

The logo consists of a stylized blue icon on the left, resembling a scale of justice or a set of steps, followed by the text "TAKE BACK THE COURT" in a bold, blue, sans-serif font.

**TAKE BACK
THE COURT**

The Case for Court Expansion

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I. Court expansion is the key to democracy restoration

The case for court expansion is simple: a stolen Supreme Court stands in the way of the people's right to govern and regulate themselves. If Congress enacts laws to restore democracy and to address climate change, economic inequality, gun violence, and other emergencies, the Court will almost certainly strike down the legislation.¹

The GOP and the Court are engaged in a long-term effort to shift the law in favor of billionaires and corporations, and while this project has seen many victories already, it is just getting started. Although the public believes that the Kennedy Court was moderate, data show that it was quite conservative,² usually doing the bidding of corporations and elites at the expense of workers,³ women,⁴ and people of color.⁵ Reverence for the Court among journalists who cover it and scholars who study it,⁶ however, has obscured the meticulousness and cynicism of the GOP's campaign to radicalize the judiciary.⁷

As part of its radical effort to reshape American law, the GOP has been consistently ruthless in judicial politics, and has succeeded in capturing the Court.⁸ By stealing the seat left empty when Justice Scalia died and by systematically tilting the playing field of American politics via voter suppression,⁹ dark money,¹⁰ and gerrymandering,¹¹ Republicans have locked in a nearly untouchable Supreme Court majority for decades to come.¹² And, in turn, the GOP will use that untouchable Supreme Court majority to effectively implement minority one-party rule, rendering the democratic process nearly irrelevant.¹³

The GOP's brazen approach leaves the American people unable to influence the Court's jurisprudence through normal means, namely electing presidents and senate majorities and replacing exiting justices. And, while other judicial reform options may look good on paper, their viability is illusory, and they cannot work in practice. Each proposal has a fatal flaw that makes it impractical as an approach.

The current Court, like the Kennedy Court, will almost certainly issue a few reasonable decisions. But the notion that Justice Roberts will allow Congress to restore democracy seems wildly inconsistent with the coordinated, long-term GOP plan to radicalize the judiciary.

Court expansion does entail some risk, but Republicans will respond to *any* judicial reform, no matter how neutral sounding, by expanding the Court at their first opportunity to do so.¹⁴ Thus, Democrats' only options are to do nothing, to contemplate judicial reforms that cannot work, or to expand the Court as part of a broader effort to rescue democracy. The Framers of the Constitution left specifics of the Court up to Congress¹⁵ to provide a check on an out of control judiciary,¹⁶ which is exactly what we have today. In the face of a radical intransigent opposition party, Democrats have no choice but to expand the Court.

II. Court expansion is just one component of a democracy agenda

Skeptics who criticize court expansion tend to consider the strategy in isolation, often contending that Democratic court expansion would be ineffective, as Republicans would simply reciprocate upon their return to power.¹⁷ These critics are correct on that front: court expansion is meaningless as a strategy unless it is understood as one component of a broader democracy agenda.

The only viable path for restoring democracy and addressing emergencies such as climate change requires Democrats, upon their return to power, to pursue a three-part “democracy agenda.” If Democrats re-take the White House and Senate in 2020 while retaining control over the House of Representatives, they should modify Senate rules that allow obstructionism, pass laws to un-rig the political system, and expand federal courts including the Supreme Court and lower courts.

Unless all three parts of this democracy agenda are enacted, our political system probably cannot be revived. Expanding the courts probably will be necessary for laws that un-rig the system to endure. To pass this kind of legislation and expand the courts, however, Democrats will need to modify Senate rules.

MODIFY SENATE RULES

As soon as Democrats re-take control of the Senate, they should eliminate rules that allow minorities of Senators to block legislation and that enable individual Senators to prevent the Senate from conducting business. These include filibusters, Senate holds, blue slips, and unanimous consent. Currently, super-majorities are required for the Senate to approve most bills, and obscure procedures allow individual Senators to grind the chamber to a halt.

