



## How the Stolen Supreme Court is Defeating Democracy and Why Expanding the Court Can Save it

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The U.S. Supreme Court today poses a grave threat to our democracy and to the political rights and economic well-being of Black and brown people. In decision after decision, it is gutting decades of hard-fought progress on everything from voting rights to worker power to reproductive freedom. And, fully packed with extreme conservative ideologues, the Court is poised to wreak even more destruction on the most pressing issues of our time and the communities fighting to advance them in the years ahead. To undo the damage this Court is already inflicting—and to prevent further harm—we must expand the composition of the Court. Doing so is the only way to ensure the Court is made up of justices who will apply precedent and principle, respect and even strengthen our democracy, and protect the rights of all Americans.

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## Introduction

The American political system, though claiming the mantle of equality and human dignity at its founding, was designed to protect the power and privilege of wealthy, white men. Our slow and incomplete path toward achieving the promise of our democracy has required arduous battles to open up our political system to Black people and other people of color, to women, to young people, to immigrants, to middle- and working-class people—to the full American *demos*.

Yet today that progress—and our very democracy—are in serious jeopardy. The sources of the threats facing our democracy are many, but one of the most powerful and pressing is the U.S. Supreme Court. Today's Court is openly hostile to the ongoing project of building a multiracial, inclusive democracy. And it is handing down decision after decision that undermines the centuries-long pursuit of racial justice in the law.

As this brief details, the current U.S. Supreme Court constitutes a grave menace both to our democracy and to the political rights and economic well-being of Black and brown people who have never fully enjoyed it. In case after case, the Court has chipped—or blasted—away the political and human rights generations have fought so hard to secure. And as anti-democratic and racially unjust as the decisions and orders described in this brief have been, they're likely only the beginning. The current term represents the first in which a radical conservative supermajority is fully entrenched on the bench. And the issues they've elected to tackle—from abortion access<sup>1</sup> to gun control<sup>2</sup> to the very power of the federal government to protecting the environment, workers' rights, health care, and more<sup>3</sup>—should make everyone working for equity and justice fear the worst.

The American people know something is wrong with our highest Court. The very existence of the Presidential Commission on the Supreme Court<sup>4</sup> conveys an understanding by the Biden administration, legal scholars of all stripes, and most importantly the public of the serious problems with the current Court and the dangerous threat it presents to the fundamental values of our nation.

Recently, the Commission released the report President Biden charged it with drafting.<sup>5</sup> At 288 pages, the report is certainly a serious and thorough review of the various debates surrounding the Court and several reform options that have been proposed. The Commission took a full 7 months to consider the problems facing the Court and to analyze various solutions, hearing from dozens of expert witnesses and fielding thousands of comments from the public. Yet at the end of the day, all we're left with is a lengthy academic analysis—one that, notably, makes no conclusions and very few recommendations. After another year of Supreme Court decisions that weaken our democracy and the constitutional protections and rights of Black and brown people, we are no closer to realizing urgently-needed reforms that would address the existential threat the Court poses to our nation.

While the Commission apparently could not get there, the solution is clear: **expand the membership of the Supreme Court to inoculate against the extraordinary partisan packing that has *already* taken place and to defend our democracy and the civil and human rights of all Americans, especially Black and brown Americans.**

Whether you are an advocate for reproductive choice, racial justice, the right to housing, the environment, or the very existence of our democracy, the urgent need to reform the structure of the Supreme Court should be clear. The consequences for our democracy, and by extension to all facets of

our political and economic lives, of not instituting immediate reforms to the Court that meet the nature, scale, and urgency of this threat will be severe. And as with all deficiencies in our systems, they will fall most heavily on Black and brown communities. In fact, they already are.

## The Current Supreme Court Represents an Existential Threat to an Inclusive, Multiracial Democracy

Our nation has made important strides toward the multiracial democracy that is the promise of the American political experiment. That progress has largely come about after sustained organizing by Black and brown communities, and often via landmark legislation such as the Civil Rights Act of 1964 and the Voting Rights Act (VRA) of 1965. At moments that have been all too rare, that progress has also been helped along by the Supreme Court, such as when it finally struck down state-sanctioned racial segregation in *Brown v. Board of Education* (1954),<sup>6</sup> established the principle of “one person, one vote” in *Reynolds v. Simms* (1964),<sup>7</sup> invalidated poll taxes in *Harper v. Virginia State Board of Elections* (1966),<sup>8</sup> and upheld the constitutionality of the VRA’s preclearance provision in *South Carolina v. Katzenbach* (1966).<sup>9</sup>

However, the contemporary story of democracy and the Court is much more grim, and today’s Court poses a threat not just to the progress we have made as a nation since our founding, but to our democracy itself. A series of Supreme Court decisions in recent years have undermined our democracy by weakening protections of the fundamental right to vote, allowing big money to flood our elections, and turning a blind eye to partisan gerrymandering. In addition to the severe material consequences of these decisions, they demonstrate a disturbing disregard for the very democracy that the Court, as the supreme power in our third branch of government, is meant to protect and uphold.

