this pattern. Beginning in the late 1800s, the Court sided with employers and the government as they violently suppressed a burgeoning union movement. It upheld injunctions and struck down laws expanding workers' rights to engage in strikes and boycotts, as well as

[1]Jamelle Bouie, Mad About Kavanaugh and Gorsuch? The Best Way to Get Even is to Pack the Court, Sept. 17, 201 9, https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html.

laws establishing minimum working standards. While the Court changed course for a time to uphold New Deal legislation, it soon returned to constricting labor rights. A similar pattern has played out in the Court's jurisprudence in many other areas, including racial justice, abortion rights, and democracy.

The current Supreme Court is unusually extreme in some ways. Its right-wing supermajority is the result of overt right-wing political hardball. After Justice Antonin Scalia died in 2016, Republican Senators refused to even consider Merrick Garland (President Obama's nominee to the Supreme Court) and held the seat open until they confirmed Neil Gorsuch in 2017. Republican Senators also confirmed Brett Kavanaugh in 2018 despite credible allegations of sexual assault, and pushed Amy Coney Barrett's confirmation through just a week before the end of the 2020 election. The Supreme Court's far-right supermajority is also unusually antimajoritarian, in that three of its members were appointed by a president who lost the popular vote, and four were confirmed by senators who represented a minority of the population. And it is particularly brash in its willingness to issue decisions without explanation, disregard ethical norms, and overturn decades-old precedents and the decisions of democratically accountable agencies to benefit the political party that nominated most of its members. But it is not an aberration in terms of the antidemocratic role it plays.

This section also responds to the idea that judicial review is necessary because courts protect less-powerful minorities against the tyranny of the majority. This argument founders both on the Court's own antidemocratic history, and on the fact that in many landmark progressive decisions, like *Brown v. Board of Education* and *Obergefell v. Hodges*, the Court was not invalidating a law passed by Congress, but rather enforcing a congressionally enacted law which allows individuals to sue states and localities for constitutional violations.

Part II argues that court reform would strengthen democracy. It would do so by shifting the power to define the Constitution's meaning away from unelected judges' idiosyncratic interpretations of a short, vague, 200+-year-old document which is extremely difficult to amend, to the public, social movements, and democratically accountable officials. Court reform, versions of which have been acted numerous times

"But it is not an aberration in terms of the antidemocratic role it plays."

in American history, would give the courts a smaller, more appropriate role in our system of government, and would lead to a judiciary more in line with voters' views of the meaning of the Constitution. This might also have the side effect of improving public opinion of the courts. This increased esteem would be legitimate because it would be warranted, as opposed to artificially propped up by legal elites who excuse glaring problems with the institution in the name of preserving the public's respect for it.

Court reform would also allow for a more progressive vision of the Constitution to prevail. This is illustrated through a discussion of the labor movement's egalitarian, democracy-enhancing vision of the Constitution, which it largely advances not through the courts, but in the public and before other government bodies. Labor's constitutional vision is starkly at odds with the Court's pro-corporate version of the Constitution. Reforming the courts would broaden the futures and constitutional understandings that labor and other social movements can plausibly seek, beyond the tight limits currently described by judicial decisions.

Part III of this report explores a variety of court reform tools:

1. **Court expansion:** Adding justices to the Supreme Court.
2. **Jurisdiction stripping:** Removing courts' ability to hear challenges to a specific law or regulation, or more broadly to all federal laws and regulations.
3. **Jurisdiction channeling:** Designating a specific court, agency, or other body to hear specific types of cases.
4. **Supermajority requirements:** A rule that a court can only strike down a law or regulation on constitutional grounds if a supermajority, or all, of the court's members agree.

5. **Fast-track congressional fixes to statutory interpretation decisions:** An efficient process for Congress to overrule a court decision misinterpreting a federal law or regulation.

6. **Other complementary reforms:** Ethics reform, shadow docket reform, lower court expansion, term limits, and laws to correct antidemocratic judicial doctrines. These would complement other reforms, and would be helpful, but not alone sufficient, in addressing the problems of the federal courts.

As this section explains, there is no one perfect or best court reform policy, in part because there is not just one problem with the courts. Rather, there are a collection of tools which have different strengths and could be useful in different political and legal circumstances. Progressives should consider all of them and work to advance them whenever possible.

Progressives should take some concrete steps right now. They should support the Judiciary Act of 2023, which would add four seats to the Supreme Court to balance out its current far-right supermajority. They should add jurisdiction stripping or channeling or supermajority language to every progressive bill to protect it from the courts. And they should work with Congress to write and introduce broader court-reform legislation, which could include many of the tools described in this report.

Part IV turns to responding to several of the most common arguments against court reform. The first is the idea that judicial review (courts' power to overturn a law on a finding that it violates the Constitution) and judicial supremacy (the idea that the courts are the last and only word on the meaning of the Constitution) are necessary for democracy. In other nations and at other points in U.S. history, judicial review did not exist or was not used as frequently and aggressively as courts use it today.

Second, the related argument that judicial review is needed to protect minority rights is refuted by experience. As discussed in Part I, many of the Court's celebrated progressive decisions, like *Brown, Roe, and Obergefell* were enforcing, not striking down, federal law, and were consistent with, not standing up to, public opinion.

"Third, those who question empowering Congress because it is ineffectual and populated by alarming extremists have a point—but the problems with Congress are due in part to the Court's own antidemocratic rulings in areas like voting rights, campaign finance, partisan gerrymandering, and in weakening the labor movement."

The Court's own history, and its recent reversal of *Roe*, demonstrates that relying on the federal courts to be the protector of minority rights is a bad bet.

Third, those who question empowering Congress because it is ineffectual and populated by alarming extremists have a point—but the problems with Congress are due in part

“Finally, progressives must not accept learned helplessness by deciding it is pointless to consider court reform because it is politically unlikely to be enacted in the short term, or because courts might strike it down.”

to the Court’s own antidemocratic rulings in areas like voting rights, campaign finance, partisan gerrymandering, and in weakening the labor movement. Congress certainly should enact other structural reforms, particularly eliminating the filibuster and making the District of Columbia a state, but those are beyond the scope of this report. Even with a highly imperfect Congress, it is far healthier in a democracy for the public and social movements to be able to make policy demands of elected officials, rather than have those demands be rendered eternally impossible by the decisions of unelected judges. And when Congress is not acting, administrative agencies can and do enact policy with more democratic accountability than courts.

Finally, progressives must not accept learned helplessness by deciding it is pointless to consider court reform because it is politically unlikely to be enacted in the short term, or because courts might strike it down. Progressives must build consensus on court reform now so that elements of it can be enacted when political conditions make that possible. And while there is of course some chance that the federal courts will try to thwart challenges to their own power by striking down court reform, the legal case for reforms rests on solid ground and, in some cases, is indisputable. In any case, the possibility of failure is not a reason not to try. While despair is not an unreasonable response to our current politics and courts, progressives cannot give into it by preemptively giving up.

INTRODUCTION

It is now early summer, and the end of the Supreme Court’s term is approaching. At this time every year, as the public waits for the Court to hand down its pronouncements on immensely consequential policy issues, the Court’s outsized power in our democracyneand its predilection for protecting the interests of powerful corporations, the wealthy, and the Republican party—become particularly clear. By late June or early July, the Court will decide whether:

- Former President Donald Trump has immunity from prosecution for trying to overturn the 2020 election;
- Emergency room doctors have to provide abortion care when pregnant people face health risks like the loss of an organ, but are not yet at the brink of death;
- It will reverse the Food and Drug Administration’s decision to make the abortion pill mifepristone more available;
- A federal ban on “bump stocks” can survive;
- People subject to domestic violence protective orders have a right to keep their guns;
- January 6 insurrectionists can be charged with obstructing an official proceeding[2];
- To make it more difficult for the National Labor Relations Board to obtain a court injunction requiring an employer to rehire workers illegally fired during a union organizing campaign[3];
- To allow cities and states to criminalize homelessness by passing laws against “camping”;

[2]Ann E. Marimow and Nick Mourtoupalas, The biggest 2024 Supreme Court rulings so far, and what’s still to come, Washington Post, Mar. 27, 2024, https://www.washingtonpost.com/politics/2024/supreme-court-cases-abortion-trump-guns/.
[3]Ronald Mann, Justices appear likely to side with Starbucks in union organizing dispute, Scotusblog, Apr. 25, 2024, https://www.scotusblog.com/2024/04/justices-appear-likely-to-side-with-starbucks-in-union-organizing-dispute/.

- To strike down a 2017 law taxing offshore earnings, a ruling which could affect whether Congress can someday impose a wealth tax; and
- It will eliminate *Chevron* deference so courts can refuse to defer to agencies' reasonable interpretations of ambiguous laws.[4]

The Court's huge impact on public policy in these cases will be in addition to its holdings in its last term invalidating a Biden administration student debt forgiveness plan; invalidating race-conscious affirmative action in higher education; permitting web designers to refuse to create websites for same-sex weddings; and constricting the Environmental Protection Agency's ability to regulate pollution in wetlands.[5] And going back just one more year, in the term ending in 2022 the Court overturned *Roe v. Wade* and allowed states to ban abortion; fettered the EPA's ability to regulate the energy sector to address climate change; struck down state gun safety laws; and struck down the Department of Labor's COVID vaccine-or-test rule for large employers.[6]

Even when Supreme Court decisions aren't in the headlines, the federal courts' past and potential future decisions limit the policy options that elected officials will consider and that the public feel they can demand. More broadly, they shape how people think about the Constitution and our institutions, and what we can imagine for the future.

The current Supreme Court acts as a policy-making wing of corporate and partisan interests, and should certainly not have this much power. But, in fact, no Supreme Court should have this much power.[7] Nine unelected lawyers' interpretations of the Constitution,a document of less than 8,000 words written in general terms more than 200 years ago, should not be the final word on whether Congress can enact voting rights laws, gun safety laws, or labor law reform.

"No Supreme Court should have this much power."

This report makes the case that progressives cannot simply accept the status quo, or hope that they can change it just by winning elections, making good legal arguments, and shaming the current justices into being less partisan. That this is not enough is borne out in the data: a recent study projected that in the absence of Court expansion, the Supreme Court will continue to have a majority of justices appointed by Republican presidents until 2065, and Democratic appointees will comprise a Court majority for only 29 of the next 100 years.[8]

Court reform provides a collection of tools that progressives can and should use to protect policies they care about, and to allow people, unions, social movements, and democratically accountable officials, not just judges, to determine what the Constitution means.

I. THE SUPREME COURT'S DECISIONS HAVE LONG BEEN ANTIDEMOCRATIC

Throughout its history, with a few notable exceptions, the Supreme Court's decisions have had an antidemocratic effect on the nation: it has nullified laws that the peoples' elected representatives enacted to increase equality

[4]Marimow and Mourtoupalas, supra note 2.
[5]Adam Liptak and Eli Murray, The Major Supreme Court Decisions in 2023, New York Times, June 29, 2023, https://www.nytimes.com/interactive/2023/06/07/us/major-supreme-court-cases-2023.html.
[6]Adam Liptak and Jason Kao, The Major Supreme Court Decisions in 2022, New York Times, June 30, 2022, https://www.nytimes.com/interactive/2022/06/21/us/major-supreme-court-cases-2022.html.
[7]Nikolas Bowie and Daphna Renan, The Supreme Court Is Not Supposed to Have This Much Power, The Atlantic, June 8, 2022, https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/.
[8]Adam Chilton, Dan Epps, Kyle Rozema, and Maya Sen, The Endgame of Court-Packing (working paper), May 4, 2023, https://ssrn.com/abstract=3835502.

and empower people.[9] Specifically, it has repeatedly struck down or narrowed federal laws aimed at strengthening worker power and the rights of people of color and other less-powerful groups, while inventing constitutional doctrines to protect the property and power of corporations and to entrench inequality.

Lawyers and schoolchildren are taught, and many people believe, that courts are important to a constitutional democracy because they protect the rights of less-powerful minorities against hostile majorities. In order to do this, the argument goes, courts must have both the power of judicial review (the ability to overturn laws they find to be unconstitutional) and judicial supremacy (the authority to be the last word on the meaning of the Constitution). But history and present experience show that the Supreme Court has not played this role: it has much more consistently expanded the power of the powerful at the expense of less-powerful minorities, including people of color, immigrants, LGBTQ+ people, people convicted of crimes, and workers.

This section first traces the history of the Court's hostility to the labor movement. The report focuses on the labor movement because questions of power—who has it, why it should not be concentrated in the hands of a few elites, how people can build it—are central both to the labor movement and to the question of what role the courts should play in our system of government. The section then briefly recounts the Court's similar approach in other areas of the law.

A. Courts' hostility to the labor movement

Workers in the United States joined unions in increasing numbers in the late 1800s, as industrialization and sharply rising inequality forced many people to take dangerous jobs for low pay. Many staged strikes and boycotts to seek better working conditions, only to be met with violent repression by employers, private militias, and police and military forces.

"Between the 1880s and 1935, courts issued more than 4,000 injunctions against strikes, picketing, and other collective action by workers; imprisoned numerous labor leaders; and struck down hundreds of worker-protective laws."

Courts strongly backed this repression of labor. Between the 1880s and 1935, courts issued more than 4,000 injunctions against strikes, picketing, and other collective action by workers; imprisoned numerous labor leaders; and struck down hundreds of worker-protective laws.[10]

The Supreme Court took the lead in this fight against working people. In 1895, it upheld an injunction against a strike by Pullman railroad workers.[11] In *Loewe v. Lawlor* (1908), it held that

[9]Nikolas Bowie, The Contemporary Debate over Supreme Court Reform: Origins and Perspectives, Written testimony for Presidential Commission on the Supreme Court of the United States, 1-3, June 30, 2021, https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf; Kate Andrias, Constitutional Clash: Labor, Capital, and Democracy, 118 Nw. U.L. Rev. 985, 1069 (2024), https://scholarship.law.columbia.edu/faculty_scholarship/4368 [hereinafter Andrias, Constitutional Clash]; Ryan D. Doerfler & Samuel Moyn, Democratizing the Supreme Court, 109 California Law Review 1703, 1711 (2021), https://www.californialawreview.org/print/democratizing-the-supreme-court; Christopher Jon Sprigman, Jurisdiction Stripping as a Tool for Democratic Reform of the Supreme Court, Written Testimony for The Presidential Commission On The Supreme Court of the United States, 1-2 (Aug. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf [hereinafter Sprigman, Jurisdiction Stripping as a Tool for Democratic Reform].

[10]Kate Andrias, Constitutional Clash, supra note 9, at 1002; William E. Forbath, Law and the Shaping of the American Labor Movement 61 (1991).