- ▶ Modifying Senate rules will give the Democrats a chance to restore democracy by passing laws that add seats to the courts and un-rig the system. As well, modifying Senate rules may make it possible to enact major policy changes such as Medicare-for-all.
- ▶ Little if any major legislation is remotely possible as long as current Senate rules remain in place, even if Democrats re-take control of government.¹⁸

- ▶ Senate procedures that allow obstructionism are not required by law, and the Senate is free to eliminate them with a simple majority vote.¹⁹ The Senate has modified its rules many times, and the Constitution does not mention filibusters, unanimous consent, Senate holds, or “blue slips.” The founding fathers expected that, except in rare cases such as impeachment, Congressional votes would be decided by simple majority, not super-majority.²⁰
- ▶ Thanks in part to Senate obstructionism, Congressional gridlock is at an all-time high, and Congressional effectiveness is at an all-time low. According to a 2012 Brennan Center report, “The current Senate passed a record-low 2.8 percent of bills introduced in that chamber, a...90 percent decrease from the high in 1955–1956.”²¹ Modifying Senate rules could reduce cynicism by making government more responsive to voters, especially following landslide elections.²²
- ▶ Some critics have argued that the contemporary Republican Party, led by Senate Majority Leader Mitch McConnell, have deliberately relied on counter-majoritarian tactics in the Senate to shift policymaking power from the democratically accountable Congress to an unaccountable, increasingly reactionary judiciary.²³ If these critics are correct—and they make a compelling case²⁴—democratic policymaking (in both the small-d and large-D sense of the word) will be literally impossible without Senate reform.

Many progressives fear that if the Senate were to eliminate the filibuster and other procedures that impede majority rule, then Republicans could take advantage of the new 50-vote threshold to pass harmful legislation such as privatizing Social Security. Modifying Senate rules will incur risk, but the risk is lower than may be apparent,

as the parties are not positioned equally with respect to the filibuster. Perhaps the best evidence for this point is that Senator McConnell has not eliminated the statutory filibuster thus far. To appreciate McConnell’s calculus, it is necessary to distinguish between the politics of passing new laws and the politics of repealing currently-existing legislation.

- ▶ With respect to the passage of new laws, Republicans, unlike Democrats, already enjoy a 50-vote threshold—rather than the 60-votes necessary to overcome a filibuster—for much of what they want to get done, in particular tax cuts and deregulation, thanks to Senate procedures such as reconciliation.²⁵
- ▶ By contrast, passing laws that establish new government programs usually require super-majority Senate approval. Thus, filibusters usually prevent Democrats from passing laws that would improve the lives of Americans.²⁶
- ▶ With respect to the repeal of currently-existing legislation, the filibuster’s 60-vote threshold usually prevents Democrats from repealing laws that they oppose.
- ▶ By contrast, the primary obstacle preventing Republicans from overturning laws that they dislike, such as the Social Security Act, is not the filibuster, but rather the popularity of the legislation.²⁷ Recall that the GOP could not muster 51 votes to kill the Affordable Care Act.
- ▶ Therefore, eliminating the statutory filibuster would make it easier for Democrats to pass legislation or repeal laws that they oppose, but would not necessarily enable Republicans to overturn legislation that they dislike.

Moreover, abolition of the filibuster is justifiable not only on pragmatic grounds, but on moral grounds. The Senate's inherent small state bias is well documented.²⁸ This inherently anti-democratic structure—which especially reduces the power of racial and ethnic minority groups²⁹—is aggravated by the Senate's supermajority requirement, which allows 41 senators, who may represent a significantly smaller percentage of the population than their majority counterparts, to obstruct any Senate action. Abolition of the filibuster would mark a significant stride towards righting the wrong that is inherent in the Senate's anti-democratic structure, which privileges the interests of certain Americans over others solely by virtue of the fact that they have chosen to live in a smaller state.³⁰

UN-RIG DEMOCRACY

Once Democrats modify Senate rules, they should immediately enact a range of measures, some of which are included in House Resolution 1, the *For the People Act*,³¹ to repair democracy and increase participation in the political process. Without court expansion, many of these pro-democracy reforms would be at risk of evisceration by a far-right Supreme Court majority.³²