### Voting Rights

Among the most insidious of these decisions is the Court’s notorious 2013 *Shelby v. Holder* decision, which invalidated a longstanding and critical component of the Voting Rights Act (VRA) and opened the floodgates to voter suppression tactics in states across the country.<sup>10</sup> Immediately after the decision, states throughout the South moved to enact laws that make it harder for people to vote.<sup>11</sup> While the deleterious effects of the *Shelby* decision were apparent immediately, they were by no means contained to the period just following the decision.<sup>12</sup> Indeed, 2021 has seen more anti-voter, anti-democracy bills introduced and passed than any year since 2011.<sup>13</sup>

While perhaps the most consequential, *Shelby* is not the only anti-democracy decision from the contemporary Court. A few years before *Shelby*, in *Crawford v. Marion County Election Board* (2008),<sup>14</sup> the Supreme Court upheld Indiana’s voter ID law against a facial attack on its constitutionality, and 35 states now have some form of photo ID requirement, a voting qualification that disproportionately burdens Black and brown people, low-income people, youth and the elderly.<sup>15</sup> In *Husted v. A. Philip Randolph Institute* (2018),<sup>16</sup> in contradiction to the plain terms of the NVRA prohibiting the removal of voters for “failure to vote,” the Court allowed states to target eligible voters for purges simply because they had not voted frequently enough in the eyes of state officials. That same year, in *Abbott v. Perez*,<sup>17</sup> the Court further limited the protections against racially discriminatory voting laws by making it much harder to bring intent-based racial discrimination claims under the VRA. And, most recently, the Court weakened the protections of the VRA even further. In *Brnovich v. DNC* (2021)<sup>18</sup> the Court

created an arbitrary set of factors, never before deemed material in these cases, that courts must now consider in hearing challenges under Section 2 of the VRA. The arbitrary and unprecedented nature of this judicial policymaking aside, the new test will have the effect of making it harder to use Section 2 claims to protect the fundamental right to vote.

In addition to the harm it has done with major decisions like these, the Court further endangered the fundamental right to vote during the unprecedented 2020 election. As voters struggled to safely cast ballots in the midst of a raging global pandemic, the Court overturned lower court rulings that would have made voting safer, and upheld lower court rulings that made the election less accessible, especially to the Black and brown voters and low-income people hardest hit by the pandemic. The unwillingness of the Supreme Court to allow adjustments that would have helped all people safely participate in one of the most critical elections of our lifetimes demonstrates this Court's fundamental and extreme hostility toward the principle and practice of democracy.

### **Money in Politics & Gerrymandering**

The Court's anti-democracy orientation is not limited to decisions and actions that severely restrict the ability of eligible Americans to cast ballots that count. In *Citizens United v. FEC* (2010)<sup>19</sup> and then *McCutcheon v. FEC* (2013),<sup>20</sup> the Supreme Court undermined campaign finance laws designed to protect our elections and effectively sanctioned unlimited spending in political campaigns. In a less sweeping but nonetheless concerning decision earlier this year, *Americans for Prosperity v. Bonta* (2021), the Supreme Court struck down a California law requiring the disclosure of certain political contributions. While the ruling applied only to the California law, it likely opens the door to future challenges to the disclosure laws that help promote transparency in our elections and combat corruption in our democracy. According to Justice Sotomayor, the decision "marks reporting and disclosure requirements with a bull's-eye."<sup>21</sup>

And in *Rucho v. Common Cause* (2019),<sup>22</sup> the Supreme Court withdrew the federal courts from any role in preventing incumbents from locking in their power and diluting their constituents' votes through unlawful partisan gerrymandering. Already this year we've seen the severe consequences of this abdication of responsibility by the Court, with states from Texas to Ohio to North Carolina passing maps that create grossly distorted legislatures that do not reflect the political preferences of voters across the state, and which create even more politically "safe," uncompetitive districts.<sup>23</sup> Thanks to *Rucho*, proponents of fair maps find the doors to the federal judiciary are firmly shut.

Taken together, these decisions represent an all-out assault on our democracy.

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While the Supreme Court is not and has never been a democratic institution, the justices who make up its bench over time have a large impact on whether our laws and systems support the ultimate goal of democracy: political equality. Time and time again, especially in recent years, the Court has shown itself to be openly hostile to political equality and to the laws that promote it.

Worse, the current Court is even more conservative than the one that rendered several of the decisions described above, and the justices most hostile to democracy are among the youngest to sit on the Court in modern times. These realities mean we have likely not yet seen the full consequences of this anti-democracy majority—and that we cannot simply wait out the current hyper-conservative majority and hope our democracy survives their tenure.

As Commissioner and Former U.S. District Judge Nancy Gertner pointed out in one of the Commission meetings, when talking about the ways that Supreme Court membership and ideology should, and has in the past, ebbed and flowed over time: “This is a moment unlike any other... if current trends continue, there will not be that kind of ebb and flow in the composition of the Court. The Court will be entrenched in ways that have not happened before... and will be entrenched even as elections come and go.”<sup>24</sup>

## The Supreme Court Is Causing Grave Harm to Black and Brown People

The implications of the Supreme Court’s hostility toward democracy are not confined to theoretical debates about the dangers of the demise of a political system. The Court’s anti-democratic bent has real consequences for real people—chief among them Black and brown people.

First and foremost, the Court’s regression on issues of political equality described above severely impacts Black and brown communities. The harmful practices the Court has allowed states to employ—from voter ID to voter purges—disproportionately impact communities of color, making it harder for these Americans to cast a ballot that counts, to make their voices heard in our big-money elections, and to elect candidates of their choice.<sup>25</sup> Further, in weakening landmark voting rights and voter registration laws, the Court has made it materially harder for these voters to find justice in the Courts when their rights are violated. When Black and brown people are denied the voting rights they have fought so long and hard to secure, they also lose access to an entire suite of civil and human rights, from housing to health care to clean air to fair wages. After all, as the Court itself has said, the right to vote is fundamental and “preservative of all other rights.”<sup>26</sup> And when Black and brown people are denied these rights, our nation slips backward to an older, uglier version of ourselves.