[11]In re Debs, 158 U.S. 564 (1895).

secondary boycotts—those aimed at companies that do business with the main company involved in the labor dispute—violated the Sherman Antitrust Act, which was intended to restrict business monopolies, not unions.[12]

Congress and state legislators responded by passing laws to protect workers' collective activity, but the Supreme Court struck down those laws or interpreted them so narrowly that they became worthless. In 1920, the Court held that notwithstanding the Clayton Act, which Congress passed to prevent courts from issuing injunctions in labor disputes, courts could still enjoin secondary boycotts.[13] The following year the Court held that labor picketers were coercively interfering with employer property rights and could be enjoined,[14] and overturned a state law protecting labor strikes and boycotts, saying it violated the Fourteenth Amendment rights of employers.[15]

During this time courts also struck down hundreds of local, state, and federal laws establishing minimum working standards on the basis of a dubious, pro-corporate interpretation of the Fourteenth Amendment, in what came to be known as the *Lochner* era.[16] The *Lochner* Court struck down a New York law barring bakers from working more than 60 hours per week;[17] federal and state laws prohibiting employers from requiring employees to agree not to join unions;[18] federal laws regulating child labor;[19] and a federal law establishing minimum wage levels for women and children in the District of Columbia.[20]

After Franklin D. Roosevelt became president in 1933 in the depths of the Great Depression and began to enact New Deal legislation to spur the nation's recovery, the Court continued to apply its pro-business reading of the Constitution. It struck down several key New Deal laws, including the National Industrial Recovery Act in 1935 and the Agricultural Adjustment Act in 1936.[21] Roosevelt railed against the decisions, and after his landslide reelection in 1936 he responded by proposing to expand the Court.

FDR's court reform proposal failed and left the term "court-packing" with a negative connotation. However, the political pressure it generated likely played a role in the Supreme Court's rapid change in its jurisprudence, which saved the New Deal.[22] In 1937, the Court upheld minimum wage laws for women.[23] It went on to uphold other New Deal laws that enacted minimum labor standards, like the Fair Labor Standards Act, and allowed workers to unionize and collectively bargain, like the National Labor Relations Act (NLRA).[24]

But the Supreme Court's 1930s "switch in time" was more of an intermission than a curtain on the Court's hostility to labor. Particularly after Congress responded to pressure from business interests by restricting union activities through the Taft-Hartley Act in 1947,[25] the Court followed suit by steadily weakening protections for workers' concerted activity.[26] In a reboot of its pre-New Deal reasoning, beginning in the 1950s, it upheld restrictions and injunctions on labor picketing and protests against First Amendment challenges,[27] taking away some

[12] *Loewe v. Lawlor*, 208 U.S. 274 (1908).
[13] *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1920).
[14] *American Steel Foundries v. Tri-Cities Trades Council*, 257 U.S. 184 (1921).
[15] *Truax v. Corrigan*, 257 U.S. 312 (1921).
[16] Andrias, Constitutional Clash, supra note 9, at 1002.
[17] *Lochner v. New York*, 198 U.S. 45 (1905).
[18] *Adair v. United States*, 208 U.S. 161 (1908) (federal law); *Coppage v. Kansas*, 236 U.S. 1 (1915) (state law).
[19] *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).
[20] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).
[21] *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding National Industrial Recovery Act was unconstitutional); *United States v. Butler*, 297 U.S. 1 (1936) (holding the Agricultural Adjustment Act of 1933 was unconstitutional).
[22] Laura Kalman, The Constitution, the Supreme Court, and the New Deal, The American Historical Review, Vol. 110, Issue 4, at 1052-1080 (Oct. 2005), doi.org/10.1086/ahr.110.4.1052.
[23] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[24] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act as an exercise of Congress's Commerce Clause power); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act, also as an exercise of Congress's Commerce Clause power).
[25] Kim Phillips-Fein, Invisible Hands: The Businessmen's Crusade Against the New Deal 31-32 (2009).
[26] James B. Atleson, Values and Assumptions in American Labor Law 47, 59-66, 106-07 (1983).
[27] Int'l Bhd. of Teamsters, *Local 695 v. Vogt, Inc.*, 354 U.S. 284, 289 (1957) (upholding state court injunction of peaceful union picketing); *NLRB v. Retail Store Emp. Union, Local* 1001, 447 U.S. 607 (1980) (rejecting First Amendment challenge to federal ban on secondary picketing).

of the tools workers could use to exert power against their employers. In a series of decisions, it held that the Federal Arbitration Act of 1925 let employers make their employees enter into forced arbitration agreements, even though the law contains an exception for employment contracts, and even if the agreements bar collective action, which is explicitly protected by the NLRA.[28] In 2019, the Economic Policy Institute and the Center for Popular Democracy estimated that, because of the Court's arbitration decisions, more than 80 percent of private sector, non-union workers would be bound by forced arbitration agreements at work by 2024.[29] This leaves workers without any effective recourse against discrimination, harassment, or wage theft, at a time when employers steal wages from nearly one in five low-wage workers.[30]

In *Cedar Point Nursery v. Hassid* (2021), the Court held that a state law giving unions a right to enter a farm employer's property at specific, limited times to speak to farmworkers about their rights constituted a "taking" of the employer's property under the Constitution.[31] Farmworkers are often indigenous people from Mexico who have very little formal education and who speak native languages, some of which do not exist in written form. They often lead migratory lives, live in temporary or inaccessible locations, including in their cars or farm buildings; if they have phones, their numbers may change frequently; and they are very dependent on farm labor contracting companies for their housing and transportation. If union organizers are unable to speak to them at their work sites, there is often no way for these workers to learn about or exercise their right to form a union, and thus to have any power to fight for better working conditions.[32]

As the percentage of private-sector employees represented by unions has shrunk to a historic low, in part thanks to Supreme Court decisions like those above, the Court has turned its attacks to public sector unions, which still represent about one-third of the public sector workforce.[33] In a series of decisions culminating in *Janus v. AFSCME* (2018), the Court weakened public-sector unions by using the First Amendment to strike down state laws permitting unions to negotiate fair-share fee agreements, under which all the workers who benefit from a union's representation pay their share of the cost of representation.[34] The result is that public-sector unions have to put more resources into signing up members, and have less to devote to organizing, negotiating and enforcing contracts, legislative campaigns, and building power.

Today, unions are experiencing a historic surge in popularity and high-profile organizing drives and strikes are in the news, but our labor laws and court decisions have made it so difficult for workers to form unions that the share of U.S. workers in unions has continued to decline.[35]

B. The Supreme Court's hostility to other pro-people laws

A similar story to that of the Court's hostility to labor could be told about numerous other areas of the law. The Supreme Court has routinely invalidated laws and policies expanding the rights and political equality of people of color, women, and other less-powerful groups, while at the same time upholding policies that

[28] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Epic Systems v. Lewis*, 584 U.S. 497 (2018); *Lamps Plus v. Valera*, 587 U.S. 176 (2019).
[29] Kate Hamaji, Rachel Deutsch, Elizabeth Nicolas, Celine McNicholas, Heidi Shierholz, and Margaret Poydock, Unchecked Corporate Power: Forced arbitration, the enforcement crisis, and how workers are fighting back, Economic Policy Institute, 1, May 20, 2019, https://files.epi.org/uploads/Unchecked-Corporate-Power-web.pdf.
[30] Id. at 1, 8.
[31] *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).
[32] Brief for United Farm Workers of America as Amicus Curiae, *Cedar Point Nursery v. Hassid*, 10-Feb. 12, 2021, https://www.supremecourt.gov/DocketPDF/20/20-107/168936/20210212151459042_2021-02-12.%20Cedar%20Point.%2020-107.%20UFW%20ACB%20iso%20Respts.ecf.pdf.
[33] Bureau of Labor Statistics, Union Members—2023, Jan. 23, 2024, https://www.bls.gov/news.release/pdf/union2.pdf (union membership rate was 32.5% in the public sector, and 6% in the private sector).
[34] *Janus v. AFSCME*, 585 U.S. 878 (2018). The cases in which the Supreme Court laid the groundwork for its decision in Janus were *Knox v. Service Employees International Union Local* 1000, 567 U.S. 298 (2012), *Harris v. Quinn*, 573 U.S. 616 (2014), and *Friedrichs v. California Teachers Ass'n*, 578 U.S. 1 (2016) (4-4 decision due to Justice Scalia's death).
[35] Greg Rosalsky, You may have heard of the 'union boom.' The numbers tell a different story, NPR, Feb. 28, 2023, https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story.

enshrine inequality and protect the wealthy.[36] The well-known exceptions to this rule, in which the Warren Court strengthened civil rights in the 1950s and 60s, are discussed below in Section I.D.

1. Permitting oppression of racial and ethnic minorities & preventing Congress from fighting racial inequality and violence

The Supreme Court's pattern of invalidating federal laws in order to entrench racial hierarchy began with perhaps its most infamous decision, *Dred Scott v. Sandford*, in 1857. *Dred Scott* was an enslaved Black man who sued for his freedom after his owners brought him out of a slave state. The Court, in an attempt to resolve the national controversy about slavery, held that enslaved Black people were not citizens entitled to the protections of the Constitution. The decision also struck down the Missouri Compromise, which banned slavery in some federal territories, as an unconstitutional limitation on slaveowners' property rights.[37] Rather than settling the controversy about slavery, the racist and indefensible decision helped spark the Civil War.

During the Reconstruction period after the Civil War, Congress passed numerous laws to safeguard the rights of formerly enslaved people and to implement the Reconstruction Amendments.[38] The Court responded by striking down or narrowing many of these laws. In 1876, in *U.S. v. Cruikshank*, the Court overturned the federal convictions of vigilantes who carried out the Colfax Massacre in Louisiana, which killed 60–150 Black people, holding that a law Congress had passed to protect citizens against deprivation of their rights did not apply to the actions of private parties, including lynch mobs, or state governments.[39] In The Civil Rights Cases in 1883, it invalidated key parts of the Civil Rights Act of 1875, and held that the Thirteenth and Fourteenth Amendments did not give Congress the power to prohibit racial discrimination by private entities like inns and theaters.[40]

"Dred Scott was an enslaved Black man who sued for his freedom after his owners brought him out of a slave state. The Court, in an attempt to resolve the national controversy about slavery, held that enslaved Black people were not citizens entitled to the protections of the Constitution."

These decisions extinguished Congress's power to give meaning to the new constitutional provisions, and permitted decades of racist disenfranchisement, segregation, and racial terror against Black people.

In more recent years, the Court has continued to strike down policies intended to remedy racial discrimination and increase diversity, including affirmative action programs in federal contracting implemented through

[36]Bowie, supra note 9, at 3-11.
[37]*Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[38]The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution are known as the Reconstruction Amendments, and were intended to ensure equality and rights for formerly enslaved people. The Thirteenth Amendment abolished slavery except as punishment for a crime. The Fourteenth was intended to ensure full citizenship rights and the equal protection of the laws for all people born in the United States, including Black people and the formerly enslaved. The Fifteenth Amendment prohibits discrimination in voting rights on the basis of "race, color, or previous condition of servitude."
[39]*U.S. v. Cruikshank*, 92 U.S. 542 (1875).
[40]Civil Rights Cases, 109 U.S. 3 (1883).

federal law[41] and private and public affirmative action programs in college admissions.[42] The Supreme Court's recent decision striking down affirmative action in higher education is likely to significantly reduce the number of students who are Black or from other underrepresented groups at colleges that previously used affirmative action, and to deprive all students of the improved educational outcomes that diversity brings.[43]

While the Court has frequently struck down federal laws intended to end racial hierarchy, particularly in the post-Civil War period, it has repeatedly let stand state and federal policies that perpetuate racial hierarchy. In 1896 in *Plessy v. Ferguson*, it upheld a Louisiana law requiring Black people to ride in separate train cars from white people.[44] Three years later it rejected a challenge to part of the federal Chinese Exclusion Act, in a decision that described Chinese people as "vast hordes" and reasoned that the U.S. should be able to exclude "foreigners of a different race . . . who will not assimilate with us."[45] In the early 1900s the Court held that Congress could disregard treaties with Native American tribes.[46] During World War II, it upheld the internment of Japanese-Americans in *Korematsu v. United States*.[47] In 2018, while purporting to finally repudiate *Korematsu*, the Court continued its pattern of permitting sweeping discriminatory federal policies based on a fig leaf of non-discriminatory justifications by rejecting a challenge to President Donald Trump's "Muslim ban," which restricted travel into the United States from several mostly Muslim nations.[48]

" Three years later it rejected a challenge to part of the federal Chinese Exclusion Act, in a decision that described Chinese people as "vast hordes" and reasoned that the U.S. should be able to exclude "foreigners of a different race . . . who will not assimilate with us.""

2. Weakening democracy

The Court's jurisprudence about democracy overlaps considerably with its decisions about racial hierarchy, described above, and displays the same pattern: with the exception of important Warren Court decisions, the Court has repeatedly struck down federal laws intended to strengthen democracy, and ruled on cases involving state laws in ways that weakened peoples' ability to elect representatives of their choosing.

In 1903, the Court rejected a challenge to new voter suppression provisions of the Alabama Constitution which, although facially neutral, allowed almost all white men to register to vote and barred almost all Black people from registering.[49] This, combined with the Court's other post-Civil War decisions and the end of Congressional Reconstruction, allowed states in

[41] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
[42] *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023).
[43] Elise Colin, Bryan J. Cook, The Future of College Admissions without Affirmative Action, UrbanWire, June 23, 2023, https://www.urban.org/urban-wire/future-college-admissions-without-affirmative-action (when California and Michigan banned race-conscious affirmative action, the result was a 12% decline in underrepresented groups across the UC system, with up to a 60% drop at UC Berkeley and UCLA, and Black undergraduate enrollment dropped by nearly half at the University of Michigan between 2006 and 2021).
[44] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[45] *Chae Chang Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581 (1889).
[46] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[47] *Korematsu v. United States*, 323 U.S. 214 (1944).
[48] *Trump v. Hawaii*, 585 U.S. 667 (2018).
[49] *Giles v. Harris*, 189 U.S. 475, 488 (1903).

the former Confederacy to disenfranchise Black people and deprive them of political power for generations.[50]

More than 50 years later, Congress passed the Voting Rights Act (VRA) to give meaning to the Fifteenth Amendment's guarantee of racial political equality. The VRA barred state and local governments from imposing voting rules that "result in the denial or abridgement" of the right to vote on account of race or color," and required states and jurisdictions with a history of voting rights violations to get "preclearance" from the Justice Department before changing their voting systems.[51] The law was the most successful piece of civil rights legislation in the history of the United States, resulting in sharp increases in Black voter registration.[52] Congress reauthorized the law several times, including most recently in 2006, with broad bipartisan support. But in 2013, the Court struck down a key part of the "preclearance" requirement of the VRA in *Shelby County v. Holder*.[53] The jurisdictions previously covered by the preclearance requirement responded by implementing nearly 100 voting restrictions in the next 10 years, resulting in a growing turnout gap between white and nonwhite voters.[54]

" The jurisdictions previously covered by the preclearance requirement responded by implementing nearly 100 voting restrictions in the next 10 years, resulting in a growing turnout gap between white and nonwhite voters."