- ▶ **Voting:** Following the recommendations of the Brennan Center, Congress should pass a comprehensive Voting Rights Act—including restoration of the important protections struck down by the Roberts Court in 2012's *Shelby County v. Holder*—to ensure that all Americans have the right to vote and an equal opportunity to vote, and that voting is convenient for everyone.³³ By requiring states to follow the Brennan Center's plan for registration modernization, 50 million voters could be added to the rolls.³⁴ The Act should enfranchise convicted felons, 6.1 million

of whom were denied the right to vote in 2016.³⁵ Finally, the Act should protect U.S. elections from foreign influence.³⁶

- ▶ **Gerrymandering:** The National Democratic Redistricting Committee (NDRC), chaired by former U.S. Attorney General Eric Holder, has endorsed policies that minimize partisanship in the drawing of congressional districts.³⁷ As well, the Brennan Center has offered recommendations for reforming the redistricting process so as to create fair, competitive maps.³⁸ Congress should use its powers under the Constitution's Elections Clause to ban partisan gerrymandering and require states to follow the recommendations of the NDRC and the Brennan Center.
- ▶ **Statehood:** One of the central pillars of American democracy is that all citizens must be represented in government. Citizens residing in the District of Columbia and Puerto Rico, however, lack Congressional representation. The absence of political representation is inconsistent with the spirit of democracy, and sustains federal financial neglect as well, such as the Trump administration's anemic response to Hurricane Maria.³⁹ Congress should offer statehood to Washington, DC and to Puerto Rico, thus expanding the size of the Senate to 104 if citizens of those two locales vote to accept statehood.
- ▶ **Citizenship:** It is undemocratic for 12 million undocumented immigrants to live in fear that they will be deported and to be denied equal protection under the law. Our national conversation has elided the U.S. role in helping to create conditions in Central and South America that effectively force many people to emigrate,⁴⁰ as well as the \$12 billion per year that

undocumented immigrants pay in state and local taxes and the \$9 billion per year that they pay in payroll taxes, even though few will ever receive Social Security or Medicare benefits.⁴¹ Once Democrats re-take control of the legislature and White House, Congress should create a quick path to citizenship for all law-abiding immigrants.

- ▶ **Campaign Finance:** Congress should eliminate dark money in politics by passing the DISCLOSE Act, which would require super PACs and other organizations that spend in federal elections to disclose their donors to the public.⁴² Passing the DISCLOSE Act would mitigate the harms caused by the *Citizens United*⁴³ decision, which allowed for unlimited independent political spending by corporations, by requiring public clarification of the role of corporations in political campaigns. Congress should also pass a mandatory version of the Fair Elections Now Act, which would curtail the impact of elite and corporate donors by transforming the current large-dollar private campaign financing system to one based on small-dollar public funding.⁴⁴

EXPAND FEDERAL COURTS

Finally, Democrats should pass a law expanding the size of the Supreme Court and increasing the number of district and appellate court judges.

- ▶ The number of Supreme Court Justices changed seven times in the 19th century, and there is no legal or constitutional requirement to cap the Court's size at nine.⁴⁵ Nor is there any constitutional requirement to fix the size of the district or appellate courts at their current levels. The size of the federal courts at all levels is set by an ordinary statute, which can be modified by Congress like any other.⁴⁶
- ▶ The *New York Times* reports that "In Obama's final two years, 18 of his district nominees and just one of his appellate court nominees were confirmed — the lowest number since Harry Truman was president."⁴⁷ Thanks to this obstructionism, Trump inherited 107 judicial vacancies and an open Supreme Court seat.
- ▶ Then, following the 2016 election, Republicans declined to let Democratic Senators use procedures that the GOP had leveraged to block Obama's appellate nominees, thus allowing Trump, in his first 19 months in office, to fill 24 appellate judgeships. By contrast, during his first 48 months in office, President Obama was able to fill just 15 appellate judgeships.⁴⁸

As long as Republicans remain radicalized, democracy probably cannot be restored, regardless of what happens at the ballot box.