But the damage the Court is doing to Black and brown Americans’ political rights is not the end of the story; it is also wreaking havoc on the economic lives of these Americans. In the last few months alone, the Court has issued decisions that have caused immediate and lasting material injury to Black and brown communities.

### Reproductive Justice

On September 1, 2021, in a shadowy one-paragraph order issued in the middle of the night, the Court declined to stay a radical, unconstitutional Texas law<sup>27</sup> that undermines *the Court’s own precedents* by denying nearly all people who can give birth in Texas their constitutional right to abortion.<sup>28</sup> “Content to ignore its constitutional obligations to protect not only the rights of women, but also the sanctity of its precedents and of the rule of law,” as dissenting Justice Sonia Sotomayor put it,<sup>29</sup> 5 members of the Court, without apparent deliberation, denied millions of Texans access to critical reproductive care. The Court—perhaps after beginning to detect “the stench” of its own partisan machinations<sup>30</sup>—subsequently agreed to hear arguments in *Whole Women’s Health v. Jackson* (2021). But it has yet to render a decision, leaving millions of Texans without access to reproductive care, or to their constitutional rights, for months.

Many of these Texans are Black and brown. Historic and present-day racism in reproductive health care policy and ongoing economic exclusion mean patients of color are already less likely to have

access to this lifesaving reproductive health care than white women.<sup>31</sup> In allowing the unconstitutional Texas law to stand, the radical conservative majority on the Court has endangered the livelihoods, and in some cases even the lives, of millions of patients of color. In December 2021, the Court heard arguments in yet another case with potentially dire consequences for the constitutional right to abortion: *Dobbs v. Jackson Women's Health Organization*.<sup>32</sup> During 2 hours of oral arguments, the Court's radical conservative majority seemed poised to uphold Mississippi's unconstitutional ban on abortions after 15 weeks,<sup>33</sup> effectively overturning *Roe v. Wade* (and with it a half century of its own precedent). If it does so, it will open the floodgates to even more radical anti-abortion laws across the country and extend the harm it is already inflicting on Texans to more than 36 million people who can become pregnant across the United States.<sup>34</sup>

### **Right to Housing**

Scarcely a week before the *Whole Women's Health* shadow docket decision, and amidst the surge of the deadly Delta variant, the Supreme Court issued another disastrous order, this one ending an eviction moratorium that had protected millions of tenants—including hundreds of thousands of Black and brown tenants—from facing homelessness.<sup>35</sup> Centuries of economic exclusion and exploitation, coupled with ongoing racialized wage and wealth gaps, mean Black and brown Americans are more likely to rent than own their homes, and more likely to experience housing insecurity.<sup>36</sup> That same systemic racism means these Black and brown communities are also among the hardest hit by the coronavirus pandemic, and the least likely to be able to access the high quality health care needed to combat it.<sup>37</sup> In this case, the Court's radical conservative majority significantly heightened the risks of the pandemic, of homelessness, and of myriad other dangers associated with both, for millions of Black and brown Americans.

### **Immigration & Human Rights**

In yet another order that same week, also with devastating consequences for Black and brown people, the Court ruled the Biden administration must reinstate former President Trump's racist and illegal "remain in Mexico" policy. Black and brown people make up the vast majority of people seeking asylum in the United States via the southern border. Under the "remain in Mexico" policy, tens of thousands of asylum seekers have been denied their rights and made instead to wait in dangerous conditions in border towns in Mexico.<sup>38</sup> Despite the Department of Homeland Security's authority to end this program through its power to determine immigration policy,<sup>39</sup> and in violation of asylum seekers' legal right to seek protection in the United States,<sup>40</sup> the radical conservative majority on the Court opted to prolong the danger faced by tens of thousands of Black and brown people at our southern border.

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### **The Shadow Docket**

Over the past few years, the radicalism of the Court has also manifested in the dramatic growth of the so-called "shadow docket." The shadow docket is made up of cases in which the Court intervenes—issuing stays of favorable district court or appellate rulings or vacating unfavorable rulings—in a summary fashion, without briefing or argument, in order to advance their agenda without even basic process and transparency. Emergency orders are historically reserved for truly emergency questions, such as a life-or-death appeal of a death penalty sentence, or for dealing with relatively mundane matters like denying cert. in uncontroversial cases, dividing

up oral arguments, or granting additional time for filing briefs. Normally, cases involving substantive, and sometimes highly politicized, policy issues benefit from full review and appeal in the lower courts; detailed briefings by the parties and substantial input from interested amici; oral arguments before the full Court; conference among the Justices; and lengthy, deliberative opinion drafting.<sup>41</sup> But, as in the abortion, eviction, and immigration cases described above, the radical conservative majority on the current Court is increasingly using emergency orders to decide substantive and enormously consequential policy questions.