The Court has also repeatedly struck down federal campaign finance laws as violations of the First Amendment,[55] with the result that our elections are flooded with nearly unlimited money through super PACs funded by corporations, wealthy individuals, and dark money groups that do not disclose their donors.[56] This contributes to a political system in which, as two political scientists found, "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence."[57]

In two other important democracy cases involving the application of the Constitution to state laws or policies, the Court weakened voters' ability to elect their own representatives, and also helped the Republican party. In 2000, in one of its most blatantly partisan decisions, the Court stopped a vote recount in Florida, handing the presidential election to George W. Bush, on the basis of a newly invented

[50]Richard H. Pildes, Democracy, Anti-Democracy, and the Canon, Constitutional Commentary, Vol. 17, 2000, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=224731.
[51]*Shelby County v. Holder*, 570 U.S. 529 (2013).
[52]Kareem Crayton, The Voting Rights Act Explained, Brennan Center for Justice, July 17, 2023, https://www.brennancenter.org/our-work/research-reports/voting-rights-act-explained.
[53]*Shelby County v. Holder*, 570 U.S. 529 (2013).
[54]Kevin Morris, Peter Miller, and Coryn Grange, Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act, Brennan Center for Justice, Aug. 20, 2021, https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights.
[55]*Buckley v. Valeo*, 424 U.S. 1 (1976) (striking down federal limits on election expenditures); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[56]Daniel I. Weiner, Citizens United Five Years Later, Brennan Center for Justice, Jan. 15, 2015, https://www.brennancenter.org/our-work/research-reports/citizens-united-five-years-later.
[57]Martin Gilens and Benjamin I. Page, Testing Theories of American Politics: Elite, Interest Groups, and Average Citizens, Cambridge University Press (Sept. 18, 2014), cambridge.org/core/journals/perspectives-on-politics/article/testing-theories-of-american-politics-elites-interest-groups-and-averagecitizens/62327F513959D0A304D4893B382B992B; see also Andrew Prokop, Study: Politicians listen to rich people, not you, Vox (Jan. 28, 2015), vox.com/2014/4/18/5624310/martin-gilens-testing-theories-of-american-politics-explained.

constitutional principle the Court said was valid for that case only.[58] And in *Rucho v. Common Cause* (2019), it closed the doors of federal courts to constitutional challenges to partisan gerrymanders on the ground that such cases present non-justiciable "political questions."[59] While both political parties have used partisan gerrymanders, in recent years Republicans have been the primary beneficiaries, as they have used computer models to draw bizarrely shaped districts to favor their candidates and prevent Democratic voters from having electoral power commensurate with their numbers.[60]

3. Blocking gun safety and laws fighting violence against women

The Court has struck down both federal and state laws intended to tackle gun violence and violence against women. It invalidated parts of the federal Brady Handgun Violence Prevention Act in 1997,[61] and parts of the federal Violence Against Women Act in 2000.[62]

In *District of Columbia v. Heller* (2008) and *New York State Rifle & Pistol Ass'n v. Bruen* (2022), the Court held that individuals have a Second Amendment right to own firearms and carry them in public, and struck down state gun safety laws, including New York's requirement that applicants show why they needed a concealed carry license.[63] The holding in Bruen freezes policy-makers' ability to regulate guns, limiting them to the types of regulations in effect at the time the Second Amendment was enacted—effectively invalidating almost all state restrictions on public carrying of guns, and blocking voters' ability to advocate for policies to address the scourge of gun violence.

4. Permitting state abortion bans

Until two years ago, *Roe v. Wade* (1973) was one of the vaunted Warren Court decisions progressives would point to as an example of why judicial review was necessary to protect the rights of less-powerful people. *Roe* protected pregnant peoples' right to abortion free from undue state interference under the Fourteenth Amendment.[64] But in the decades after *Roe* was decided, the Court began to permit more and more state restrictions on abortion.[65] When Donald Trump was running for office in 2016, he pledged to appoint justices who

"As of May 1, when Florida's six-week abortion ban took effect, the 21 million women of reproductive age who live in the dozen southern states that have banned abortion have been left essentially without access to the procedure, unless they can access self-managed abortion or find the resources to travel hundreds of miles."

[58] *Bush v. Gore*, 521 U.S. 98, 109 (2000).
[59] *Rucho v. Common Cause*, 588 U.S. 684 (2019).
[60] Adam Liptak, Supreme Court Bars Challenges to Partisan Gerrymandering, New York Times, June 27, 2019, https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html.
[61] *Printz v. United States*, 521 U.S. 898 (1997).
[62] *United States v. Morrison*, 529 U.S. 598 (2000).
[63] *District of Columbia v. Heller*, 554 U.S. 570 (2008); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).
[64] *Roe v. Wade*, 410 U.S. 113 (1973).
[65] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

would "automatically" overturn *Roe*.[66] In 2022, the Court did as he said in *Dobbs v. Jackson Women's Health Organization*, overturning a nearly 50-year-old precedent and permitting states to ban abortion.[67]

As a result of *Dobbs*, many states have banned abortion almost entirely or severely limited its availability, with devastating impacts. As of May 1, when Florida's six-week abortion ban took effect, the 21 million women of reproductive age who live in the dozen southern states that have banned abortion have been left essentially without access to the procedure, unless they can access self-managed abortion or find the resources to travel hundreds of miles.[68] Abortion bans have also reduced access to contraception and other types of women's health care and increased maternal mortality, including because of intimate partner violence and homicide against pregnant people.[69] The impacts are disproportionately severe for Black, American Indian, and Alaska Native women, who are more likely to live in states with abortion bans and restrictions, and other women of color who have higher uninsured rates, more limited financial resources, and worse maternal health outcomes.[70]

5. Preventing Congress from addressing inequality, COVID-19, climate change

The Court has invalidated federal and state laws intended to address economic inequality, climate change, and the COVID-19 pandemic, all based on dubious constitutional reasoning and, recently, a newly-invented "major questions doctrine."

In 1895, the Supreme Court struck down the federal income tax. As Justice Henry Brown wrote in dissent, "The decision involves nothing less than the surrender of the taxing power to the moneyed class."[71] That decision was overruled by the adoption of the Sixteenth Amendment in 1913.

In 2012, the Court held that Congress could not expand Medicaid to states that did not agree to that expansion,[72] leaving 1.5 million people without Medicaid coverage.[73]

Over the last few years, the Court has invented a new doctrine, known as the "major questions doctrine," to justify invalidating federal agency decisions it disagrees with. Under the doctrine, the Court can strike down an agency's action even though Congress passed a law broad enough to allow the agency to take that action, simply because the Court says the topic is too important to believe that Congress meant to allow an agency to take it. In 2022, it used that doctrine to limit the EPA's power to regulate greenhouse gas emissions from existing power plants to fight climate change.[74] The Court also used the major questions doctrine, among other reasoning, during the COVID-19 pandemic to invalidate federal and state actions intended to protect workers, renters, and others from COVID-19, often using brief, unsigned opinions on the "shadow docket."[75] And it cited the doctrine again last year when it struck down a Biden administration agency action which

[66]Dan Mangan, Trump: I'll appoint Supreme Court justices to overturn *Roe v. Wade* abortion case, CNBC, Oct. 19, 2016, https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

[67]*Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

[68]Holly Honderich, New Florida six-week abortion ban will be felt beyond the state, BBC, May 1, 2024, https://www.bbc.com/news/world-us-canada-68925009.

[69]Swapna Reddy and Mary Saxon, Arizona's now-repealed abortion ban serves as a cautionary tale for reproductive health care across the US, The Conversation, May 8, 2024, https://theconversation.com/arizonas-now-repealed-abortion-ban-serves-as-a-cautionary-tale-for-reproductive-health-care-across-the-us-228077.

[70]Latoya Hill, Samantha Artiga, Usha Ranji, Ivette Gomez, and Nambi Ndugga, What are the Implications of the *Dobbs* Ruling for Racial Disparities?, KFF, Apr. 24, 2024, https://www.kff.org/womens-health-policy/issue-brief/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities/.

[71]*Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 695 (1895).

[72]National Federation of Independent *Business v. Sebelius*, 567 U.S. 519 (2012).

[73]Patrick Drake, Jennifer Tolbert, Robin Rudowitz, and Anthony Damico, How Many Uninsured Are in the Coverage Gap and How Many Could be Eligible if All States Adopted the Medicaid Expansion?, KFF.org, Feb. 27, 2024, https://www.kff.org/medicaid/issue-brief/how-many-uninsured-are-in-the-coverage-gap-and-how-many-could-be-eligible-if-all-states-adopted-the-medicaid-expansion/.

[74]*West Virginia v. EPA*, 597 U.S. 697, 766 (2022) (Kagan, J., dissenting) (noting that the majority opinion "announces the arrival of the major questions doctrine").

[75]*National Federation of Ind. Businesses v. Dep't of Labor*, 142 S.Ct. 661 (2022) (per curiam); *Alabama Ass'n of Realtors v. Dep't of Health and Human Services*, 141 S.Ct. 2485 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

would have canceled up to $400 billion in student loan debt.[76]

C. The current Court is not an aberration

Viewed in the context of history, the current Supreme Court's hostility to pro-people laws and its willingness to impose its own partisan and policy preferences through its decisions are not an aberration. The current Court is more extreme in some ways than many Supreme Courts past, but its antidemocratic rulings are part of a long tradition. As Ryan Doerfler and Samuel Moyn put it, the problem with the Supreme Court is not just "institutional capture by the right," but that the "institution is undemocratic in role and output." The solution is not to "put things back the way they were," but to "question the way they have consistently been."[77]

Associate Justice Brett M. Kavanaugh

"Right-wing politicians' willingness to spend huge amounts of political capital, and capital capital, to secure these Supreme Court seats points to the obvious fact that they expected that effort to yield significant partisan gains."

The current 6–3 ultra-conservative supermajority on the Court is the result of outrageous norm-breaking by right-wing elected officials over the course of several years. Republicans in the Senate refused to even consider President Barack Obama's nomination of Merrick Garland after Justice Antonin Scalia died in 2016, and floated the idea that they would continue to blockade any Democratic nominee to the Court if Hillary Clinton was elected in 2016.[78] This effectively reduced the size of the Court to eight for more than a year—even though Congress did not pass a law to change the Court's size—and ultimately resulted in the confirmation of Neil Gorsuch in 2017. Republican Senators confirmed Justice Brett Kavanaugh in 2018 despite credible allegations of sexual assault against him.[79] And in 2020, they rushed to confirm Justice Amy Coney Barrett just days before the end of the presidential election in which voting had already begun.

[76] *Biden v. Nebraska*, 600 U.S. ___, 143 S.Ct. 2355 (2023).
[77] Doerfler and Moyn, supra note 9, at 1711.
[78] Nina Totenberg, If Clinton Wins, Republicans Suggest Shrinking Size of Supreme Court, NPR, Nov. 3, 2016, https://www.npr.org/2016/11/03/500560120/senate-republicans-could-block-potential-clinton-supreme-court-nominees.
[79] Maeve Sheehey, Christine Blasey Ford lawyers call Kavanaugh investigation a 'sham' after new details emerge, Politico, July 23, 2021, https://www.politico.com/news/2021/07/23/christine-blasey-ford-brett-kavanaugh-investigation-new-details-500652.

The sordid circumstances surrounding the three Trump justices' appointments add to the already antidemocratic makeup of the Court majority. The three Trump justices were appointed by a President who lost the popular vote.[80] Four of the right-wing supermajority were confirmed by Senators representing a minority of the population.[81]

Right-wing politicians' willingness to spend huge amounts of political capital, and capital capital,[82] to secure these Supreme Court seats points to the obvious fact that they expected that effort to yield significant partisan gains. And it did: the Court now routinely enacts, through its decisions, policy outcomes that corporations and the Republican party favor but are not able to enact through the elected branches of government. The justices have also vastly increased the number of cases they resolve through the shadow docket without hearing full arguments and without bothering to explain their reasoning.[83] They have also acted in ways that would certainly violate ethics rules if any such rules applied to them, including by accepting lavish gifts and trips from politically connected billionaires without disclosing them,[84] refusing to recuse themselves in cases involving their family members,[85] and criticizing the media for correctly pointing out the Court's legitimacy problems.[86]

While this behavior is all unjustifiable and harmful to democracy, it would be inaccurate to see it as a dramatic departure. Instead, the current Court is better understood as an exaggerated version of the Supreme Court's long-standing antidemocratic role as protector of the interests of the powerful.

"Many of the progressive Court opinions were actually enforcing a federal law, not invalidating one."

D. Progressive rulings do not outweigh this history

Notwithstanding the long history discussed above, the Supreme Court decision that is perhaps most prominent in the public imagination is the Warren Court decision *Brown v. Board of Education* (1954), which held that *de jure* segregation in schools was unconstitutional. Our national reverence and nostalgia for the Warren Court—and tendency to see it as a hero of the civil rights movement—do a lot to prop up the idea that strong judicial review is necessary to protect peoples' fundamental rights, especially those of less-powerful minorities.

However, it's important to understand a bit more about *Brown* and the context in which it was decided. As a matter of history, it is more accurate to see progressive decisions like *Brown* as following the broad sweep of public opinion, rather than standing up to it. The Brown decision overruled the Court's 1896 decision in *Plessy v. Ferguson*, which held that "separate but equal" was constitutionally permissible. In the late 1800s, the white ruling class wanted to preserve

[80]President G.W. Bush appointed Chief Justice Roberts and Justice Alito in 2005. President G.W. Bush lost the popular vote when he was first elected in 2000, but he did win the popular vote in 2004 before he nominated the two justices.
[81]Philip Bump, The minoritarian third of the Supreme Court, Washington Post, Dec. 2, 2021, https://www.washington-post.com/politics/2021/12/02/minoritarian-third-supreme-court/ (Justices Thomas, Gorsuch, Kavanaugh, and Barrett).
[82]Marianne Levine, Judicial Crisis Network launches $3 million ad campaign for Barrett, Politico, Sept. 26, 2020, https://www.politico.com/news/2020/09/26/judicial-crisis-network-barrett-ad-campaign-422052 (noting a "broader $25 million conservative push" for Justice Barrett and millions more spent on the confirmations of Justices Gorsuch and Kavanaugh).
[83]Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023); David Leonhardt, Rulings without explanations, New York Times (Sept. 3, 2021), nytimes.com/2021/09/03/briefing/scotus-shadow-docket-texas-abortion-law.html.
[84]Justin Elliott, Joshua Kaplan, and Alex Mierjeski, Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court, ProPublica, June 20, 2023, https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court.
[85]Nina Totenberg, Legal ethics experts agree: Justice Thomas must recuse in insurrection cases, NPR March 30, 2022, npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases.
[86]Adam Serwer, By Attacking Me, Justice Alito Proved by Point, The Atlantic, Oct. 12, 2021, theatlantic.com/ideas/archive/2021/10/alito-supreme-court-texas-abortion/620339/.

racial segregation, and the Court permitted that. Fifty years later, public—and particularly elite—opinion was beginning to change, due to the nascent civil rights movement and the perceived need, growing out of World War II and the Cold War, for the United States to reject segregation to show the rest of the world that democracy was a just form of government.[87] Only then did the Court reverse itself, and begin to issue liberal rulings in an era when public opinion was broadly liberal.[88]

Later progressive Court decisions, like *Obergefell v. Hodges*, which struck down state laws barring gay marriage,[89] were also generally consistent with public opinion, which had changed in favor of marriage equality starting in the early 2000s.[90]

History also shows that it has more often been Congress, not the courts, that has acted to enforce constitutional values like racial equality.[91] This was even true during the civil rights era: while *Brown* stated that segregated schools were unconstitutional, desegregation in Southern schools did not begin in earnest until after Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[92] Neither did the Court's decision itself shift public opinion on civil rights; that was the result of the work of movement organizing and protest, and public rejection of the violence and brutality of Southern resistance to it.[93]

It is also key that many of the progressive Court opinions were actually enforcing a federal law, not invalidating one. When federal courts hear constitutional challenges to state laws, they are almost always doing so under a Reconstruction-era federal law, 42 U.S.C. § 1983. Both *Brown* and *Obergefell* were brought under § 1983. Congress passed § 1983 as part of the Ku Klux Klan Act of 1871 to give individuals the ability to sue state and local government officials who violate their federal constitutional rights. When federal courts hear cases under § 1983, they are enforcing a Congressional judgment about what was necessary to make real the Constitution's promises of equal rights and racial justice after the end of slavery—not second-guessing Congress's decisions.[94]

To put it a different way, when the Supreme Court strikes down a federal law on the ground that it violates the Constitution, it denies the American people the ability to determine their government's policies and assert their own understanding of what the Constitution allows through laws enacted by their elected representatives. By contrast, when federal courts overturn state laws as violating the Constitution, they are enforcing the supremacy of the federal Constitution over states.[95] Federal supremacy is justified by an American history in which states have frequently and sometimes violently disregarded Constitutional guarantees. It is also necessary in a country with 50 states, and is required by the Constitution's Supremacy Clause.