III. Electoral politics cannot save democracy

Many on the left believe that by winning at the ballot box, Democrats can teach Republicans that radicalism is a losing electoral strategy.⁴⁹ As long as Republicans remain radicalized, however, democracy probably cannot be restored, regardless of what happens at the ballot box. Reviving democracy requires the passage of durable laws, but Republicans probably will be able and willing to block or dismantle those laws for the indefinite future.

Perhaps, if Democrats were able to dominate federal and state electoral politics for a long time, with few interruptions, they might be able to restore the political system. Unfortunately, however, Democrats are unlikely to achieve long-term electoral dominance. American electoral politics are cyclical,⁵⁰ and even under normal circumstances, it is somewhat rare for Democrats to take control of the legislative and executive branches simultaneously. The same pattern has repeated itself twice over the past 38 years. In both cycles of the pattern, long periods of Republican rule inflicted damage that resulted in landslide Democratic presidential victories (in 1992 and 2008). In both cases, however, Democrats were soundly defeated in subsequent midterms (1994 and 2010), losing control of at least one congressional chamber after only two years at the helm. Thus, over the past 38 years, there were only two two-year periods (1993–1995 and 2009–2011) when Democrats had a reasonable chance of passing bold, progressive

legislation. In the future, with the political process skewed in favor of the Republican Party by a partisan Republican judiciary,⁵¹ it will be even less likely for Democrats to be able to do so.

More recently, the consolidation of the GOP's structural advantages in the House and Senate as well as voter suppression, dark money, and gerrymandering have made it even more difficult for Democrats to achieve single-party control.⁵² Even in the best case, absent a fundamental re-alignment, Democrats have little chance of taking long-term control of the executive and legislative branches simultaneously. The best Democrats probably can hope for is two years of control from time to time, but without a Senate super-majority.

While Democrats may not be able to achieve long-term dominance, perhaps occasionally winning at the ballot box can teach Republicans that radicalism is a losing electoral strategy. Unfortunately, there is little available evidence to support the position that intermittent electoral defeats have a moderating impact on the Republican party. Nationally, the GOP was walloped in the 1992, 2006, and 2008 elections, and soundly defeated in 1996 and 2012, but with each electoral defeat, the party became more radical.⁵³ After the 2012 election, GOP leaders performed an autopsy concluding that radicalism is a losing political strategy, but then lined up

behind Trump’s radicalism during the 2016 campaign and beyond.⁵⁴

Electoral defeats do not and probably will not convince Republicans that radicalism is a losing strategy because the party can achieve much of its agenda even while in the minority, especially if conservative justices retain control of the Supreme Court, enabling Republicans to enact regressive economic policies—such as dismantling unions—through the judiciary.⁵⁵ While the Obama administration (barely) enacted three laws that the GOP detests (the Affordable Care Act, Dodd-Frank, and the modest 2012 tax hike), Republicans can easily leverage procedures that enable obstructionism to ensure that progressive political victories are few and far between.

Even when progressive political victories occur, they may only be temporary, as Republicans can use their hand-picked judges and justices to eviscerate and even eliminate the fruits of Democratic political victories. The example of the Affordable Care Act demonstrates this dynamic. Democrats enacted the ACA,⁵⁶ a sweeping reform of the health care system, in 2010, after overwhelming political victories in the 2008 election: indeed, President Obama won the 2008 election by a larger margin than any non-incumbent in U.S. history.⁵⁷ By any reasonable standard, the ACA had as much democratic legitimacy as it is possible for a statute to have. Nevertheless, right-wing groups have used conservative control of the judiciary to achieve the result they could not achieve at the ballot box. In 2012, the Supreme Court struck down a key component of the law, its expansion of Medicaid.⁵⁸ Even after Republicans

took full control of the federal government in 2017, they were unable to repeal the law,⁵⁹ and in the 2018 midterm elections, Democrats took control of the House of Representatives running on a pro-ACA platform.⁶⁰ Despite this clear democratic rejection of Republicans’ ACA repeal, radical right-wing state attorneys general, working in conjunction with the Trump administration, have pursued abolition of the ACA via the courts on a legal theory that even ACA critics have described as a “mockery of the rule of law.”⁶¹ Nonetheless, a sympathetic district court judge accepted this theory and struck down the law.⁶² The ultimate outcome of the ACA litigation remains uncertain, but its example demonstrates how right-wing partisans can and will use the radicalized judiciary to get their way even when defeated at the ballot box.