A member of the Court itself, Justice Elena Kagan, described the problem in her dissent in the Texas abortion case described above:

*“Today’s ruling illustrates just how far the court’s ‘shadow-docket’ decisions may depart from the usual principles of appellate process ... [T]he majority has acted without any guidance from the court of appeals—which is right now considering the same issues. It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion ... In all these ways, the majority’s decision is emblematic of too much of this court’s shadow-docket decision making—which every day becomes more unreasoned, inconsistent and impossible to defend.”<sup>42</sup>*

While the Commission report does not take a position on or make recommendations related to the shadow docket, it does concede that, in recent years, “the issues resolved through emergency rulings often are controversial as well as consequential,” and that their prevalence in the Court’s activity has increased notably:

*“Emergency orders breaking down 6-3 or 5-4 along ideological lines have multiplied in recent years, indicating that the Court increasingly is deciding contested legal questions through cursory and relatively non-transparent emergency procedures. During the 2017 Term, there were five orders from which at least three Justices publicly dissented; during the 2020 Term, there were 29 such orders.”<sup>43</sup>*

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## **Workers’ Rights**

Earlier this summer, the Court issued another decision with severe consequences for Black and brown people, and for workers’ rights and organized labor more generally. In *Cedar Point Nursery v. Hassid* (2021),<sup>44</sup> the radical conservative majority on the Court invalidated a 50-year-old California law that allowed union organizers to enter farms outside working hours to support workers to organize for their rights. Explicitly excluded from many federal labor protections, farmworkers in California had long accessed critical support as they organized to protect themselves, thanks to this law. In California and across the nation, farmworkers are overwhelmingly people of color.<sup>45</sup> They work long hours in hazardous and low-paying jobs to feed America, and they experience some of the highest rates of labor violations such as wage theft, hours violations, and inadequate housing.<sup>46</sup> In invalidating this longstanding law, the Supreme Court further endangered the lives and livelihoods of these workers

and dealt yet another blow to the organized labor that is a lifeline for so many Black and brown workers across the country.

### **Juvenile Justice**

And this spring, in *Jones v. Mississippi* (2021), the radical 6-3 majority on the Court upheld a life-without-parole sentence imposed on a 15-year old defendant.<sup>47</sup> The immediate and horrifying effect of *Jones*, in addition to the plaintiff's continued indefinite incarceration, is that it is now likely easier for states to impose similar life without the possibility of parole sentences on juveniles. However, the decision is also significant for the departure it represents from a juvenile justice jurisprudence that had, until *Jones*, been trending away from support for barbaric sentences like life without the possibility of parole for children.<sup>48</sup> As with so many of this Court's decisions, both effects will land most heavily on the Black and brown people who have been in the crosshairs of a racist criminal legal system since its creation. For centuries Black and brown people, and especially Black and brown youth, have been targeted by this system and its foot soldiers—police, prosecutors, judges, prison guards, white vigilantes, and mobs. And now, thanks to the radical conservative supermajority on the Court, they're once again targets of the supreme institution charged with promoting equality and justice under the law.

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These are just a few of the most recent decisions from this Court that run roughshod over the rights of, and are already having devastating consequences for, Black and brown people across the country. But they demonstrate how, in addition to undermining our democracy, the radical conservative supermajority on the Court will not hesitate to weaken—or fully dismantle—the rights of and protections Black and brown communities have fought for centuries to secure.

## **The Already-Packed Supreme Court**

The outcomes of these decisions are not coincidental—nor are they the result of natural ideological ebbs and flows on the Court. They are the direct result of a highly intentional and well-funded campaign to pack the Court with radical conservative justices, a decades-long strategy that was cemented by the highly irregular and openly partisan power grabs of open Supreme Court seats over the last 5 years. The goal of this effort? To finally and completely undo the progress made through the courts on everything from civil rights and racial equality to worker power and reproductive justice, and to further entrench the power of corporate interests and the rich and powerful at the expense of the rest of us.

### **Decades-Long Strategy**

Far-right ideologues have had their sights trained on the courts for decades. Displeased by the victories for civil, worker, and reproductive rights of the mid-20<sup>th</sup> century, conservative thinkers and strategists hatched a plan to take over the federal judiciary to roll back those victories and advance their own agenda. The origins of this strategy can likely be traced to a secret report commissioned by the U.S. Chamber of Commerce with tremendous and lasting implications for the American judiciary (and many facets of American political and economic life): the Powell Memo.<sup>49</sup> The goal of the



memo—submitted to the Chamber a mere 2 months before its author, Lewis Powell, was nominated and later confirmed to the U.S. Supreme Court—was to determine how to reassert corporate hegemony in American politics.

After avowing to the Chamber that "political power is necessary; that such power must be assiduously [sic] cultivated; and that when necessary, it must be used aggressively and with determination," Powell goes on to detail the "neglected opportunity in the courts."<sup>50</sup> He noted:

*"Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change. Other organizations and groups, recognizing this, have been far more astute in exploiting judicial action than American business.... This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds. As with respect to scholars and speakers, the Chamber would need a highly competent staff of lawyers. In special situations it should be authorized to engage, to appear as counsel amicus in the Supreme Court, lawyers of national standing and reputation. The greatest care should be exercised in selecting the cases in which to participate, or the suits to institute. But the opportunity merits the necessary effort."<sup>51</sup>*

In describing the role of the Chamber of Commerce in taking advantage of this opportunity, he reminded the concerned business elites that "Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations."<sup>52</sup> He noted that what they wanted to do—to give businesses the final word in American democracy, rather than the people or even elected officials—would require significant investment and coordination, and it would take time.