Consistent with the different constitutional meaning of federal courts striking down state versus federal laws, most versions of court reform would preserve federal courts' ability to strike down state laws, as the Court did in *Brown, Roe, and Obergefell*.

To be sure, there are cases in which the Supreme Court has struck down state laws as unconstitutional in ways that promote inequality and injustice. *Janus v. AFSCME*, the Court's attack on public sector unions, and Bruen and its progeny, invalidating swaths of state gun safety laws, are two examples. Congress could address these cases through targeted court reform. For example, it could

[87]Mary L. Dudziak, Brown as a Cold War Case, Journal of American History, Volume 91, Issue 1, 32–42, June 2004, https://doi.org/10.2307/3659611; Michael Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 173 (2004).
[88]Ben Johnson and Logan Strother, The Supreme Court hasn't followed public opinion for 50 years. Why would it start now?, Washington Post, Oct. 17, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/17/the-supreme-court-hasnt-followed-public-opinion-for-50-years-why-would-it-start-now/.
[89]*Obergefell v. Hodges*, 576 U.S. 44 (2015).
[90]Justin McCarthy, U.S. Support for Gay Marriage Stable After High Court Ruling, Gallup, July 17, 2015, https://news.gallup.com/poll/184217/support-gay-marriage-stable-high-court-ruling.aspx.
[91]Bowie, supra note 9, at 8.
[92]Id.; Klarman, supra note 87, at 362-63.
[93] Klarman, supra note 87, at 7, 253, 381-85.
[94]Bowie and Renan, supra note 7.
[95]Id. at 7-8.

pass a federal law on the relevant subject, such as public sector unions[96] or gun safety, and could include language preempting state legislation and also stripping courts of jurisdiction to hear challenges.[97] Other court reform tools, such as court expansion, could also get at this problem indirectly.

The federal courts have also, at times, struck down federal laws because they violated the rights of less-powerful minorities. In *United States v. Windsor* (2013), the Court struck down the federal Defense of Marriage Act, which denied federal recognition of same-sex marriages,[98] and in *Boumediene v. Bush* (2008), it invalidated the Military Commissions Act of 2006 because it violated the constitutional rights of Guantanamo Bay detainees.[99] While these decisions were important, there are relatively few of them compared to the numerous harmful Court decisions discussed in this section. These decisions also generally followed public opinion. The Defense of Marriage Act was enacted in 1996, and was challenged in federal court a number of times without success in the first years after its enactment.[100] But by the time the Supreme Court struck it down in *Windsor* seven years later, gay marriage was already legal in more than ten states, due in large part to successful organizing work by activists, and public opinion was changing rapidly in favor of marriage equality.[101]

It is difficult, or perhaps impossible, to identify a Supreme Court decision which went against public opinion to strike down a federal law as unconstitutional because it violated the rights of less-powerful minorities.

It is certainly possible to imagine a "nightmare scenario" in which Congress could pass a blatantly unconstitutional law—for instance, barring Black people from voting—and use jurisdiction stripping to make the federal courts powerless to invalidate it.[102] Realistically, though, there is no reason to have faith that the courts in such a society would stand up for minority rights either.

"It is difficult, or perhaps impossible, to identify a Supreme Court decision which went against public opinion to strike down a federal law as unconstitutional because it violated the rights of less-powerful minorities."

This examination of the sweep of Supreme Court decisions throughout history makes clear that the Court has generally been an undemocratic force. In area after area—labor, racial equality, democracy, abortion, inequality, climate change—it has struck down laws passed by Congress to guarantee equality and rights for less-powerful groups, while refusing to intervene when Congress has enacted unjust laws.

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[96]See Public Service Freedom to Negotiate Act of 2021, H.R. 57527 (2021-22).
[97]Congress could also hypothetically pass a law to remove certain types of cases from federal courts' power to adjudicate the constitutionality of state laws under 42 U.S.C. § 1983. However, it seems sounder for it to affirmatively legislate on a particular topic than to set the precedent of changing the scope of Section 1983, which is a broad and vital civil rights law.
[98]*United States v. Windsor*, 570 U.S. 744 (2013).
[99]*Boumediene v. Bush*, 553 U.S. 723 (2008).
[100]Pew Research Center, Fact Sheet: Same-Sex Marriage in the Courts, Dec. 7, 2012, https://www.pewresearch.org/religion/2012/12/07/same-sex-marriage-in-the-courts/.
[101]Human Rights Campaign, The Journey to Marriage Equality in the United States, https://www.hrc.org/our-work/stories/the-journey-to-marriage-equality-in-the-united-states (last visited April 26, 2024); Pew Research Center, Report: Growing Support for Gay Marriage: Changed Minds and Changing Demographics, March 20, 2013, https://www.pewresearch.org/politics/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/.
[102]Sprigman, Jurisdiction Stripping as a Tool for Democratic Reform, supra note 9, at 13.

"There is an inherent democratic legitimacy problem when unelected judges strike down legislation passed by living voters' elected representatives on the basis of the judges' interpretations of a constitution that is very old, short, vague, and difficult to amend."

In so doing, it has interpreted the Constitution as protecting the powerful against democratic challenge and taken power to make policy away from the peoples' elected federal representatives to keep for itself. It has made some progressive and pro-democracy rulings, especially during the Warren Court era, but those do not outweigh the overall antidemocratic character of its history.

Most of its celebrated decisions, like *Brown v. Board of Education*, actually enforced federal law in striking down unconstitutional state laws, and were also generally consistent with public opinion.

The next section will set forth how court reform would strengthen democracy, both by increasing democratic legitimacy and allowing a more egalitarian vision of the Constitution to prevail.

II. COURT REFORM WOULD STRENGTHEN DEMOCRACY

In addition to protecting progressive policies from invalidation by the courts, court reform tools that would prevent or make it difficult for courts to overrule statutes on constitutional grounds would make our system of government more democratic. Under our current system of judicial review and judicial supremacy, unelected judges often effectively veto laws passed by Congress, and chill Congress or advocates from even attempting to pass laws because of the risk that courts might strike them down. It would be more consistent with democracy—the idea that people, through their representatives, should determine the policies that govern them—to eliminate or significantly reduce the courts' ability to do this based on judges' interpretation of a very old constitution which is written in general terms and very difficult to amend.[103] Court reform could also improve the public's perception of the Supreme Court, which is currently at a historic low, by giving it a more appropriately sized role and bringing it more in line with the public's views about the Constitution. There is also ample precedent for court reform in U.S. history.

Court reform would strengthen our constitutional democracy by allowing people, through social movements, to sway our national understanding of the Constitution. Social movements have long made implicit or explicit claims about the meaning of the Constitution,[104] but judicial review has stunted and silenced these claims. Court reform would change this by de-centering the courts as the only bodies allowed to interpret the Constitution, and allowing people and social movements to have more power to advance their own visions of what the Constitution means.

[103]Making it easier to amend the Constitution would help our constitutional democracy considerably. Unfortunately and ironically, doing so would require amending the Constitution, which is such an onerous process that this report does not address any reforms that would require Constitutional amendments.
[104]Kate Andrias, Building Labor's Constitution, 94 Tex. L. Rev. 1591, 1593-94 (2016). https://scholarship.law.columbia.edu/faculty_scholarship/2858/ [hereinafter Andrias, Building Labor's Constitution].

A. Court reform would increase democratic legitimacy

In the context of court reform, "legitimacy" can mean several things. When thinking about the proper role of courts, democratic legitimacy, in the sense of whether our overall system of government is a functioning multiracial democracy, should be the overall goal.

As part of a functioning multiracial democracy, it is necessary to have a judiciary that is legitimate in the sense that its actions and holdings are defensible, that it does not encroach on the roles of the other branches of government, and that people have sufficient respect for the institution that they will abide by its rulings. But court legitimacy cannot mean that the judiciary's public approval rating is inflated because legal elites have managed to explain away or excuse glaring problems with the institution.

1. Federal policy should be set by democratically accountable officials, not judges' interpretations of a centuries-old document

There is an inherent democratic legitimacy problem when unelected judges strike down legislation passed by living voters' elected representatives on the basis of the judges' interpretations of a constitution that is very old, short, vague, and difficult to amend.[105] The American Constitution, including its amendments, is less than 8,000 words long. Most of it was adopted more than two hundred years ago. Most of it was written and enacted by men who did not consider Black people, women, Native Americans, or non-property owning men to be worthy of the vote. It is perhaps more difficult to amend than any constitution in the world.[106] When the Supreme Court decides whether contemporary laws are constitutionally permissible, it does so by interpreting vague constitutional phrases like "due process of law" and "cruel and unusual punishment," and sometimes by making inferences from the document's structure or history, all of which are highly subject to disagreement and interpretation, whether in good faith or otherwise.

"Our system of judicial review chills policy-makers and activists from even trying to enact laws they know or fear would be struck down by the courts."

President Abraham Lincoln made the point that judicial review presents a problem for democratic legitimacy in his first inaugural address, after the infamous *Dred Scott* decision. "[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court," he said, then "the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."[107]

This legitimacy problem has become worse over the course of U.S. history as the federal courts have amassed increasing swaths of policy-making power to themselves and shown no signs of being deferential to the judgment of Congress and the president about what the Constitution permits.[108] When President Lincoln spoke against judicial review before the Civil War, the Supreme Court had only struck down three federal laws over the first 70+ years of the country's existence.

[105]Christopher Jon Sprigman, Congress's Article III Power and the Process of Constitutional Change, 95 N.Y.U. L. REV. 1778, 1798-99 (2020), https://www.nyulawreview.org/wp-content/uploads/2020/12/NYULawReview-Volume-95-Issue-6-Sprigman.pdf [hereinafter Sprigman, Congress's Article III Power].
[106]Richard Albert, The World's Most Difficult Constitution to Amend?, 110 California Law Review 2005 (Dec. 2022), https://www.californialawreview.org/print/the-worlds-most-difficult-constitution-to-amend. Amending the U.S. Constitution requires a two-thirds vote of both Houses of Congress, or a request for a convention by two-thirds of the States, and ratification by three-fourths of State Legislatures or state ratifying conventions.
[107]Abraham Lincoln, First Inaugural Address, Mar. 4, 1861, The Avalon Project, Yale Law School, https://avalon.law.yale.edu/19th_century/lincoln1.asp.
[108]Sprigman, Congress's Article III Power, supra note 105, at 1798-99.

By contrast, in less than twenty years of the Roberts court, the Supreme Court has struck down, in whole or in part, nearly 30 federal laws.[109]

In addition to vetoing laws and policies that have actually been enacted, our system of judicial review chills policy-makers and activists from even trying to enact laws they know or fear would be struck down by the courts. For instance, given current Supreme Court doctrine, if Congress were to pass democracy-enhancing laws ending the flood of corporate money in politics,[110] barring states from imposing voter ID laws, or disenfranchising people convicted of crimes, they would almost certainly be struck down in court. Similarly, while labor lawyers and scholars have generated a flood of excellent recommendations for how to improve our inadequate and outdated labor laws within the constraints of current Constitutional doctrine,[111] some imaginable reforms are off the table because of the Supreme Court: for example, a federal law granting union organizers a general right of access to workplaces to speak to workers about their union rights,[112] or one limiting corporate executive pay to some reasonable multiple of the pay of the lowest-compensated employee of the company or its subcontractors. The same would be true of federal laws tackling gun violence by significantly limiting peoples' rights to buy and carry guns,[113] or creating a general right to health care or adequate education.

A system that permitted the people currently governed by the Constitution, and their elected representatives, freer range to enact policies of their choice would be much more democratic and legitimate than one that allows judges to rope off large numbers of those choices for themselves.

2. The public's low estimation of the Supreme Court is earned, but could be improved by court reform

"It is important to be clear that the current low state of public opinion about the Court is due to the Court's own actions and those of the presidents and senators who staffed it."

Another meaning of "legitimacy" is public support for the Court and public acceptance of the Court's decisions. It is certainly true that the Court is currently low on this type of legitimacy. But this does not constitute an argument against court reform. It is not a valid goal to prop up public support for the Court at the expense of the democratic legitimacy of our system of government in general.

It is important to be clear that the current low state of public opinion about the Court is due to the Court's own actions and those of the presidents and senators who staffed it. Right-wing court-packing between 2016 and 2020; the fact that multiple justices were nominated and appointed by elected officials who did not represent a majority of voters; its shadow docket and ethics shenanigans; its enthusiasm for overturning long-standing precedents in service of corporate and partisan interests; and particularly its decision to allow states to ban abortion, all contributed to the public's historically low trust in it.

[109]Cong. Rsch. Serv., Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court, Constitution Annotated, https://constitution.congress.gov/resources/unconstitutional-laws (last visited Apr. 23, 2024) [hereinafter C.R.S., Table of Laws Held Unconstitutional] (listing 3 cases between 1789 and 1861, and 29 cases between 2005 and 2024, in which the Court struck down federal laws in whole or in part as unconstitutional).
[110]See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[111]Sharon Block and Benjamin Sachs, Clean Slate for Worker Power: Building a Just Economy and Democracy, Harvard Law School Center for Labor and a Just Economy, Jan. 23, 2020, https://clje.law.harvard.edu/clean-slate/.
[112]See *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).
[113]See *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

"Labor's goals of democratizing the workplace and the government go hand in hand with court reform's goal of allowing people and entities other than the federal courts to make claims about what the Constitution means."

Reforming the courts to address these problems could give the court a smaller, more appropriate role, and lead to a Court more in line with the peoples' current views of the Constitution. This would have the side effect of improving the public's trust in the institution, and importantly, that trust would be earned.