Even if the GOP loses a string of federal elections, it can also use the Senate’s 60-vote super-majority requirement, with rare exceptions, to prevent the passage of significant tax hikes on the wealthy and significant expansion of the welfare state. In turn, reconciliation often enables Republicans, when in power, to invoke a 50-vote Senate threshold for tax cuts.⁶³

The cumulative effect of these dynamics is that GOP *wins gradually* over time, as suggested by the decline in top marginal income tax rates over the past half century. In 1963, the top rate was 91 percent, but by 2017 the rate had been cut to 37 percent, which is quite low in comparison to top rates in other western, industrialized countries.⁶⁴ The GOP has almost no incentive to de-radicalize even if Democrats prevail at the ballot box from time to time.

IV. Other judicial reforms cannot save democracy

The U.S. faces a range of emergencies including climate change, gun violence, hyper-incarceration, health care, and economic inequality. The stakes of these emergencies are so high that we cannot afford to waste time considering reform options that look good on paper, but that cannot work in practice.


Legal scholars have offered a range of judicial reform options, but all such options—except court expansion—suffer from the same fatal flaw: they cannot be implemented. It is arguably irresponsible for 2020 presidential contenders to float reform options that cannot work, no matter how compelling they might seem at first glance.

- ▶ **Term limits and appellate rotation:** Congress could pass a law imposing term limits on Supreme Court justices.⁶⁵ Because the Constitution requires lifetime appointments to the federal bench, appellate court justices could rotate onto the Supreme Court for fixed terms, and then rotate back down to lower courts when their terms end.⁶⁶ The fatal flaw with this option is that between Congressional passage of a statute authorizing term limits and the implementation of the new system, there would be an ample window of time during which the Supreme Court could be expected to strike down the statute.⁶⁷ It is almost unimaginable that the Court's five conservatives would cede their power.
- ▶ **5-5-5:** Several presidential contenders have discussed a 5-5-5 plan under which the Court would consist of five Democratic justices, five Republican justices, and five justices who would have been chosen unanimously or nearly unanimously by the other ten justices.⁶⁸ Such a plan might temper the Court by forcing liberals and conservatives to compromise on the five moderate selections. Similar to term limits, however, 5-5-5 suffers from the fatal flaw that between Congressional passage of a statute authorizing it and the implementation of the new system, there would be an ample window of time during which the Supreme Court could be expected to strike down the statute. The Court's five conservatives would have no reason to cede their power.
- ▶ **Jurisdictional stripping:** Historically, critics of the Supreme Court have proposed (and sometimes enacted) so-called "jurisdiction stripping" statutes:⁶⁹ legislation depriving the Supreme Court of power to hear cases related to certain issues. The basis for such legislation would be Article 3 of the Constitution, which authorizes Congress to create exceptions to the Supreme Court's otherwise comprehensive appellate jurisdiction. However, there is significant debate in the academic literature regarding the question of whether Congress may entirely strip the

Supreme Court of jurisdiction over certain cases to prevent it from interpreting the Constitution,⁷⁰ and it is probable that the ultimate resolution of this question would be left to the Supreme Court itself, which is highly unlikely to cede its power.

- ▶ ***Voting rule modifications:*** Certain critics have suggested that Congress should enact a law requiring a supermajority 6-3 or 7-2 vote in certain cases, such as those interpreting the Constitution or striking down state or federal laws.⁷¹ Proponents of this reform suggest that it would reduce the partisanship of the Court by requiring greater consensus in high-profile cases. Like other proposed reforms, however, a supermajority

requirement itself would be subject to challenge in the Supreme Court, and there is no guarantee that a 5-member conservative majority would not strike it down.⁷² Furthermore, a supermajority requirement would likely mean that lower court rulings would be left in place if a coalition on the Court were unable to form a supermajority in favor of reversal, which would allow Trump's hyperpartisan lower-court judges to impose their will on parts of the country without a Supreme Court check.



The most common error plaguing critiques of court expansion is the failure to recognize that Republicans will pack the Court if they need to do so to control it, regardless of what Democrats do.