His recommendations were embraced with alacrity, and with all the aggressive determination and financing he urged, by both the Chamber and the conservative movement more broadly. The Federalist Society—created in the early 1980s while Powell was presiding over the nation as a justice of the Supreme Court, and often cited as the force behind the takeover of the federal judiciary—is just one strand of something much bigger: a remarkably focused and extremely well-funded strategy to put business back in control of our democracy.<sup>53</sup> Employed alongside conservative politicians who share business' pro-gun, anti-regulation, anti-choice, anti-environment, racist agenda, this strategy has been wildly successful in packing the federal courts, at all levels, with conservative judges and justices.

### **Today's Stolen Seats**

Already working as intended, this longstanding strategy was supercharged and cemented by the unprecedented and illegitimate filling of the last 3 Supreme Court vacancies. Highly politicized processes, these nominations and confirmations were marked by the desertion of historical norms meant to guard against precisely such undemocratic and partisan machinations.

In 2016, Senate Republicans shattered norms by holding open the seat of the late Justice Antonin Scalia, who passed away a full 9 months before the election, leaving the Court without a full bench and often deadlocked 4-4 for 14 months. Even though President Obama quickly nominated a highly qualified replacement, Judge Merrick Garland was denied a hearing for 293 days, and Scalia's seat was ultimately filled by a president who lost the popular vote.

In 2018, Senate Republicans rushed through the nomination and confirmation of Justice Brett Kavanaugh, despite not having reviewed his full record and in the midst of an ongoing FBI investigation into his conduct. After President Trump nominated Justice Kavanaugh, the White House refused to turn over more than 100,000 pages of records of his time serving under President George W. Bush, and the Republican-led Senate Judiciary Committee held Kavanaugh’s confirmation hearing weeks before the National Archives said it could have his records ready for review.<sup>54</sup> In addition, but likely not unrelated, to the unprecedented procedural improprieties of Justice Kavanaugh’s confirmation, Senate Republicans also brushed aside credible allegations from multiple women that the new nominee had committed sexual assault. They ignored public outcry against the nominee more significant than any seen in nearly 30 years to confirm now-Justice Brett Kavanaugh.

Then, in 2020, in direct opposition to *their own position* just 4 years earlier that the winner of the election should fill the vacant Supreme Court seat, Senate Republicans rammed through Justice Amy Coney Barrett’s nomination to replace Justice Ruth Bader Ginsburg—who passed away scarcely more than a month before Election Day—just one week before the election. Justice Barrett’s rushed nomination and confirmation, so soon on the heels of the stonewalling of Judge Garland, was so obviously a partisan subversion of the high Court for political gain that not a single Democrat voted to confirm her, making her the first Justice in 150 years to be confirmed without bipartisan support.<sup>55</sup>

### **A Co-opted Court**

In its final report, the Presidential Commission on the Supreme Court points to the argument of opponents of Court expansion that “expanding—or ‘packing’—the Court would significantly diminish its independence and legitimacy and establish a dangerous precedent that could be used by any future political force as a means of pressuring or intimidating the Court.”<sup>56</sup>

What the report misses—and what so much of the debate on Court expansion ignores—is that this is *already the reality* of the Supreme Court. The Court has *already* been packed by partisan forces intent on rolling back civil rights and racial justice, and its independence and legitimacy are *already* severely diminished. And the political actors who shattered norms to install ideologue justices who will do their bidding have *already* established a dangerous precedent that they have *already* admitted they will not hesitate to leverage in the future to block nominees that are not to their liking. When asked whether, if Republicans take control of the Senate after the 2022 elections, he would confirm a nominee to the Supreme Court in 2023, Senate minority leader Mitch McConnell said “well, we’d have to wait and see.”<sup>57</sup>

A Court that is co-opted by a political process such as we have seen in the last several years has no legitimacy as an independent branch of our government. Only fair and principled decisions that protect civil and human rights and advance justice for all Americans can restore balance and legitimacy to the Court. But the current conservative supermajority on the Court has made crystal clear it cannot or will not deliver such fair, principled jurisprudence. It should be just as clear that, to defend our democracy and protect the civil and human rights of all Americans, we must reform the Supreme Court.

## Court Expansion Will Restore Balance and Defend Democracy and Civil Rights

The current Court's radical conservative supermajority has shown itself willing to do the bidding of the partisan actors who installed it—to issue decision after decision that favors the interests of the wealthiest corporations and individuals at the expense of the rights of working people, especially Black and brown people. These decisions show a Court all too ready to threaten our representative democracy, weaken Congress' protections for the fundamental right to vote, chip away at the right to join together in unions to secure safe and equitable working conditions, undermine the constitutional right to abortion, and thwart racial justice. And, thanks to the extraordinary partisan machinations of the last few nominations, this radical anti-democratic supermajority on the Court is poised to reign for decades to come.

