

Demos

# SOCIAL EXCLUSION

What's at Stake in Courts and Elections:  
Toward Structural Inclusion, a More Perfect Union, and Power



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## About Dēmos

Dēmos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy.

Our name means “the people.” It is the root word of democracy, and it reminds us that in America, the true source of our greatness is the diversity of our people. Our nation’s highest challenge is to create a democracy that truly empowers people of all backgrounds, so that we all have a say in setting the policies that shape opportunity and provide for our common future. To help America meet that challenge, Dēmos is working to reduce both political and economic inequality, deploying original research, advocacy, litigation, and strategic communications to create the America the people deserve.

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## Introduction

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You see it in textbooks, TV shows, statuary, statements—the ideal of blind justice permeates our culture. Politicians and lawyers across the political spectrum invoke the image of an ideologically neutral judiciary. On the left as well as the right, this aspiration to a blank bench has salience.

Against this baseline, “judicial activism” appears dangerous. The conservative legal movement has nurtured a trope of “activism” that it uses to systematically head off progressive legal change. Its definition of “judicial restraint”—judicial activism’s purported antithesis, grounded in a supposedly static and decidedly constrained understanding of the Constitution—deeply entrenches radically exclusionary policies by doing nothing to redirect the inertia of our systems in favor of inclusion. For instance, for most of American legal history, the Supreme Court has constrained the application of expansive constitutional concepts like “equal protection” and “due process” to people of color, women, immigrants, and working people. All the while, the conservative jurists behind these activist decisions have portrayed themselves as mere umpires calling balls and strikes, as both John Roberts and Brett Kavanaugh described the role in their confirmation hearings.

As newly-confirmed Brett Kavanaugh takes his seat on the Supreme Court, it reminds us that the judiciary is a *human* institution. Throughout the first hearing, Kavanaugh’s supporters described him—and he described himself—as impartial and non-partisan, despite his record of writing and joining radical opinions “that exacerbate rather than ameliorate inequality.”<sup>1</sup> The focus on any nominee’s record as a lawyer and judge is important during the confirmation. But both his temperament and strong partisan bias were on display during the hearing concerning sexual assault.

But coming out of the confirmation process, we remember the importance of the judiciary as a human institution. It is the branch of our government that can have the longest-lasting impact: deciding whether the laws put into place by the legislature and the actions taken by the executive branch can stand in full or in part. That lesson is one progressives must integrate deeply into how we think about building the power to create a more inclusive and more perfect United States. In this paper, I examine the conservative legal movement’s strategy to solidify power behind a social exclusion agenda through the courts, and draw lessons for building the power to leverage the courts for comprehensive structural inclusion.

## Where We Are

Justice Kavanaugh's confirmation is the culmination of a long-standing conservative legal movement strategy. Senate Majority Leader Mitch McConnell has spearheaded this phase of the long-term plan to control the courts, and White House counsel Don McGahn has doggedly implemented the project. McGahn leaves his job this fall after less than 2 years, having pushed through 60 appointees to the bench (including 12 circuit-court judges and 2 Supreme Court justices).<sup>2</sup> By comparison, the Senate held up all but 22 judicial nominees in the last 2 years of Barack Obama's presidency.<sup>3</sup> And, of course, Senate Republicans refused to hold confirmation hearings for (or, in many cases, even meet with) Supreme Court nominee Merrick Garland.

This 4-year gambit is part of a strategy that conservatives have been nurturing for at least 40 years to reclaim the judiciary for the right, through a robust, concerted effort. In the face of changing laws and public sentiment, the conservative legal movement rightly supposed that they could lose elections and policy fights; but if they control the courts, they can control everything else. With a well-funded pipeline to groom young lawyers for judgeships, a policy infrastructure to push the conservative bounds of laws and regulations, a voter education and mobilization structure to raise the importance of the courts with everyday conservative voters, the conservative legal movement is returning us to being a more exclusionary nation.<sup>4</sup>