V. Risks of court expansion and its alternatives

RISKS OF ALTERNATIVE JUDICIAL REFORMS

Every strategy involves risk, and the risk of other judicial reform options is, as argued above, that they cannot be implemented. Impracticality is a serious risk because:

- ▶ There may only be a decade left to prevent planetary climate change catastrophe,⁷³ yet the Supreme Court is unlikely to uphold legislation to mitigate the damage⁷⁴;
- ▶ 2020 may be the Democrats' last opportunity for quite a while to capture the Senate. There may not be another opportunity to pass a judicial reform law for a long time;
- ▶ In addition to climate change, other emergencies including gun violence, hyper-incarceration, health care, and economic inequality pose clear threats to American democracy, yet the Court is unlikely to allow Congress to pass legislation which would solve the problems.⁷⁵

RISKS OF COURT EXPANSION

The most common and significant error plaguing critiques of court expansion is the failure to recognize that Republicans will pack the Court if they need to do so to control it, as soon as they have the opportunity to do so, regardless of what Democrats do.

- ▶ If and when a liberal majority is achieved via the normal rotation of justices off of the court due to retirement or death, the right-wing media will quickly and effectively de-legitimize the Court. For instance, thanks to false rhetoric about rigged elections, 68 percent of Republicans believe that the non-existent issue of voter fraud is a more significant problem than disenfranchisement.⁷⁶ Conservative opinion leaders will have little difficulty shaping their base's perceptions of a liberal Court.
- ▶ For the same reasons, if and when Democrats were to reform the Supreme Court in a neutral, non-partisan way—by instituting term limits or “5-5-5,” for example—the right-wing media will quickly and effectively de-legitimize the Court.

- ▶ Following the two points above, Republicans will pack the Court if they need to do so to control it, as soon as they have the opportunity to do so. Indeed, the blockade of the Merrick Garland nomination proves that the Republican Party is committed to adjusting the size of the Supreme Court for political reasons; there is no meaningful distinction between shrinking the court, as the GOP did in 2016, and packing it. The notion that the GOP would sit by passively if Democrats were to neutralize the conservative lock on the court via normal turnover or via some “neutral” option such as term limits is a fantasy.

Opponents of court packing invoke four inter-related risks, but we argue below that the strategy is much safer than skeptics posit.

Preservation of Norms

Skeptics argue that preserving the norms of democracy is of utmost importance, and Republicans have demolished so many norms that Democrats must do whatever they can to protect those that remain, such as the notion that the Supreme Court should consist of nine justices.⁷⁷ While skeptics are right to emphasize the importance of protecting norms, normative preservation is not a persuasive rationale for opposing court expansion.

- ▶ A norm is only a norm as long as both sides believe in it. When the founder of the Federalist Society published a study endorsing packing the Supreme Court, this was a strong signal that the GOP no longer takes the norm of nine justices seriously. When he published a subsequent paper endorsing expansion of the lower courts, this was a strong signal that the GOP is not wedded to the current size of district and appellate courts.⁷⁸

- ▶ When leading Republican moderates said before the 2016 election that they would freeze the size of the Supreme Court at eight throughout Hillary Clinton’s presidency, they sent a strong signal that the GOP no longer takes the norm of nine justices seriously.
- ▶ It is folly and an invitation to get sucker-punched when one of two parties adheres to a norm that the other party no longer embraces.

Collapse of Democracy

Some leading scholars of democratization oppose court expansion because, they say, democracy died in a handful of cases around the world in which political opponents used hardball tactics to oppose democratically elected leaders who, like Trump, displayed authoritarian tendencies.⁷⁹ Their analysis, however, elides important context:

- ▶ The scholars assume that democracy died in the cases they studied because political opponents used hardball tactics to respond to authoritarians. One cannot, however, eliminate the possibility that democracy would have died anyway, and that the use of hardball tactics, while unsuccessful, may not have been the cause of collapse.
- ▶ Their scholarship is based on only a handful of cases, all of which were weakly institutionalized democracies, and none of which are comparable to the modern United States. Venezuela, for example, had only been a democracy for about a decade when Hugo Chavez’s opponents used hardball tactics unsuccessfully.
- ▶ The scholars did not include in their analysis the handful of cases in which hardball tactics arguably succeeded in restoring democracy, such as France under De Gaulle.