The only way to restore balance to the Court—and to ensure it will defend democracy and protect civil and constitutional rights—is to expand the membership of the Supreme Court by 4 additional associate justices to match the number of federal circuit courts, 13. Other proposed reforms have merit, but none meet the nature, scale, or urgency of the threats the Court currently poses to our democracy and to the American *demos*, particularly to Black and brown people. Term limits alone will not solve this crisis, as it will take years—even decades—to realize the benefits of fixed tenure and rolling nominations. A judicial code of ethics alone will not suffice either, as it does nothing to rectify the current packing of the Court by extreme right-wing ideologues or to address the threats they now pose. **To undo the damage inflicted by the flawed and illegitimate appointments of the Trump administration, we must expand the composition of the Court. Doing so is the only way to ensure the Court is made up of justices who will apply precedent and principle, respect and even strengthen our democracy, and protect the rights of all Americans.**

The Presidential Commission on the Supreme Court got at least one thing right, in its finding that “determining the size of the Court that might be ‘necessary and proper’ to its functioning seems well within Congress’s formal discretion.”<sup>58</sup> Put more plainly: adding seats to the Court can be done by a simple legislation.

There is already a bill in Congress that would do just that. The Judiciary Act of 2021 would add 4 additional associate justices to match the number of federal circuit courts—13—and would restore balance to this most important institution.<sup>59</sup> The bill has 45 co-sponsors in the House of Representatives and 3 in the Senate. As soon as it returns in the new year, Congress should take up and pass this critical legislation.

### **The Arguments Against Court Expansion Are Wrong**

While the Presidential Commission on the Supreme Court could not find a way to make recommendations about how to address the crisis in our democracy that is the Supreme Court, it did dedicate considerable space in its report to the arguments that opponents make against court expansion. Considering their care to include a comprehensive account of these critiques, we will not reiterate them in great detail here, but we will offer our reactions to a few of the most common arguments against expanding the Supreme Court.

- *Opposition Point #1: Expansion will undermine the Court’s legitimacy and politicize the institution.*
  - Public trust in the U.S. Supreme Court is already deeply undermined. The Court’s own jurisprudence, coupled with the unprecedented and illegitimate theft of recent Supreme Court seats, have rightly and significantly eroded public confidence. According to recent Gallup polling, nearly two-thirds (64 percent) of Americans have “none,” “very little,” or only “some” confidence in the Supreme Court. Just 36 percent report having high confidence in the Court, down 14 percentage points from 2 decades ago.<sup>60</sup>
  - **Expansion of the Supreme Court by 4 justices who better reflect both the ideological makeup and the demographic composition of the American populace will make the institution more representative of the American people, increase the likelihood of decisions that protect rights, and help to restore the legitimacy of the institution.**
  
- *Opposition Point #2: Expanding the Court could create a “race to the bottom,” with future Congresses and administrations of a different party retaliating by further packing the Court.*
  - This argument is based on the faulty assumption that one political party has not already shattered democratic norms and undermined the legitimacy of the Court. To the contrary, one party has already created a mess of the federal judiciary; the need to expand the Supreme Court is a direct result of actions they have *already* taken.
  - The last several years have made clear that, no matter the rules or norms, Republican leaders will stop at nothing to seize and cling to power, and they certainly do not wait for Democrats to move first. They have shown over and over again that they will do what is necessary to maximize their power, whatever the consequences for democracy. And they are banking on the fact that defenders of democracy believe so deeply in norms that we will not fight back, in spite of their blatant court-stealing schemes of the last several years.
  - **Expansion is key to restoring the legitimacy and integrity of the Supreme Court at a moment when it is possible to do so. Avoiding much-needed reforms today in the hope that Republicans will not further politicize the Supreme Court in the future is a recipe for surrendering any prospect of restoring and protecting the fundamental rights the Court has already discarded.**
  
- *Opposition Point #3: The proposal to expand the Court by 4 seats is just a political power grab, since that’s the number needed to ensure a majority of justices are appointed by Democrats.*
  - The proposal to add 4 seats brings the size of the Court into alignment with the number of circuit courts, which is itself a nod to the history of Supreme Court expansion. The last 5 times that Congress has added seats to the Court, it has set the number to match the number of circuits that existed in the federal court system. Today, there are 13 circuit courts, and so it makes sense to follow precedent and set the number of justices at 13.
  - Moreover, it is not a political power grab to object to the destruction of our democracy or the abdication of the solemn responsibility to deliver equal justice to all Americans. Elected leaders in Congress themselves swear an oath to support and

defend our Constitution, too, and are pursuing this legislation for the purpose of restoring the Court to a body that respects and protects constitutional rights.

- **This Court is openly hostile to a democracy of, by, and for the people. Four is the number of additional justices needed to create a pro-democracy, pro-people majority on the Court.**

## Conclusion

As the last stop for Americans seeking relief through the judicial system, the United States Supreme Court occupies a unique and critical place in our democracy. To faithfully execute its most sacred responsibility—to provide equal justice under the law—the Supreme Court must remain independent, legitimate, and willing to assess the merits of a case without influence by political forces.

Unfortunately, the current Court is neither independent nor legitimate, and it is therefore unable to fulfill its promise. Only expanding the membership of the Court by 4 associate justices can address the leading role the current Court is playing in our democracy's demise and ensure the Court fulfills its responsibility to protect the rights of all Americans.