3. There is plenty of precedent for court reform

Sometimes arguments about legitimacy equate to a concern that court reform would be an unprecedented change, and thus would be risky. But none of the court reform proposals under discussion now are unprecedented; throughout U.S. history, Congress has frequently taken back power from the courts. Just as a few examples, Congress has passed laws to change the number of seats on the Supreme Court seven times, in each case giving the elected officials who made the change more power over the Court's membership, and thus more power to bring the Court's views into line with their own.[114]

Congress has passed hundreds of jurisdiction stripping or channeling laws barring courts from hearing certain cases or categories of cases. These include a Reconstruction-era law preventing the Supreme Court from considering a pending case challenging the Military Reconstruction Act; the Norris-La Guardia labor law of 1932, barring courts from issuing injunctions in labor disputes; the Emergency Price Control Act of 1942, channeling cases about wartime price controls to an Emergency Court of Appeals; and the 2023 debt-ceiling law, which barred courts from hearing challenges to approvals for the Mountain Valley Pipeline.[115]

B. Court reform would allow a more egalitarian, democratic constitutional vision to prevail

The end goal of court reform efforts should be to build a more democratic country, one in which more progressive interpretations of the Constitution advanced by people and

social movements are able to prevail. This section explores this by examining the labor movement's implicit and explicit claims about the meaning of the Constitution over time, and how those claims have clashed with and been constrained by the very different vision of the Constitution backed by corporations and the wealthy and embraced by the courts.[116]

The labor movement, like other social movements, has long made arguments grounded in the Constitution. For example, in the late 1800s and early 1900s, workers in the newly invigorated labor movement expressed their demands in explicitly constitutional terms,

[114]Presidential Commission on the Supreme Court of the United States, Final report, 67-69, Dec. 2021, https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [hereinafter Presidential Commission, Final Report] (Congress set the number of Supreme Court justices at 6 in 1789, then changed it to 5 in 1801; back to 6 in 1802; to 7 in 1807; to 9 in 1837; to 10 in 1863, to 7 in 1866, and to 9 in 1869).
[115]See discussion and citations infra Section III.B and C.
[116]See generally Kate Andrias, Constitutional Clash, supra note 9.

justifying their calls to organize, bargain for better working conditions, and have a voice at work as stemming from their fundamental rights to speech, association, and freedom from oppression as workers under the First, Thirteenth, and Fourteenth Amendments.[117]

When the Supreme Court began to uphold New Deal labor laws starting in the late 1930s, it briefly flirted with acknowledging labor collective action as a "fundamental right."[118] However, it quickly shifted to describing labor activity as purely economic, and thus entitled to a lower level of constitutional protection than Court-identified fundamental rights.[119] Over time, this framing contributed to unions' shift away from making broad claims about labor rights and the Constitution, and contributed to the public image of unions as self-interested entities that did not advance the public interest.[120]

As the 20th and 21st century Court's hostility to labor grew, the labor movement moved away from framing its claims in constitutional terms at all.[121] By the time the Supreme Court heard arguments in *Janus v. AFSCME* in 2018, public sector unions making the case for their own constitutional worth were limited by Supreme Court doctrine to making wan claims that unions help ensure "labor peace," rather than arguing that allowing workers to join together to improve their economic condition is itself an important constitutional value.

The last few years have seen a dramatic increase in public support for unions, in union organizing, and in strikes. During this time, the labor movement has advanced new constitutional claims, although today they are generally implicit rather than explicit.

As Kate Andrias argues, labor's new constitutional vision calls for strengthening democracy by expanding it to the workplace; guaranteeing workers' socioeconomic rights; including historically excluded workers; and insisting on a more democratic government.[122] Labor advances this vision in multiple ways, including by using a "bargaining for the common good" approach in collective bargaining to fight for policy changes that extend beyond the terms and conditions of members' jobs, and by pushing for sectoral bargaining systems like wage boards, through which workers, employers, and government can set standards industry-wide.[123] Workers and unions generally press their constitutional vision not in court, but before the public and democratically accountable bodies through strikes, protests, bargaining demands, and legislative and administrative advocacy. This is in part because courts are hostile to labor's substantive claims, but also because the labor movement is founded on a belief in peoples' collective power, not on the supreme declarations of judges.

Needless to say, labor's constitutional vision conflicts with the private property-focused, pro-corporate, hierarchical version of the Constitution articulated by the wealthy and powerful and embraced by the courts.[124]

Labor's vision for a more democratic, egalitarian Constitution—and its inconsistency with the Court's interpretation of the Constitution—provides a strong argument for court reform.

[117]Diana S. Reddy, After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions, 132 YALE L.J. 1391, 1396 (2023), https://www.yalelawjournal.org/feature/after-the-law-of-apolitical-economy; William E. Forbath, Workers' Rights and the Distributive Constitution, Dissent, Spring 2012, https://law.utexas.edu/faculty/wforbath/papers/forbath_workers_rights_and_the_distributive_constitution.pdf; James Gray Pope, Labor's Constitution of Freedom, 106 YALE L.J. 941 (1997).
[118]*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).
[119]Reddy, supra note 117, at 1414-15.
[120]Id. at 1418-1427.
[121]Kate Andrias, Building Labor's Constitution, supra note 104, at 1593; William E. Forbath, Workers' Rights and the Distributive Constitution, Dissent, Spring 2012, https://law.utexas.edu/faculty/wforbath/papers/forbath_workers_rights_and_the_distributive_constitution.pdf.
[122]Andrias, Constitutional Clash, supra note 9, at 1013.
[123]Id. at 1037-1042.
[124]Id. at 989-993.

Labor's goals of democratizing the workplace and the government go hand in hand with court reform's goal of allowing people and entities other than the federal courts to make claims about what the Constitution means. Court reform would broaden the futures and constitutional understandings that labor and other social movements can plausibly demand, beyond the restrictive boundaries drawn by the federal courts.

III. COURT REFORM TOOLS

There are numerous tools available to reform the federal courts, most of which have been used before at various points in American history. There is no one perfect reform that will solve all the problems with the federal courts, because there are multiple problems with the courts. The two primary problems—that the Supreme Court and many lower courts act as partisan policymakers who consistently hoard power for themselves, and that strong judicial review is inherently antidemocratic—are accompanied by other problems like unethical behavior by judges and the asymmetrical difficulty for Congress to overturn court misinterpretations of federal laws.

These different problems demand different solutions. Each reform has different strengths in terms of which problem it addresses and its possible negative consequences. Therefore, this section does not discuss these reforms with the aim of identifying a perfect or best one; rather, progressives should consider all of them.[125]

That being said, progressives should all take several steps now. They should support the Judiciary Act of 2023 to add four seats to the Court; this would address the problem of the current Court supermajority acting as a partisan, pro-corporate policy-maker. Advocates who are trying to move progressive federal laws or regulations that are in any danger of being struck down by federal courts—which is most progressive legislation—should add jurisdiction-stripping, jurisdiction-channeling, or supermajority language to protect those policies from the courts. Progressives should also work with members of Congress to draft and introduce a broader court reform bill, which could include multiple of the reform tools described below.

> **"Congress has passed laws to change the number of seats on the Court seven times."**

The reforms discussed in this section are court expansion; jurisdiction stripping; jurisdiction channeling; supermajority or unanimity requirements; a fast-track congressional fix for decisions misinterpreting statutes and regulations; and other complementary reforms, specifically ethics reform, shadow docket reform, lower court expansion, term limits, and laws to reverse antidemocratic doctrines.[126]

A. Court expansion

What is it?

Court expansion means adding seats to the Supreme Court.

[125]A few additional types of court reform have been proposed recently, including merit selection of Supreme Court justices; "partisan balance" proposals, in which the Supreme Court would be expanded to 15 justices, with 5 selected by each political party and 5 "neutral" members selected by the other 10; and "lottery" proposals that would have rotating groups of circuit court judges serve as justices. Daniel Epps & Ganesh Sitaraman, Supreme Court Reform and American Democracy, Yale L.J.F. 821, 822 (2021), https://www.yalelawjournal.org/forum/supreme-court-reform-and-american-democracy. We do not address these proposals because they are premised on the questionable idea that our democracy simply needs more centrist judges, and because to the extent they seek to change the composition of the current Supreme Court, Court expansion would accomplish that and is more uncontroversially possible to accomplish through legislation.

[126]Jurisdiction stripping and channeling, supermajority requirements, and fast-track congressional overrides of Supreme Court decisions interpreting federal laws are sometimes called "disempowering reforms," Doerfler and Moyn, supra note 9, at 1725, or "power-limiting" reforms, Stephen Vladeck, 76. A Taxonomy for Court Reform, Substack, Apr. 15, 2024, https://stevevladeck.substack.com/p/76-a-taxonomy-for-court-reform, because they would remove power from the courts. They might more positively be called "democratizing reforms" because they would shift power to democratically accountable branches of government. Other reforms, such as ethics reform and some shadow docket reforms, could be called "accountability-enhancing reforms." Id.

"However, Americans are correct to think that the current Court acts as a partisan political body. Corporate-backed right-wing elected officials have been working to pack it for this very reason for years. Trying to bolster public respect for the Court by pretending this is not the case is not a solid basis for a system of government."

What would it take to do it? Is that legal?

Congress could pass a law increasing the number of seats on the Supreme Court. Specifically, the Judiciary Act of 2023 would add four new seats, for a total of thirteen.

Court expansion is "uncontroversially legal."[127] The Constitution does not specify the number of justices on the Supreme Court; the Court's size is entirely up to Congress.

Has this ever been done before?

Yes. Congress has passed laws to change the number of seats on the Court seven times.[128] Each time, the change was justifiable for practical or other reasons, and also allowed the party making the change to influence the direction of the Court's rulings.[129] For instance, in 1837, on President Andrew Jackson's last day in office, Congress passed a law adding two new circuits and two new justices. There was a non-political justification for this: the country was growing, new circuits were needed, and the justices at the time "rode circuit," traveling to circuit courts to hear cases, so it made sense for the number of justices to match the number of circuits. But the law also served the political goal of permitting Jackson to nominate two justices as he left office, helping to consolidate the Democratic party's control of the Court.[130]

There is also a much more recent precedent for changing the size of the Court for political reasons, although in that case the change was unofficial and failed to go through the proper democratic process: Senate Republicans effectively reduced the number of justices to eight after Justice Scalia's death in 2016 by refusing to consider President Obama's nominee. Adding seats to the Court through the Judiciary Act of 2023 would restore balance to the current Court, and would do so in a way that respects the democratic process.

Which problem(s) of the federal courts would it help solve?

Court expansion would address the problem

"Court reform tools like Court expansion are one of the many ways the Constitution allows one branch of government to check another."

[127] Doerfler and Moyn, supra note 9, at 1753.
[128] See supra note 114.
[129] The Court as an Institution, Supreme Court of the United States website (last accessed March 28, 2024), https://www.supremecourt.gov/about/institution.aspx.
[130] Presidential Commission, Final report, supra note 114, at 45, 68.

of the current Court acting as a power-hungry, partisan policy-maker. That would in turn expand the possibilities for elected officials to strengthen democracy in other ways.

Adding justices whose track records show they would respect the constitutional values of democracy and equality, and Congress's power to legislate to protect those values, should correct the partisan tilt and power-stockpiling tendency of the current Court in the short to medium term. Expanding the Court could make it possible to institute other important structural changes—such as restoring the Voting Rights Act and campaign finance law, making the District of Columia a state, and expanding workers' rights to organize and to address economic inequality—that would strengthen democracy in the longer term. To the extent there are concerns that the current Court might strike down other court reforms, expanding the Court could ameliorate that risk. Court expansion could also strengthen the Court by increasing its diversity and its capacity to hear more cases, as the U.S. population and federal caseloads grow.[131]

Could there be negative consequences?

The primary arguments against court expansion are that it would harm both the Court's legitimacy, by making Americans think the justices are just politicians, and its independence, by permitting the other branches of government to meddle with the Court's decisions.[132] These arguments are often tied to the negative connotations that "court-packing" acquired after FDR's failed 1936 proposal to expand the Court, as well as the fact that leaders in other nations, like Venezuela, Turkey, Hungary, and Poland, have expanded their high courts as part of broader democratic backsliding.[133]

However, Americans are correct to think that the current Court acts as a partisan political body. Corporate-backed right-wing elected officials have been working to pack it for this very reason for years. Trying to bolster public respect for the Court by pretending this is not the case is not a solid basis for a system of government.

And dismissing the true goal of Court expansion—namely strengthening democracy—as "partisan" is a nihilistic version of legal both-sides-ism.

The judicial independence argument incorrectly supposes that the Constitution requires the Court to be free from all checks by other branches, when in fact court reform tools like Court expansion are one of the many ways the Constitution allows one branch of government to check another. What has made Court expansion troubling in other countries is the fact that it was part of a larger attack on democracy, rather than an attempt to use legally prescribed means to strengthen it.

Another argument against court expansion is that it could result in a cycle of retaliation that would mean an ever-growing Court. A recent study showed that if Democrats had added four seats at the beginning of the Biden Administration, and both parties added additional seats in the future under similar political conditions, the size of the Court would grow to an average of 37 seats over 100 years, and Democrats would control the Court for an average of 55 out of those 100 years. By contrast, without any change in the Court's size, the study projected that the Court will remain in Republican hands until 2065, and Democratic appointees will have a majority in only 29 out of the next 100 years.[134]

However, it is not clear what harm would come from repeated retaliatory increases in the Court's size that is not already a problem with the Court. In terms of perception, the nomination and confirmation process for justices is already a pitched political battle because the Court has amassed so much power to itself that its composition has a tremendous impact on the policies and direction of the nation. Americans are already appropriately aware of this reality. Substantively, it is hard to imagine what a larger, right-wing-dominated Court could do that would be worse than the current Court. There would be practical challenges related to the need to find office space for more justices, but that is not a sufficient reason not to expand the Court.

[131] Presidential Commission, Final Report, supra note 114, at 78-79.
[132] Id. at 79-80.
[133] Id. at 80-81.
[134] Adam Chilton, Dan Epps, Kyle Rozema, and Maya Sen, The Endgame of Court-Packing (working paper), May 4, 2023, https://ssrn.com/abstract=3835502.

Additionally, there is no real doubt that the Republican Party would expand the Court if necessary to retain their control over it, regardless of whether Democrats do so first. For example, Republican elected officials in Arizona and Georgia expanded their state Supreme Courts in recent years so they could appoint a majority of those courts' justices.[135]

From a different perspective, some progressive critics say expansion and other "personnel" changes would be inferior to "disempowering" or democratizing reforms, like jurisdiction stripping or supermajority requirements, because they would do less to strengthen democracy.[136] But our view is that there is no one perfect or best reform because there is not just one problem with the courts. Court expansion would address many of the problems of the current Court; the fact that it would not solve for all of them is not a reason not to do it.

B. Jurisdiction stripping

What is it?