### *A vicious cycle*

By investing in this long-term strategy, conservatives won enough power (through elections, with the courts as a prime issue) to rig enough of the rules (through restrictive voting laws, for instance) to win more power (through subsequent elections) to limit democracy further (through Supreme Court rulings on aggressive voter purges and stonewalling the appropriate confirmation processes for judges they didn't want) to win even more power (through elections with some voters suppressed or disallowed, and smoothing the confirmation process for the judges they did want) to create a country that more closely mirrors their vision, grounded in social exclusion.\*

Surely, this past spring, many decisions made by the Supreme Court put into stark relief the stakes involved in that court. On the issues, those who would double down on social exclusion, siding with the already powerful, saw great movement

in their direction. The president's third attempt at a travel ban on travelers from majority-Muslim countries was upheld (*Trump v. Hawaii*). The Court outlawed the fees that public sector non-members pay for the representation services unions provide (*Janus*) and allowed corporations to require employees and customers to give up their right to a day in court (*Epic Systems*). And it undercut protections for LGBTQ people from discrimination in public accommodations (*Masterpiece*).

The losses on issues are significant challenges to the idea of inclusion, but this term's decisions also continue an attack by the conservative wing on systemic instruments of inclusion that are designed to remediate long-standing policies, practices, and patterns of social exclusion. *Janus* further weakens the ability of workers to exercise political power through advocacy and organizing; the voting rights decisions further entrench the rigging of our electoral system (*Husted v. A. Philip Randolph Institute*, *Abbott v. Perez*); decisions like *Trump v. Hawaii* and *Masterpiece* effectively immunize discriminatory conduct (by the executive branch in one case, and by private parties in another). These rulings could undermine constitutional rights (e.g., 14th Amendment protections) and statutory protections under federal and state law (e.g., the Civil Rights Act, public accommodations laws, and state-based human rights claims). Without unions, antidiscrimination law, and voting rights, the systematic power to push back against exclusionary policies erodes.

For those of us working for structural inclusion, the doctrinal implications are further cause for alarm. The conservative justices have structured what I call a Dog-Whistle Doctrine, holding that dominant groups can actively display their racial and religious animus, and explicitly tie that animus to policy that they enact; so long as they do not *name* that animus in the policies themselves, they have risen above the bar for discrimination (e.g., *Abbott v. Perez* and *Trump v. Hawaii*). This Dog-Whistle Doctrine contributes to a record that can undercut disparate impact claims. The conservative majority on the court also weaponized the 1st Amendment during the session by protecting the interests of the economically and politically powerful over the rights of individuals with less power (e.g., *Masterpiece*, *Epic Systems*, *Janus*, *Trump v. Hawaii*). The session also saw a worrying abdication of the Court's role to check the executive branch in favor of an expansive sense of executive privilege (e.g., *Trump v. Hawaii*).

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\*As I describe in [Social Exclusion: The Decisions and Dynamics that Drive Racism](#), “Social deprivation, economic disadvantage, and democratic disqualification are interrelated and mutually reinforcing—but distinct—dimensions of the overarching phenomenon of social exclusion. Social deprivation refers in part to a systemic denial of social capital, in which the loose social networks that lubricate one’s daily life through ‘norms of reciprocity and trustworthiness’ are differently shaped and available depending on race, gender, and class. Economic disadvantage refers specifically to constraints on how groups of people are able to participate as workers, consumers, and owners. Democratic disqualification refers to the limits placed on the ability of certain citizens to have an equal say in the decisions of the nation or community.”

## “Power creates freedom, not the other way around.”

It is a disheartening cycle, but it also provides a roadmap. It reminds us, in the words of Ibram Kendi, that “Power creates freedom, not the other way around—as the powerless are taught.”<sup>5</sup> And rather than counting on blind justice, which has failed us before, we can build the power to create the judiciary that aims toward our more perfect union, that builds toward structural inclusion.