As Commissioner Gertner warned during one of the final meetings of the Presidential Commission on the Supreme Court: “the risks associated with expanding the Court really don’t compare in severity to the risks associated with failing to take action.”<sup>61</sup>

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- <sup>1</sup> *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, cert. granted May 17, 2021.
- <sup>2</sup> *New York State Rifle & Pistol Association Inc. v. Bruen*, No. 20-843, cert. granted April 26, 2021.
- <sup>3</sup> *West Virginia v. Environmental Protection Agency*, No. 20-1530, cert. granted October 29, 2021.
- <sup>4</sup> Then-candidate Biden committed to creating such a commission on the campaign trail ([https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed\\_story.html](https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed_story.html)), and he created it by Executive Order in April 2021 (<https://www.whitehouse.gov/pcscotus/>).
- <sup>5</sup> Presidential Commission on the Supreme Court, *Final Report*, December 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.
- <sup>6</sup> *Brown v. Board of Education* 347 U.S. 483 (1954).
- <sup>7</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).
- <sup>8</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).
- <sup>9</sup> *South Carolina v. Katzenbach* 383 U.S. 301 (1966).
- <sup>10</sup> *Shelby v. Holder* 570 U.S. 529 (2013).
- <sup>11</sup> Texas, for example, began implementing its photo ID law, which a federal court had previously rejected for its discriminatory effect, within 2 hours of the *Shelby* decision. North Carolina moved forward with an omnibus voter suppression bill that was later found by a federal court to “target African-Americans with almost surgical precision.” Naila Awan, “Voting Rights Challenges In the Wake of Shelby County,” Demos, February 4, 2016, <https://www.demos.org/blog/voting-rights-challenges-wake-shelby-county>.
- <sup>12</sup> *Democracy Diminished: State and Local Threats to Voting Post-Shelby County*, *Alabama v. Holder*, NAACP Legal Defense Fund, updated May 18, 2021. [https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished\\_as-of-5.17.21.pdf](https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_as-of-5.17.21.pdf).
- <sup>13</sup> “Voting Laws Roundup: May 2021,” Brennan Center for Justice, May 28, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.
- <sup>14</sup> *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008).
- <sup>15</sup> Bernard L. Fraga and Michael G. Miller, *Who Does Voter ID Keep from Voting?*, University of Chicago Press, January 1, 2021. <https://www.journals.uchicago.edu/doi/abs/10.1086/716282>.
- <sup>16</sup> *Husted v. A. Philip Randolph Institute*, 584 U.S. \_\_\_\_, (2018).
- <sup>17</sup> *Abbott v. Perez*, 585 U.S. \_\_\_\_, (2018).
- <sup>18</sup> *Brnovich v. DNC*, 594 U.S. \_\_\_\_, (2021).
- <sup>19</sup> *Citizens United v. FEC*, 588 U.S. 310 (2010).
- <sup>20</sup> *McCutcheon v. FEC*, 572 U.S. 185 (2014).
- <sup>21</sup> *Americans for Prosperity v. Bonta* (2021), 594 U.S. \_\_\_\_, Sotomayor, J., dissenting.
- <sup>22</sup> *Rucho v. Common Cause*, 588 U.S. \_\_\_\_, (2019).
- <sup>23</sup> Michael Wines, “As Gerrymanders Get Worse, Legal Options to Overturn Them Dwindle,” *The New York Times*, November 21, 2021, <https://www.nytimes.com/2021/11/21/us/redistricting-gerrymandering-republicans.html>. See also “What Redistricting Looks Like in Every State,” FiveThirtyEight, <https://projects.fivethirtyeight.com/redistricting-2022-maps/>.
- <sup>24</sup> Presidential Commission on the Supreme Court, November 19, 2021 meeting, Commissioner Nancy Gertner comments beginning 1:13:17, <https://www.whitehouse.gov/pcscotus/public-meetings/november-19-2021-pcscotus-meeting/>.
- <sup>25</sup> *Supra* note 15. See also Chiraag Bains, “Written Testimony of Chiraag Bains to the House on H.R.1, the For the People Act,” February 14, 2019, <https://www.demos.org/testimony-and-public-comment/written-testimonychiraag-bains-house-hr-1-people-act>; and Shruti Banerjee and Stuart Naifeh, “How the Wisconsin Voter Purge Targets Black Voters,” December 20, 2019, <https://www.demos.org/blog/how-wisconsin-voter-purge-targets-black-voters>.
- <sup>26</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) notes that the right to vote “is regarded as a fundamental political right, because preservative of all rights.”