Jurisdiction stripping means Congress passes a law which removes courts' jurisdiction to hear challenges to a specific law or regulation, or more broadly to all federal laws and regulations. For instance, a narrow or policy-specific version of jurisdiction stripping would mean that if Congress passed the Protecting the Right to Organize Act to strengthen workers' labor rights, or the Women's Health Protection Act to protect abortion rights, it could include language in the law stating that courts would not have jurisdiction to hear constitutional challenges to those laws or regulations.[137] To be effective, Congress would need to remove jurisdiction from the Supreme Court, lower federal courts, and possibly also state courts.[138]

A broader jurisdiction stripping law could say courts would not have jurisdiction to hear any Constitutional challenges to federal statutes or regulations, or to challenges to Congress' power to legislate under specific constitutional provisions, such as the Fourteenth Amendment.

As is mentioned above in Section I.D, Congress could also act to prevent the courts from overturning specific state laws or categories of laws.

What would it take to do it? Is that legal?

Congress could strip jurisdiction through ordinary legislation, as it has done hundreds of times in the past.[139] The Constitution explicitly gives Congress the power to make "exceptions" to the Supreme Court's appellate jurisdiction.[140] The Constitution also leaves it up to Congress whether to create lower courts at all; it is well-established that this means Congress has the power to limit lower courts' jurisdiction. Congress could also strip state courts of jurisdiction to hear constitutional challenges

[135]Aaron Mendelson, How Republicans flipped America's state supreme courts, Center for Public Integrity, July 24, 2023, https://publicintegrity.org/politics/high-courts-high-stakes/how-republicans-flipped-americas-state-supreme-courts/.
[136]Doerfler and Moyn, supra note 9, at 1709.
[137]See discussion supra in Section I.D about how Congress could prevent courts from striking down state laws in specific instances.
[138]Michael C. Dorf, Congressional Power to Strip State Courts of Jurisdiction, 97 Tex. L. Rev. 1 (2018), https://scholarship.law.cornell.edu/facpub/1702/; Sprigman, Congress's Article III Power, supra note 105, at 1832-33.
[139]Dawn M. Chutkow, Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts, The Journal of Politics 70, No. 4, 1053-64 (Oct. 2008), https://doi.org/10.1017/s002238160808105x (finding that since 1943, Congress passed 248 public laws containing 378 provisions expressly denying the federal courts any power of review, mostly over administrative agency decisions).
[140] U.S. Constitution, Article III, § 2, clause 2 ("In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.") This clause defines two categories of Supreme Court jurisdiction, original and appellate. Original jurisdiction allows a narrow class of litigants to bring suits directly to the Supreme Court. The Constitution does not give Congress the power to make exceptions to original jurisdiction.

Original jurisdiction might create a loophole that could partially thwart jurisdiction stripping unless addressed. The Constitution gives Congress the power to make exceptions to the Supreme Court's appellate jurisdiction, but not to its original jurisdiction. Currently, original jurisdiction makes up a very small sliver of Supreme Court cases. However, in a world of jurisdiction stripping, some parties, particularly states, might bring constitutional challenges to federal laws under original jurisdiction to get around the jurisdiction stripping rule. Presidential Commission, Final Report, supra note 114, at 163-164. This could possibly be addressed by including in a broad jurisdiction-stripping bill a supermajority requirement to overturn federal laws under the Supreme Court's original jurisdiction.

to federal legislation if it found that doing so was necessary to make its restraints on federal court jurisdiction, or its other substantive laws, effective.[141]

Some courts and academics have suggested that certain versions of jurisdiction stripping or channeling, particularly the broader type that would insulate all federal laws from constitutional review and those that would not leave any alternative avenues for judicial review in another forum, might violate the Constitution.[142] But the possibility that some potential, vague limits on this power could be determined down the road is not a good reason not to enact these laws.

Has this ever been done before?

Yes, Congress has passed numerous jurisdiction-stripping laws dating back to the earliest days of the country, and the federal courts have upheld many of them. Examples of longstanding or judicially approved jurisdiction stripping laws include:

- After the Civil War, Congress stripped the Supreme Court of appellate jurisdiction over a pending case that presented constitutional questions about the Military Reconstruction Act. The Supreme Court upheld this in *Ex parte McCardle* (1869), saying, "We are not at liberty to inquire into the motives of the legislature" in stripping it of jurisdiction.[143]
- The Norris-LaGuardia Act of 1932 bars federal courts from issuing injunctions in nonviolent labor disputes and from enforcing "yellow-dog" contracts (contracts requiring workers, as a condition of employment, to agree not to join a union). The Supreme Court upheld this in *Lauf v. Shinner & Co* (1938).[144]
- The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 stripped all courts of jurisdiction to review certain federal agency immigration decisions.[145]
- The Gun Lake Trust Land Reaffirmation Act stripped courts of jurisdiction over claims related to a specific piece of land. The Supreme Court upheld dismissal of a case pursuant to this provision in

"On a practical level, jurisdiction stripping could mean the difference between Congress being able to implement vital policies like labor law reform, abortion rights, voting rights, or gun safety, and its being powerless to do so in the face of judicial disapproval."

[141]Sprigman, Jurisdiction Stripping as a Tool for Democratic Reform, supra note 9, at 7; Presidential Commission, Final Report, supra note 114, at 163.
[142]Id. at 162-169 (concluding that constitutional challenges to jurisdiction-stripping legislation are likely, and that the more that such legislation leaves open some avenues to adjudicate the constitutionality of a statute, the more likely it is to survive challenges). See also *Webster v. Doe*, 486 U.S. 592, 593 (1988) (suggesting in dicta that federal laws eliminating judicial review of "colorable constitutional claims" would raise a "serious constitutional question"); *Patchak v. Zinke*, 583 U.S. 244, 253 (2018) (plurality opinion stating in dicta that "So long as Congress does not violate other constitutional provisions," its ability to determine the jurisdiction of federal courts is "plenary").
[143]*Ex parte McCardle*, 74 U.S. 506, 514 (1869). The Court did note that Congress had potentially left open another avenue for parties to challenge the Military Reconstruction Act. Another Reconstruction-era case, *United States v. Klein*, 80 U.S. 128 (1871), struck down a statute that made it harder for pardoned Confederates to receive compensation from the United States. The Court reasoned, unclearly, that a law that confers jurisdiction up to a point but then requires the Court to dismiss the case "when it ascertains that a certain state of things exists" was improper.
[144]*Lauf v. Shinner & Co.*, 303 U.S. 323 (1938).
[145]Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208.

Patchak v. Zinke (2018).[146]

- The Fiscal Responsibility Act of 2023 stripped courts of jurisdiction over challenges to agencies' approvals for construction of the Mountain Valley Pipeline, and also channeled "original and exclusive" jurisdiction over claims challenging the jurisdiction-stripping provision to the U.S. Court of Appeals for the D.C. Circuit.[147] The Fourth Circuit dismissed a pending case pursuant to this law in *Appalachian Voices v. U.S. Dep't of the Interior* (4th Cir. 2023).[148]

Which problem(s) of the federal courts would it help solve?

In the cases to which it applied, jurisdiction stripping would address both the problem of the current courts acting as partisan policy-makers, and the problem of judicial review being fundamentally undemocratic, because it would block the courts from acting at all in that universe of cases. Eliminating the risk that a law or regulation could be struck down would expand the democratic power of the people to make policy decisions and determine the country's future.[149]

On a practical level, jurisdiction stripping could mean the difference between Congress being able to implement vital policies like labor law reform, abortion rights, voting rights, or gun safety, and its being powerless to do so in the face of judicial disapproval.[150]

It would also strengthen democracy in the additional sense that some policies Congress could protect via jurisdiction stripping, particularly structural ones like strengthening voting rights and regulating campaign finance, would have compounding positive impacts on democracy.

Could there be negative consequences?

Jurisdiction stripping does not have only progressive results; it could and has been used by both political parties. Indeed, since the 1950s, policy-specific jurisdiction stripping proposals have more often been made by conservatives, including failed proposals following *Brown v. Board of Education* to strip the courts of jurisdiction to hear challenges to school segregation,[151] and later to protect school prayer, Pledge of Allegiance mandates, and anti-pornography legislation.[152] In the long term, the results of the more frequent use of policy-specific jurisdiction stripping would depend on election results.[153] In a democracy, this is, on balance, a good and reasonable outcome.

A broader jurisdiction-stripping law, removing all court jurisdiction to adjudicate the constitutionality of all federal laws, would have more dramatic impacts. It would insulate laws with negative effects on democracy as well as those with positive effects. But it would also reinject energy into democracy by entirely returning the question of what the Constitution means and requires, and which policies should be enacted, to democratically accountable bodies. It would also avoid the risk of "tit-for-tat" retaliation. While policy-specific jurisdiction stripping could lead to each political party stripping more and more jurisdiction from the

[146] *Patchak*, 538 U.S. at 250. There was no majority decision in Patchak. Justice Thomas wrote for a plurality of the Court in that case that "Congress violates Article III when it compels findings or results under old law. But Congress does not violate Article III when it changes the law."
[147] Fiscal Responsibility Act of 2023, Section 324(e)(1).
[148] *Appalachian Voices v. U.S. Dep't of the Interior*, 78 F.4th 71 (4th Cir. 2023).
[149] Sprigman, Jurisdiction Stripping as a Tool for Democratic Reform, supra note 9.
[150] Some scholars have opined that jurisdiction stripping "will in practice often prove pointless or even backfire" because state courts will step in to fill the gap or federal courts will invalidate jurisdiction stripping laws. Daniel Epps and Alan M. Trammell, The False Promise of Jurisdiction Stripping, 123 Columbia L. Rev. 2077 (2023), https://columbialawreview.org/content/the-false-promise-of-jurisdiction-stristartpping/. But while backlashes are certainly a risk in politics of any sort, their possibility is not a reason not to try to make change in the first place.
[151] Presidential Commission, Final Report, supra note 114, at 57.
[152] Id. at 154.
[153] Doerfler and Moyn, supra note 9, at 1726.

courts each time they were in power, this kind of ongoing retaliation would not be possible after a broad jurisdiction-stripping law was passed, because there would be no more federal court jurisdiction over constitutional questions to fight over. Instead, elected officials would be left to fight about legislation itself, which is appropriate in a democracy.[154]

C. Jurisdiction channeling

What is it?

Jurisdiction channeling means Congress would designate a specific new or existing court, agency, or other body to hear particular claims. For instance, Congress could channel all cases challenging the constitutionality of a specific federal law, or all cases challenging or seeking to enjoin any federal law or policy, to the same kind of three-judge courts that hear apportionment and other kinds of cases, or to the D.C. district court. It would at the same time remove the jurisdiction of the other lower federal courts to hear those claims. The policy could allow appeals directly to the Supreme Court, as many historic and existing jurisdiction channeling provisions do, or could remove the Supreme Court's appellate jurisdiction.

What would it take to do it? Is it legal?

As with jurisdiction stripping, Congress could enact jurisdiction channeling through ordinary legislation, as it has done repeatedly in the past. The Supreme Court has approved many federal statutes that channeled jurisdiction to specific courts or non-Article III bodies.[155]

Some courts and academics have suggested that certain versions of jurisdiction channeling might violate the Constitution. But jurisdiction channeling would likely be even less susceptible to successful legal challenge than jurisdiction stripping, because courts have traditionally indicated more openness to jurisdictional changes that leave open some avenue to challenge the constitutionality of a federal policy.[156]

Has this ever been done before?

Yes, numerous times. Examples of longstanding or judicially-approved jurisdiction channeling laws include:

- From 1910 until 1976, all cases challenging the constitutionality of state laws were channeled to specially convened three-judge courts. Congress passed this law as a reaction against perceived judicial overreach in hearing these types of cases.[157]
- Today, a number of federal laws still channel particular cases to three-judge district courts under 28 U.S.C. § 2284, including challenges to the constitutionality of the apportionment of congressional districts or state legislatures, and cases brought under the Bipartisan Campaign Finance Reform Act of 2002, the Communications Decency Act of 1997, and the Voting Rights Act,[158] with appeals directly to the Supreme Court.[159]
- The Emergency Price Control Act of 1942 channeled cases challenging the constitutionality of wartime price control regulations to an Emergency Court of Appeals, with appeals to the Supreme Court. The Supreme Court upheld this in *Yakus v. United States* (1944).[160]
- The Foreign Intelligence Surveillance Act of 1978 channeled federal agencies' requests for surveillance warrants to a newly-created Foreign Intelligence Surveillance Court, with appeals to the Supreme Court.[161]
- As noted above, the Fiscal Responsibility Act of 2023 stripped courts of jurisdiction over certain challenges to the Mountain

[154] Id. at 1771.
[155] See *Crowell v. Benson*, 285 U.S. 22 (1932) (upholding law channeling certain cases to an administrative agency); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding Emergency Price Control Act of 1942, which channeled challenges to the constitutionality of price control regulations to an Emergency Court of Appeals).
[156] See supra note 142.
[157] Michael E. Solimine, The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954-76, 72 Case W. Res. L. Rev 909 (2022), https://scholarship.law.uc.edu/fac_pubs/413/.
[158] Howard M. Wasserman, Argument preview: is a three-judge court "not required" when a pleading fails to state a claim?, Scotusblog, Oct. 19, 2015, https://www.scotusblog.com/2015/10/argument-preview-is-a-three-judge-court-not-required-when-a-pleading-fails-to-state-a-claim/; see also 28 U.S.C. § 2284.
[159] 28 U.S.C. § 1253.
[160] *Yakus v. United States*, 321 U.S. 414 (1944).
[161] Foreign Intelligence Act of 1978, 50 U.S.C. ch. 36., §§ 1803–1805.

Valley Pipeline, and also channeled "original and exclusive" jurisdiction over claims challenging the jurisdiction-stripping provision to the U.S. Court of Appeals for the D.C. Circuit.[162] See *Appalachian Voices v. U.S. Dep't of the Interior* (4th Cir. 2023).[163]

Which problem(s) of the federal courts would it help solve?

Channeling challenges to federal policies to a particular district or circuit court, a multiple-judge panel, or a newly created court or agency could help address the problem of lower federal court judges acting as power-hungry partisan policy-makers, eagerly enjoining national laws or regulations at the behest of corporate and right-wing interests.[164] It could also indirectly help to address some of the problems with the Supreme Court's "shadow docket" by avoiding the problem of overlapping or conflicting nationwide injunctions from different district courts.[165]

If the policy also stripped appellate jurisdiction from the Supreme Court, it would also address the same problem at the Supreme Court level. If a channeling provision were combined with a supermajority requirement for the Supreme Court to strike down or enjoin the federal policy in those same cases, that would also partially address the problems of the Court acting as a partisan policy-maker and of judicial review being antidemocratic. If it did not change Supreme Court jurisdiction at all, then its impact would be more limited.

Could there be negative consequences?

Jurisdiction channeling would not fundamentally address the antidemocratic nature of judicial review. If a large number of important cases were channeled to a particular court or body, it is likely that confirmation fights about that court or body would come to resemble the high-stakes partisan battles that now take place about Supreme Court seats.

"It would effectively force courts to be more deferential to the democratic branches by permitting a court to overrule democratically enacted policies only if there was broad agreement among the judges that the Constitution required that outcome."