As progressives develop effective solutions to the core problems that face our communities, at least some of the bold policies that we win will end up before a court when entities enforcing the status quo challenge them. And we will file suit to protect our rights and to close the gaps in the law in favor of greater inclusion. Courts that are populated by judges selected *because* they put the interests of the wealthy and powerful first will protect those interests at the expense of the rest of us. However, jurists with a structural inclusion frame around their understanding of who belongs—and how they belong—in our national community will not be inclined to wield the Constitution as either a weapon or an excuse for exclusionary practices, policies, and systems over inclusionary ones.

The Supreme Court is the court of last resort, but there are several other courts that we care about. Our votes matter for all of the courts. For some local and state courts—including for the Supreme Courts of most states—voters directly elect the judges. For other courts, judges are appointed either by the representatives we elect (e.g., state legislator, governor, or president) or by a commission selected by the representatives we elect. Judges play a more immediate role in the lives of many people, and due to systemic racism, this is particularly true in communities of color.

Judges decide if someone needs to post bail or stay in jail while awaiting trial. Judges decide the nature of sentences and/or fines when someone is found guilty. Judges decide whether to reopen cases or hear appeals when new, exculpatory evidence has been found. Judges decide, in other words, the life chances of the people who stand before them; and judges with a structural inclusion framework consider the punishment as well as how to best prepare the people who come before them to reintegrate into the community.

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*It aims not at changing hearts and minds, but rather at changing policies and procedures, systems and structures to shift the inertia in favor of shared prosperity and power.*

*E pluribus unum: What is structural inclusion?*

**Structural inclusion** describes a pro-active, reparative approach to designing policy, developing institutions, building power, and creating systems and processes that promote economic and democratic equity. Like its opposite, social exclusion, structural inclusion is not just a concept or complex of rules; it results from a set of decisions and actions specifically intended to address the legacy of the economically and politically powerful few in the United States baking their power into our structures and justifying it with racist and oligarchic ideologies that naturalize the resulting stratification.

Structural inclusion in our nation is a radical goal in the pursuit of the transformative ideals articulated in our Declaration of Independence and Constitution. It aims not at changing hearts and minds, but rather at changing policies and procedures, systems and structures to shift the inertia in favor of shared prosperity and power.

Structural inclusion charts a reparative course out of the structures that have systematically stripped people, wealth, and other resources from communities of color. It stops the redistribution of wealth and power to the already wealthy and ensures that everyone's basic needs are met. It also builds the systems to guarantee everyone, regardless of their station, an equal say in our democracy and an equal chance in our economy.

Because a core component of social exclusion is democratic disqualification, or placing structural barriers to block the democratic participation of certain citizens (especially people of color and people with low incomes), progressive structural reforms are vital tools for rebalancing structural power from corporations, the donor class, and the politicians who represent them, and transferring it to working and poor people and to people of color. Progressive structural reforms address root causes of inequality; restructure the relations of power, as a means and an end; and increase meaningful participation in public life and democracy (e.g., facilitating public input, approval, and oversight into decisions and governing structures).

Three examples of progressive structural reforms that can rebalance our say in our democracy are: restoring the right to vote of citizens returning to their communities from prison; keeping big money out of political campaigns; and ending partisan, prison, and race-based gerrymanders. Grassroots organizations and think

tanks alike will continue to develop meaningful solutions to the core problems in our democracy and our economy, helping policymakers move those solutions into law. Such solutions dismantle the fundamental infrastructure of exclusion—including mass incarceration, the privatization of public goods and services, the deregulation of industry and finance—and assure affirmative access to basic needs to thrive, including housing, education, health care, and a robust safety net. And they guarantee and protect full and real democratic citizenship, agency, and power for all. Demos' [state](#) and [federal](#) policy books provide a broad overview of several policies that build toward structural inclusion. (In the resources section, you can find other such policy agendas.)