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- <sup>27</sup> Maggie Astor, “Here’s What the Texas Abortion Law Says,” *The New York Times*, September 9, 2021, <https://www.nytimes.com/article/abortion-law-texas.html>.
- <sup>28</sup> *Whole Women’s Health v. Jackson* 594 U.S. \_\_\_, (2021).
- <sup>29</sup> *Id.*, (Sotomayor, J., dissenting).
- <sup>30</sup> *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, argued December 1, 2021, (Sotomayor, J.).
- <sup>31</sup> Madeline Y. Sutton, Ngozi F. Anachebe, Regina Lee, and Heather Skanes, “Racial and Ethnic Disparities in Reproductive Health Services and Outcomes, 2020,” *Obstetrics and Gynecology*, January 5, 2021, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7813444/>. See also “Black Women’s Maternal Health,” National Partnership for Women & Families, April 2018, <https://www.nationalpartnership.org/our-work/health/reports/black-womens-maternal-health.html>.
- <sup>32</sup> *Supra* note 30.
- <sup>33</sup> Amy Howe, “Majority of Court Appears Poised to Roll Back Abortion Rights,” SCOTUSBlog, December 1, 2021, <https://www.scotusblog.com/2021/12/majority-of-court-appears-poised-to-uphold-mississippi-ban-on-most-abortion-after-15-weeks/>.
- <sup>34</sup> “Red Alert: Abortion Access is at Stake for Nearly Half of U.S. Women and People Who Can Become Pregnant,” Planned Parenthood and In Our Own Voice, October 1, 2021, [https://www.plannedparenthood.org/uploads/filer\\_public/8e/24/8e241a38-af52-4c89-b299-5a02c0453adf/210927-2021-red-alert-report-english-v4.pdf](https://www.plannedparenthood.org/uploads/filer_public/8e/24/8e241a38-af52-4c89-b299-5a02c0453adf/210927-2021-red-alert-report-english-v4.pdf).
- <sup>35</sup> *Alabama Association of Realtors v. HHS*, 594 U.S. \_\_\_, (2021).
- <sup>36</sup> “Figure 8: Quarterly Homeownership Rates by Race and Ethnicity of Householder for the United States: 1994-2020,” U.S. Census Bureau, <https://www.census.gov/housing/hvs/data/charts/fig08.pdf>. Joy Moses, *Demographic Data Project: Race, Ethnicity, and Homelessness*, National Alliance to End Homelessness, 2019, <https://endhomelessness.org/wp-content/uploads/2019/07/3rd-Demo-Brief-Race.pdf>.
- <sup>37</sup> The COVID Racial Data Tracker, 2021, <https://covidtracking.com/race>. *Health Coverage by Race and Ethnicity, 2010-2019*, Kaiser Family Foundation, July 16, 2021. <https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-by-race-and-ethnicity/>.
- <sup>38</sup> “Asylum Seekers at the Border,” Southern Border Communities Coalition, July 20, 2021, <https://www.southernborder.org/border-lens-asylum-seekers-at-the-border>.
- <sup>39</sup> 8 U.S.C. § 1103.
- <sup>40</sup> 8 U.S.C. § 1158. See also United Nations General Assembly, *Universal Declaration of Human Rights*, Article 14, December 10, 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.
- <sup>41</sup> “Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket,” Testimony of Stephen I. Vladeck, Senate Committee on the Judiciary, 117<sup>th</sup> Congress, September 29, 2021.
- <sup>42</sup> *Whole Women’s Health v. Jackson*, 595 U.S. \_\_\_, (2021), (Kagan, J., dissenting).
- <sup>43</sup> *Supra* note 5, p 205.
- <sup>44</sup> *Cedar Point Nursery v. Hassid*, 594 U.S. \_\_\_, (2021).
- <sup>45</sup> “Facts About Agricultural Workers,” National Center for Farmworker Health, Inc., December 2020, <http://www.ncfh.org/facts-about-agricultural-workers.html>.
- <sup>46</sup> Daniel Costa, Philip Martin, and Zachariah Rutledge, *Federal labor standards enforcement in agriculture*, Economic Policy Institute, December 15, 2020, <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/>.
- <sup>47</sup> *Jones v. Mississippi*, 593 U.S. \_\_\_, (2021).
- <sup>48</sup> “*Jones v. Mississippi*,” *Harvard Law Review*, November 10, 2021, <https://harvardlawreview.org/2021/11/jones-v-mississippi/>.
- <sup>49</sup> Lewis F. Powell, Jr., “Attack on American Free Enterprise System,” August 23, 1971, made available by Greenpeace, <https://www.greenpeace.org/usa/wp-content/uploads/2021/08/PowellMemorandumTypescript.pdf>.
- <sup>50</sup> *Id.*, p 26.
- <sup>51</sup> *Id.*

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<sup>52</sup> *Id.*

<sup>53</sup> Jeffrey Toobin, “The Conservative Pipeline to the Supreme Court,” *The New Yorker*, April 10, 2017, <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>.

<sup>54</sup> Seung Min Kim, “National Archives says it won’t be able to produce all Kavanaugh documents until end of October,” *The Washington Post*, August 2, 2018, [https://www.washingtonpost.com/politics/national-archives-says-it-wont-be-able-to-produce-all-kavanaugh-documents-until-end-of-october/2018/08/02/011a9f1e-966f-11e8-8ffb-5de6d5e49ada\\_story.html](https://www.washingtonpost.com/politics/national-archives-says-it-wont-be-able-to-produce-all-kavanaugh-documents-until-end-of-october/2018/08/02/011a9f1e-966f-11e8-8ffb-5de6d5e49ada_story.html).

<sup>55</sup> Sarah Binder, “Barrett is the first Supreme Court justice confirmed without opposition support since 1869,” *The Washington Post*, October 7, 2020, <https://www.washingtonpost.com/politics/2020/10/27/barrett-is-first-supreme-court-justice-confirmed-without-opposition-support-since-least-1900/>.

<sup>56</sup> *Supra* note 5, p 7.

<sup>57</sup> Carl Hulse, “McConnell suggests he would block a Biden nominee for the Supreme Court in 2024,” *The Washington Post*, June 14, 2021, <https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html>.

<sup>58</sup> *Supra* note 5, p 73.

<sup>59</sup> The Judiciary Act of 2021, H.R. 2584, 117<sup>th</sup> Cong., (2021). <https://www.congress.gov/bill/117th-congress/house-bill/2584/text?q=%7B%22search%22%3A%5B%22Judiciary+Act+of+2021%22%5D%7D&r=1&s=1>.

<sup>60</sup> Gallup, “Supreme Court,” 2021, <https://news.gallup.com/poll/4732/supreme-court.aspx>.

<sup>61</sup> *Supra* note 24.