Channeling would increase the size of the dockets of the courts or judges to which cases were channeled, although this could be addressed through targeted lower court expansion.

D. Supermajority or unanimity requirements

What is it?

A supermajority or unanimity requirement would mean a court could only strike down a particular action, or any actions, of the political branches on constitutional grounds if a supermajority or all of the court's members agreed. (For brevity, we will refer to both

[162]Fiscal Responsibility Act of 2023, Section 324(e)(1).
[163]*Appalachian Voices v. U.S. Dep't of the Interior*, 78 F.4th 71 (4th Cir. 2023).
[164]Elie Mystal, A Texas Court Has Decided to Let the Scariest Judge in Texas Keep Being Scary, The Nation, April 3, 2024, https://www.thenation.com/article/archive/matthew-kacsmaryk-judge-shopping-texas/.
[165]Michael E. Solimine, Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket, 98 Ind. L.J. Supp. 37 (2023), https://scholarship.law.uc.edu/fac_pubs/457/; Steven I. Vladeck, Texas's Unconstitutional Abortion Ban and The Role of the Shadow Docket, Testimony before the Senate Committee on the Judiciary, p. 33, Sept. 29, 2021, https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [hereinafter Vladeck, Texas's Unconstitutional Abortion Ban].

supermajority and unanimity requirements as "supermajority" reforms.) As with jurisdiction striping, there could be narrower versions that would just apply to specific laws or regulations, or a broader version that would apply to all federal laws or regulations.

What would it take to do it? Is that legal?

Congress could pass a law imposing a supermajority requirement on the Supreme Court (requiring decisions overturning particular or all federal laws or regulations on constitutional grounds to be by a margin of 6–3, 7–2, 8–1, 9–0, or equivalent margins in the case of a larger Court). To be effective, as with jurisdiction stripping, the law would need to also impose equivalent supermajority requirements on the circuit courts and state courts, or limit lower courts to forms of relief that expire when the Supreme Court reviews them.[166]
Congress's power to enact a supermajority requirement stems from the fact that it's properly understood as a form of jurisdiction stripping: Congress would be removing the courts' jurisdiction to overturn federal laws on constitutional grounds when only a bare majority of judges agree. Supermajority requirements can also be seen as another example of the way Congress already exercises authority over how the courts operate; for instance, Congress has defined by statute how many justices constitute a quorum on the Supreme Court.[167]

As with jurisdiction stripping, some disagree that supermajority requirements could be enacted without a constitutional amendment, but this possibility is not a good reason not to enact these laws.[168]

Has this ever been done before?

Supermajority requirements have not been enacted for federal courts in the U.S., although they have been proposed more than 60 times since 1823.[169] Some states—North Dakota, Nebraska, and Ohio—have, or had, supermajority voting requirements for their high courts.[170] At least ten other countries, including Mexico and South Korea, require supermajority votes for their high courts to invalidate legislation on constitutional grounds.[171]

Which problem(s) of the federal courts would it help solve?

Like jurisdiction stripping, a supermajority requirement could help address both the problems of courts acting like partisan policy-makers, and the problem that judicial review is fundamentally undemocratic. A supermajority requirement would function like a softer version of jurisdiction stripping: it would shift some, but not all, power from the courts to the democratically elected branches by making it more difficult, but not impossible, for courts to invalidate laws and regulations on constitutional grounds. It would effectively force courts to be more deferential to the democratic branches by permitting a court to overrule democratically enacted policies only if there was broad agreement among the judges that the Constitution required that outcome.[172]

Supermajority requirements might also encourage consensus-building among judges, which could lead to less partisan, more legally defensible outcomes.[173]

Given that the Senate currently operates under an (unnecessary and self-imposed) rule that nothing can pass without supermajority agreement—60 votes to invoke cloture to overcome a filibuster or the threat of one—a supermajority requirement for the courts to strike down legislation would create a more balanced system of checks and balances.

Could there be negative consequences?

Some of the possible downsides to jurisdiction stripping also apply to supermajority requirements, although again, they would be slightly lessened. Depending on the breadth of the requirement—whether it applied to decisions to strike down all federal laws or regulations, or just specific ones—it would protect not just progressive laws, but all laws,

[166]Doerfler & Moyn, supra note 9, at 1727 n. 116 (crediting Jed Shugerman for this idea).
[167]Id. at 1756-57.
[168]Id.
[169]Presidential Commission, Final report, supra note 114, at 169-70.
[170]Id. at 171.
[171]Id. at 171-72.
[172]Id. at 172.
[173]Id. at 173.

from being invalidated by a narrow majority of judges. This would be an appropriate outcome in a democracy. Because the Supreme Court and other courts would still have the power to strike down laws if a large majority were in ideological agreement, the intensity of Supreme Court confirmation fights would be unlikely to abate, at least in the short to medium term.

E. Fast-track congressional fixes to statutory interpretation decisions

What is it?

Congress could pass a law setting up an expedited process for it to reject or fix a Court decision misinterpreting a federal law or regulation.[174]

Such a law would give Congress a certain amount of time after the Supreme Court issues a statutory interpretation decision, or declines to review a lower court one, to initiate a review. Congressional leaders could assign an existing committee, or appoint a special committee, to examine the decision and design a legislative fix, if necessary. The fix would move on a fast-track through both houses of Congress without hurdles like committee hearings, floor amendments, or filibusters. If Congress approved it by a simple majority vote of both houses, the president could then sign or veto it, just as with ordinary legislation.[175]

The amount of time Congress would have to review or fix a court decision would be important. Ganesh Sitaraman wrote a strong piece in The Atlantic advocating for this reform, and suggested a period of 30 days.[176] However, a longer time period would enhance democratic accountability. Specifically, if the review period were 16 months, then if a controversial Supreme Court decision were handed down in one term (between October and late June), candidates for office could run on opposition to that decision in November and still be able to use the fix mechanism soon after taking office in January of the next year.

What would it take to do it? Is that legal?

Congress could enact this system through legislation. It is clearly permissible for Congress to do this, because Congress already has the authority to pass new laws overturning a judicial decision that interprets a law (as opposed to a decision that overturns a law because it violates the Constitution).[177] Congress can also set its own rules, so it can create a less onerous process than its normal legislative process for it to take this kind of action.[178]

Has this ever been done before?

A similar law allowing Congress a fast-track way to review and overturn federal agency regulations, called the Congressional Review Act (CRA), has been in effect since 1996.[179] The CRA allows both houses of Congress to vote on a resolution on the regulation through an expedited process within a certain amount of time after it is enacted, which can be up to eight months depending on when Congress is in session. If the president signs the resolution, then the agency's regulation does not take effect.[180]

Which problem(s) of the federal courts would it help solve?

A fast-track review of judicial legislative interpretation decisions would address a subset of the problem of the federal courts acting like partisan policy-makers; namely, it would

[174]A more sweeping reform with a similar structure would be a system to allow Congress to override or fix a court decision striking down a federal law or regulation as unconstitutional, as opposed to just fixing decisions that misinterpret statutes. There are good policy arguments in favor of such a system. See, e.g. Presidential Commission, Final Report, supra note 114, at 186-189; The Constrained Override: Canadian Lessons for American Judicial Review, 137 Harv. L. Rev. 1725 (Apr. 2024), https://harvardlawreview.org/print/vol-137/the-constrained-override-canadian-lessons-for-american-judicial-review/ (arguing that the United States should adopt a "constrained override" modeled on the Canadian "notwithstanding clause"). This report does not explore this reform because it is very likely that the federal courts would find it unconstitutional if it were enacted via statute rather than constitutional amendment. Presidential Commission, Final Report, supra note 114, at 189.

[175]Ganesh Sitaraman, How to Rein In an All-Too-Powerful Supreme Court, The Atlantic, Nov. 16, 2019, https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/.

[176]Id.

[177]See, e.g., the Lily Ledbetter Fair Pay Act of 2009, which overturned *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007) to make clear that statute of limitations on discriminatory pay claims resets with each new paycheck.

[178]Sitaraman, supra note 175.

[179]5 U.S.C. §§ 801-808.

[180]5 U.S.C. § 801(b).

provide a procedurally easier way for Congress to correct the courts when they misinterpret laws passed by Congress. It would not affect the antidemocratic nature of judicial review or other ways in which the courts act as partisan policy-makers.

While this reform tool would not address the problem of judicial review being antidemocratic, the majority of cases that come before the Supreme Court do not concern constitutional issues.[181] Many cases that turn on questions of statutory interpretation are very important; for instance, the Supreme Court's recent decisions allowing employers to impose forced arbitration agreements that bar employees from taking collective action,[182] striking down the Biden Administration's student debt forgiveness plan,[183] and limiting the EPA's power to regulate greenhouse gas emissions[184] were all statutory interpretation decisions.

Could there be negative consequences?

The biggest problem with this reform is that it might be insufficiently powerful. Barring an outbreak of bipartisanship, this fix would only be available if the House, Senate, and Presidency were all controlled by the same party. Because of a similar political dynamic, the CRA, which serves as a model for this idea, was only used once between its passage in 1996 and 2017. However, it was then used 16 times in 2017–18, after Republicans gained control of the House, Senate, and Presidency in 2016, and three more times in 2021–22.[185]

F. Other complementary reforms: ethics reform, shadow docket reform, lower court expansion, term limits, laws to reverse antidemocratic doctrines

What are they?

These are a variety of other reforms that would complement some of the more sweeping reforms discussed above. Each of these would be helpful in addressing some of the problems of the federal courts.

1. Ethics reform would make Supreme Court justices subject to the same ethics code, disciplinary framework, and recusal rules that apply to all other federal judges, to replace the toothless ethics statement it recently adopted for itself in the wake of its numerous ethics scandals.[186]
2. Shadow docket reform could take many forms, but at a minimum should require that if the Court grants emergency relief through its "shadow docket," the justices must disclose how they voted, give some explanation of their reasoning, and use a traditional standard of review which includes weighing harm to people that may result from their actions.[187]
3. Lower court expansion would add dozens of additional lower court judges. This has been recommended for years by the Judicial Conference of the United States to alleviate a crisis of overcrowded

"Although nearly every U.S. state has term limits and/or mandatory retirement ages for their high court justices, as does every other constitutional democracy in the world."

[181] Sitaraman, supra note 175.
[182] *Epic Systems v. Lewis*, 584 U.S. 497 (2018).
[183] *Biden v. Nebraska*, 600 U.S. ___, 143 S.Ct. 2355 (2023).
[184] *West Virginia v. EPA*, 597 U.S. 697 (2022).
[185] Maeve P. Carey and Christopher M. Davis, The Congressional Review Act (CRA): A Brief Overview, Congressional Research Service, Updated Feb. 27, 2023, https://crsreports.congress.gov/product/pdf/IF/IF10023.
[186] Michael Waldman, New Supreme Court Ethics Code is Designed to Fail, Brennan Center for Justice, Nov. 13, 2023, https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail.
[187] See generally Vladeck, Texas's Unconstitutional Abortion Ban, supra note 165, at 13, 32-33.

dockets on the lower courts.[188]

4. Term limits for Supreme Court justices would mean justices would serve 18-year terms, which would be staggered so that each President would nominate two justices per four-year term.[189]
5. Reversing antidemocratic judicial doctrines would bar the courts from using legal doctrines invented by the Supreme Court to increase courts' own power at the expense of the power of democratically accountable officials, or in order to reduce the rights of less-powerful groups. These could include qualified immunity for civil rights claims, the "major questions doctrine," and the expected end of *Chevron* deference.

What would it take to do it? Is that legal?

All of these reforms should be able to be enacted through legislation. Lower court expansion and statutory correction of judicial doctrines are uncontroversially permissible. There is some disagreement among academics and judges about whether ethics reform, certain aspects of shadow docket reform, and, especially, term limits could be passed without a constitutional amendment,[190] but in each case these concerns are debatable, and not sufficient reason not to enact these reforms through legislation.

Has this ever been done before?

1. Ethics reform: There has never been an enforceable ethics code for the Supreme Court, although Congress has imposed requirements on the Court that are somewhat analogous to a code of conduct, such as requiring the justices to take an oath of office.[191] All other federal judges have been subject to the advisory Code of Conduct issued by the United States Judicial Conferencesince 1973,[192] to discipline under the Judicial Conduct and Disability Act of 1980, and to statutes which require recusal in certain situations.[193] The Court issued its own statement about ethics in November 2023 in response to repeated ethics scandals, but it is vague, weak, and unenforceable.[194]
2. Shadow docket reform: Congress has not enacted laws precisely like the ones that would help rationalize and bring transparency to the Court's shadow docket decisions, but it has enacted similar laws; for instance, it has prescribed standards of review for the Court to apply in particular types of cases.[195]
3. Lower court expansion: The lower courts have been expanded numerous times throughout U.S. history; the last meaningful expansion was in 1990.[196]
4. Term limits for Supreme Court justices: There have not been term limits for Supreme Court justices or other federal judges, although nearly every U.S. state has term limits and/or mandatory retirement ages for their high court justices, as does every other constitutional democracy in the world.[197]
5. Reversing antidemocratic judicial doctrines: A bill to end qualified immunity has been introduced in Congress, although not enacted.[198] Congress has previously passed laws instructing judges on how to interpret laws; for instance, the first section of the United States Code,
6. titled "Rules of Construction," provides that "words importing the masculine gender include the feminine as well" and that "person" includes corporations, firms, partnerships, and societies as well as individuals.[199] Laws reversing

[188]Federal Judiciary Seeks New Judgeship Positions, United States Courts website, March 14, 2023, https://www.uscourts.gov/news/2023/03/14/federal-judiciary-seeks-new-judgeship-positions.
[189]Presidential Commission, Final Report, supra note 114, at 111.
[190]Id. at 130.
[191]Id. at 218.
[192]Id. at 216.
[193]Id. at 216-17.
[194]Waldman, supra note 186.
[195]Vladeck, Texas's Unconstitutional Abortion Ban, supra note 165, at 18 n. 44 (citing *Miller v. French*, 530 U.S. 327 (2000) (upholding provision of the Prison Litigation Reform Act that prescribes a standard of review for injunctions against unconstitutional prison conditions).
[196]Maggie Jo Buchanan & Stephanie Wylie, It Is Past Time for Congress to Expand the Lower Courts, Center for American Progress, July 27, 2021, https://www.americanprogress.org/article/past-time-congress-expand-lower-courts/.
[197]Presidential Commission, Final Report, supra note 114, at 112.
[198]Ending Qualified Immunity Act, H.R. 2847 (2023-24).
[199]1 U.S.C. § 1.

"The goal of ethics reform, shadow docket reform, term limits, and correcting antidemocratic judicial doctrines is to make the justices and the Court more accountable—to ethics and transparency principles, election outcomes, and Congress, respectively. To the extent this compromises the Court's independence, that is a good thing."

antidemocratic doctrines would be similar to these, although much more sweeping.

Which problem(s) of the federal courts would it help solve?