#### *We need the courts in order to achieve structural inclusion*

We can transform the vicious cycle of social exclusion into a virtuous cycle moving us toward the ideal aspired to in our country's founding documents. Structural inclusion can be reparative interventions that realign our institutions, laws, and rules in order to create a more perfect union. To make these interventions, we need the power to enact the policies that move us toward structural inclusion. This means that, in addition to electing and pushing officials to implement these solutions, we need to strategize around the courts. The courts have the ability to dismantle progressive power and hobble inclusive governance; or, they have the power to institutionalize structural inclusion.

As some progressives are investing in building candidate pipelines, we need to invest in policy and legal pipelines. What if first-generation college students saw their future path in progressive inclusion policy or as a champion for structural inclusion on or before the Supreme Court? What would it take to broaden the networks available to community activists to advance in those fields? How should we think about the relationships we nurture between community organizers, policy wonks, and lawyers or judges?

How will we center the importance of the courts in our ongoing community organizing and our focused voter education? And how will we excite voters to turn out, vote in, and run for local and state judicial elections, as well as legislative and executive positions at all levels?

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## Resources

Demos, *Everyone's America*: State Policies for an Equal Say in Our Democracy and an Equal Chance in Our Economy

Demos, *Everyone's Economy*: 25 Policies to Lift Up Working People

Economic Policy Institute, *First Day Fairness: An Agenda to Build Worker Power and Ensure Job Quality*

Every Voice, *Connecting with Voters on Money in Politics*

Local Progress, *Policy Briefs*

Movement for Black Lives, *Platform*

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## Endnotes

- <sup>1</sup> Demos, *Report on the Record of Supreme Court Nominee Brett M. Kavanaugh* (August 2018), <https://www.demos.org/sites/default/files/publications/Record%20of%20Supreme%20Court%20Nominee%20Brett%20M%20Kavanaugh.pdf>.
- <sup>2</sup> David Graham, "Don McGahn Was the Most Productive Person in Trump's White House," *The Atlantic* (August 29, 2018), <https://www.theatlantic.com/politics/archive/2018/08/don-mcgone/568870/>.
- <sup>3</sup> David G. Savage, "This Congress Filled the Fewest Judgeships since 1952. That Leaves a Big Opening for Trump," *Los Angeles Times* (December 31, 2016), <http://www.latimes.com/politics/la-na-judges-trump-senate-20161231-story.html#>.
- <sup>4</sup> Michael Kruse, "The Weekend at Yale that Changed American Politics," *Politico* (September/October, 2018), <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608>. Seung Min Kim, "Democrats Hope Kennedy's Retirement Make the Courts a Galvanizing Issue for Their Voters," *Washington Post* (July 7, 2018), [https://www.washingtonpost.com/politics/democrats-hope-kennedys-retirement-will-make-the-courts-a-galvanizing-issue-for-their-voters/2018/07/06/b47bb552-7f45-11e8-b9f0-61b08cdd0ea1\\_story.html?utm\\_term=.02dab08ed5e4](https://www.washingtonpost.com/politics/democrats-hope-kennedys-retirement-will-make-the-courts-a-galvanizing-issue-for-their-voters/2018/07/06/b47bb552-7f45-11e8-b9f0-61b08cdd0ea1_story.html?utm_term=.02dab08ed5e4). For instance: ABC News Analysis Desk and Paul Blake, "Election 2016 National Exit Poll Results and Analysis," *ABC News* (November 9, 2016), <https://abcnews.go.com/Politics/election-2016-national-exit-poll-results-analysis/story?id=43368675>. Philip Bump, "A Quarter of Republicans Voted for Trump to Get Supreme Court Picks—and It Paid Off," *Washington Post* (June 26, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/?utm\\_term=.75c7da155328](https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/?utm_term=.75c7da155328). NBC News, "NBC News Exit Poll: Future Supreme Court Appointments Important Factor in Presidential Voting," *NBC News* (November 8, 2016), <https://www.nbcnews.com/card/nbc-news-exit-poll-future-supreme-court-appointments-important-factor-n680381>.
- <sup>5</sup> Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America*, (New York, NY: Nation Books, 2016), 105.

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