1. Ethics reform could address some Supreme Court justices' unethical behavior and refusal to recuse in cases presenting a conflict of interest, by ensuring that the justices are subject to the same rules as the rest of the federal judiciary. A visible change in the justices' behavior with regard to conflicts of interest and recusal could have the side effect of increasing public respect for the institution.
2. Shadow docket reform would help to address some of the problems with the Court's shadow docket: it increasingly rules on important substantive issues without full briefing, without providing any reasoning for its decisions, without always disclosing how the justices voted, and without considering several of the important traditional factors courts are supposed to consider before issuing injunctive relief, including whether anyone other than the government will be harmed if a government policy goes into effect.[200]
3. Lower court expansion would address overburdened lower court dockets, and would also allow presidents to increase the demographic and professional diversity on the federal bench.

"It has now become common for the Court to second-guess laws passed by Congress: in the less than 20 years of the Robert Court, the Supreme Court has struck down 29 federal laws in whole or in part."

[200]Stephen I. Vladeck, The Supreme Court, 2018—Essay: The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123, 155-56 (2019), https://harvardlawreview.org/wp-content/uploads/2019/11/123-163_Online.pdf; Vladeck, Texas's Unconstitutional Abortion Ban, supra note 165, at 3.

4. Term limits for Supreme Court justices, an idea which has broad bipartisan support, would help to address several problems, chief among them the Court being unresponsive to the outcomes of elections.[201] If each president appointed two justices in each presidential term, the justices would reflect the results of elections better than under the current system, in which strategic retirements and unstrategic death determine how many seats a president can fill. Shortening justices' terms would also reduce each individual's power over the direction of the country, allow for more demographic and experiential diversity on the Court; improve decision-making by introducing fresh perspectives to the Court, and reduce the incentive for partisan strategic retirements.[202]
5. Reversing undemocratic judicial doctrines would help alleviate the partisan, power-amassing tendency of the current Court in particular types of cases. Ending qualified immunity would permit people whose rights are violated by state and local officials, including through police violence and misconduct, to sue and hold those officials accountable. Eliminating the major questions doctrine and guaranteeing Chevron deference would make it more difficult for courts to invalidate regulations adopted by agencies simply because the judges don't like them.

Could there be negative consequences?

Honestly, no. Critics of all of these reforms (except, perhaps, lower court expansion) would argue that they would impair judicial independence, but that is not a convincing argument. The goal of ethics reform, shadow docket reform, term limits, and correcting antidemocratic judicial doctrines is to make the justices and the Court more accountable—to ethics and transparency principles, election outcomes and Congress, respectively. To the extent this compromises the Court's independence, that is a good thing.

III. RESPONSES TO ARGUMENTS AGAINST COURT REFORM

A. Aren't strong judicial review and judicial supremacy necessary for a constitutional democracy?

One argument against court reform is that in a constitutional democracy, courts must have the power of strong judicial review and judicial supremacy, since it is their function to interpret and enforce the constitution and the laws.

First, this argument is belied by the fact that other constitutional democracies have succeeded without judicial review, or without the aggressive version of it that the courts currently practice in the United States. Until 2008, French courts could review the constitutionality of proposed laws, but not enacted laws. The Netherlands bars judicial review of laws enacted by Parliament. In Switzerland, a high court can review the constitutionality of the Swiss equivalent of state laws, but not federal legislation. In Canada, a simple majority of Parliament and provincial legislatures can declare that a law will operate "notwithstanding" certain provisions in the Canadian charter. Such a decision sunsets after five years, but it can be passed again.[203]

Strong judicial review was also not always dominant in the United States. The Supreme Court only used the power of judicial review to strike down federal laws as unconstitutional three times before the Civil War.[204] The Court entrenched judicial review during the Reconstruction era, when it repeatedly asserted its power to overrule Congress's judgment that the Constitution permitted it to pass laws to give Black Americans equal rights and political power—certainly not an auspicious origin story.[205] It has now become common for the Court to second-guess laws passed by Congress: in the less than 20 years of the Robert Court, the

[201] Presidential Commission, Final Report, supra note 114, at 111.
[202] Id. at 112-115.
[203] Sprigman, Congress's Article III Power, supra note 105, at 1788-89.
[204] C.R.S., Table of Laws Held Unconstitutional, supra note 109 (listing three pre-Civil War cases in which the Supreme Court struck down a federal law as unconstitutional: *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803), *v. Sanford*, 393 60 U.S. (19 How.) 393 (1857)), and *Boyd v. United States*, 116 U.S. 616 (1886)).
[205] Bowie and Renan, supra note 7.

"In 2022, the Court allowed multiple states to hold mid-term elections under congressional maps which violated the Voting Rights Act, on the extremely dubious ground that it would be confusing to voters to make changes months before an election—a decision which may have handed control of the House to Republicans."

Supreme Court has struck down 29 federal laws in whole or in part.[206]

Importantly, curtailing or eliminating strong judicial review would not mean the end of the judiciary as a co-equal branch of government. Courts would still have an important role to play in enforcing the laws and policies enacted by democratically accountable bodies. For instance, as discussed above, this is what the Court was doing in *Brown v. Board of Education*, when it enforced § 1983, part of Congress's Ku Klux Klan Act of 1871, to invalidate school segregation.[207] The courts also enforce federal laws when they decide whether a worker's firing or reassignment violated antidiscrimination laws, how long a person will be sentenced to prison for violating federal criminal laws, or whether a merger violates antitrust laws. Moving the determination of national policy decisions, like whether the federal government will tackle climate change or ensure voting rights, to the democratically elected branches would allow federal courts to focus more exclusively on enforcing federal law.

B. Isn't strong judicial review needed to protect less-powerful minorities from the tyranny of the majority?

A related argument is that strong judicial review is needed so the courts can protect less-powerful minorities from majoritarian laws that would violate their rights.

As discussed above in Section I.D, there is a historical flaw in this argument: it simply hasn't been born out in the experience of the last 200+ years. The main illustrations in defense of this argument are the Warren Court's decisions protecting minority rights. But in fact Warren Court decisions, and other progressive Supreme Court opinions, generally followed public opinion, rather than standing against it. Relatedly, Congress has more often acted to protect minority rights than have the courts.[208] Additionally, in most celebrated progressive Court decisions, including *Brown*, *Roe*, and *Obergefell*, the Court was actually enforcing a federal law that Congress passed after the Civil War to effectuate the Fourteenth Amendment. This does not present the same antidemocratic problem as the Court striking down a federal law as unconstitutional.

Finally, as the Court's recent overturning of *Roe v. Wade* demonstrates, even when the Court does act to protect peoples' rights, it can always reverse course.

The courts have not reliably acted to protect the interests of less-powerful groups, and it is unsound to base a system of government on faith or hope that they will start to do so.[209]

[206] C.R.S., Table of Laws Held Unconstitutional, supra note 109.
[207] Bowie, supra note 9, at 8.

[208] Bowie and Renan, supra n. 7; Doerfler and Moyn, supra note 9, at 1739.
[209] Bowie, supra note 9, at 11.

C. You trust Congress?

Another reaction to court reform proposals is that it is ridiculous to believe that Congress, which can barely keep the government open and which includes a disconcerting number of nihilist, extremist trolls, will enact either court reform or rights-protecting progressive legislation.

It is certainly true that the current Congress is, to say the least, not an inspiring body. Congress should take steps to make itself more functional and democratic, including by eliminating the filibuster and making the District of Columbia a state.

But the Supreme Court's decisions are also partly to blame for how polarized, non-representative, and non-responsive Congress is. The Court's *Shelby County* decision striking down key parts of the Voting Rights Act in 2013 has allowed states to enact discriminatory, suppressive voter ID laws, proof of citizenship requirements, and polling place closures, which have almost certainly impacted who was elected to Congress and to which constituents they felt responsible.[210] In 2022, the Court allowed multiple states to hold mid-term elections under congressional maps which violated the Voting Rights Act, on the extremely dubious ground that it would be confusing to voters to make changes months before an election—a decision which may have handed control of the House to Republicans.[211] Its decision that federal courts will no longer hear challenges to partisan gerrymanders[212] may have a significant effect on electoral outcomes and democratic accountability, by decreasing the electoral power of the political party drawing the maps and, in some cases, of people of color; protecting incumbents from challenge; decreasing the number of competitive seats; and increasing polarization.[213] Its holdings striking down campaign finance laws and allowing billionaire donors and dark-money groups to dominate our political system have led to a situation in which elected officials are not responsive to the policy preferences of the general public, but rather to those of the "economic elites and organized interest groups."[214]

"It is healthier for democracy for activists and movements to be able to make demands of democratically accountable figures like legislators and agencies, rather than being constrained to pleading their case to unelected judges."

More broadly, the Court's decisions over decades weakening the labor movement have almost certainly impacted political outcomes. Voter turnout is higher in communities with higher union density, both among union members themselves and others, because unions play a vital role in educating workers, building habits of democratic participation, and mobilizing workers and their communities to vote.[215] In

[210]Sam Levine and Ankita Rao, In 2023 the supreme court gutted voting rights—how has it changed the US?, The Guardian, June 25, 2020, https://www.theguardian.com/us-news/2020/jun/25/shelby-county-anniversary-voting-rights-act-consequences.
[211]Mark Joseph Stern, How the Supreme Court Likely Handed Control of the House to Republicans, Slate, Nov. 9, 2022, https://slate.com/news-and-politics/2022/11/supreme-court-republican-control-house-alito-mccarthy-gift.html.
[212]*Rucho v. Common Cause*, 588 U.S. 684 (2019).
[213]Deven Kirshenbaum, A Turn to Process: Partisan Gerrymandering Post-Rucho, 98 N.Y.U. L. Rev. 2111, 2118 (Dec. 2023), https://www.nyulawreview.org/wp-content/uploads/2023/12/98-NYU-L-Rev-2111.pdf.
[214]Prokop, supra note 57.
[215]Tova Wang, Union Impact on Voter Participation—And How to Expand It, Harvard Kennedy School Ash Center for Democratic Governance and Innovation, 1-2 (June 2020) ash.harvard.edu/files/ash/files/300871_hvd_ash_union_impact_v2.pdf; Sean McElwee, How Unions Boost Democratic Participation, American Prospect (Sept. 16, 2015), prospect.org/labor/unions-boost-democratic-participation.

addition to voter turnout, union membership impacts voting patterns: among white workers, being a union member decreases racial resentment, and white working-class union voters are more likely to vote for Democrats than their non-union peers.[216]

It would be ironic for the problems of Congress to be the thing that prevents progressives from pursuing court reform, when court reform could help address those problems.

Even in the face of a fairly listless Congress, it is healthier for democracy for activists and movements to be able to make demands of democratically accountable figures like legislators and agencies, rather than being constrained to pleading their case to unelected judges. Congresspeople and senators stand for election and can be voted out if constituents are unhappy with their performance, while Supreme Court justices can serve for 30 or 40 years with essentially zero chance of being removed from office. This non-zero level of democratic accountability is likely one of the reasons that Congress has historically done more to protect democracy and minority rights than the Supreme Court.[217]

When Congress is being obstructionist, and even when it is not, many policy decisions could be more democratically made by administrative agencies than by federal courts. Agencies' leaders are appointed by an elected president, and important aspects of their policy direction come from the president. It is not an accident that part of the current Supreme Court's project of amassing power to itself involves disempowering both agencies and Congress via the "major questions doctrine," and likely substituting its own judgment for those of agencies by jettisoning *Chevron* deference.

The outsized role that lawyers play in our political system may also feed into courts' outsized role in policy-making as compared to Congress. Lawyers are often the ones defending the legal system, or at least cautioning against enacting serious reforms. Legal education teaches, and legal practice reinforces, ideas about the importance of strong judicial review and judicial independence. Lawyers are obviously comfortable with making arguments to courts, and have a conscious or unconscious self-interest in perpetuating the power and centrality of courts—and their own profession—in our system of government. But, regardless of the preferences of one specific profession, the reality is that a system with less powerful courts would be a more democratic one.

D. Isn't court reform politically impossible? Wouldn't courts strike it down?

These related concerns stem from the idea that, although court reform might be a good idea, pushing for it is pointless because politics or courts are likely to kill it.

As to the legality argument, as is discussed more in Section IV, all the court reform tools discussed in this report are consistent with Congress's power under the Constitution. For some, this is uncontroversial. For others, there is disagreement, but there is at least a sound case for the reforms' constitutionality.

With respect to both points, the broader response is that if progressives did not try to enact policies that were politically difficult or at risk of being struck down in court, they might as well give up on trying to do anything at all.

CONCLUSION

The threat that the federal courts, particularly the Supreme Court, pose to nearly every progressive policy priority is plain. As this report has shown, this threat is due to two major problems. First, the Court reliably acts to amass power for itself and acts as a policy-making arm of the Republican party and corporate interests, in part thanks to the bare-knuckled partisan battle that right-wing elected officials waged to pack the Supreme Court with justices who would do exactly that. The Court's partisan and power-hungry behavior is the continuation of a long-standing pattern in which the courts have struck down laws Congress passed to strengthen the rights of less-powerful minorities, while leaving in place laws and policies to protect

[216]Paul Frymer and Jacob M. Grumbach, Labor Unions and White Racial Politics, American Journal of Political Science Vol. 65 Issue 1, 9, June 29, 2020, doi.org/10.1111/ajps.12537; Aurelia Glass, David Madland, and Ruy Teixeria, Unions are Critical to the Democratic Party's Electoral Successes, CAP Action, Dec. 21, 2021, americanprogressaction.org/article/unions-critical-democratic-partys-electoral-success/.
[217]Bowie and Renan, supra note 7.

corporate power and entrench inequality.

Second, judicial review is a fundamentally antidemocratic practice which allows unelected judges to dictate large swaths of federal policy by interpreting a Constitution which is short, nonspecific, old, and very difficult to amend.

Antidemocratic courts do not just veto federal laws that have already been passed; they chill activists and movements from fighting for legislation or regulations, or making arguments in court, that they predict would run afoul of the Court's hierarchical, pro-corporate version of the Constitution.

However, this state of affairs is not inevitable, and despite what the current Court says, it is certainly not required by the Constitution. We could have a more vibrant, inclusive democracy.[218] People and social movements have fought for different understandings of the Constitution and different visions for the nation's future; for instance, the labor movement's recent activism is based on egalitarian, inclusive, democratic constitutional values.

The court reform tools outlined in this report have the potential to significantly democratize our government, and to protect progressive policies needed to ensure justice throughout society. Court reform tools could change the composition of the Supreme Court; make it more difficult or impossible for courts to strike down laws enacted by democratically accountable officials; allow Congress to more easily correct judicial misinterpretations of federal laws and regulations; relieve pressure on crowded dockets; subject justices to ethics rules; introduce transparency into the Court's shadow docket; and reverse antidemocratic doctrines.

None of these tools is perfect, in the same way that democracy is not perfect. Court reform will be politically difficult. But we must try. The ability of the American people to shape the future of our country depends on it.

[218]Madiba K. Dennie, Throw Originalism Out. It's Time for Inclusive Constitutionalism, Slate, May 8, 2024, https://slate.com/news-and-politics/2024/05/throw-out-originalism-do-inclusive-constitutionalism.html.


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