- ▶ Responding to Republicans with hardball tactics could produce a “hurting stalemate,” a truce in which both parties agree to return to normal politics. This is particularly likely because, as argued above, court expansion would enable Congress to pass durable legislation that would add 50 million voters to the rolls.
- ▶ The primary threat to democracy is GOP radicalism. We know from experience that Democrats’ general reluctance to use hardball tactics over the past generation has not deradicalized the GOP, and as argued above, that electoral politics has almost no chance of deradicalizing the GOP. Hardball responses may be the only option to de-radicalize the GOP.

As one court-expansion proponent has noted, “[c]ourt-packing is a tool: it can be used for authoritarian ends, or for democratic ones.”⁸⁰ We propose using it for democratic ones.

Legitimacy of the Court

Critics argue that court expansion will undermine the Court’s legitimacy because the public will view the strategy as a partisan power grab.⁸¹ This is partially correct, but several points of context underscore why this risk should not be a barrier to action.

- ▶ If Democrats refrained from expanding the Court, and achieved a liberal majority via normal turnover (for example if Merrick Garland had been confirmed, or if Clarence Thomas is replaced by a Democrat), Republicans would view the Court as illegitimate. The right-wing media has the capacity to delegitimize political institutions quickly and whenever necessary with heated rhetoric (e.g. “rigged elections,” or the right-wing media criticism of the FBI and

the Department of Justice during the Mueller investigation). If Republicans are poised to delegitimize the Court even if a liberal majority is achieved via normal rotation, then concerns about legitimacy are not a sound reason to oppose expansion.

- ▶ The court has become a highly partisan institution,⁸² and as long as Republicans remain radicalized, the notion that it can be de-politicized is a fantasy.
- ▶ Historically, expansions of the Supreme Court have not undermined the Court’s legitimacy. Congress has modified the size of the Court seven times, and modification has coincided with the flourishing of democracy and the expansion of the court’s legitimacy.
- ▶ Ongoing public education about the reason for court expansion (restoring democracy) will help mitigate some concerns about the partisan basis of the strategy. Court expansion will benefit Democrats, and advocates should be honest about that, but the reason for expansion is to save democracy, a non-partisan goal that helps all Americans.

Tit-for-tat retaliation

Critics worry that if Democrats expand the Court, Republicans will respond in kind, and the tit-for-tat retaliations will destroy the Court’s legitimacy and the rule of law.⁸³ For the following reasons, this concern is unconvincing.

- ▶ All available evidence suggests that if Republicans needed to pack the Court to control it, and if they had the capacity to do so, they would not hesitate. As noted above, there is no

distinction between the Garland blockade and court-packing; both involve the manipulation of the size of the courts for political reasons.

- ▶ A party whose leading legal theorist publishes papers urging court packing is unlikely to hesitate to pack courts.⁸⁴
- ▶ A party that prevented a president from filling an open Supreme Court seat, and whose leading members declared that the next Democratic president would not be allowed to fill that seat,⁸⁵ is unlikely to hesitate to pack courts.
- ▶ A party that arguably blocked more lower court appointees in the last two years of the Obama presidency than had been blocked in all of American history, and that rushed to fill those seats by circumventing the same procedures it had leveraged to block Democratic nominees,⁸⁶ is unlikely to hesitate to pack courts.
- ▶ A party that places its own partisan interests above the national interest to an extreme degree, for example by thwarting investigations into whether a hostile foreign power subverted a

presidential election,⁸⁷ is unlikely to hesitate to pack courts.

- ▶ Democrats thus have a choice. They can expand courts first. Or they can accept that, if and when they do ever achieve a majority on the Court, Republicans will almost certainly pack it at their first opportunity.
- ▶ Perhaps most importantly, if Democrats expand the courts and enact legislation to add 50 million voters to the rolls and provide statehood to DC and Puerto Rico, it will be difficult for Republicans to pack the Court in retaliation for quite some time, because doing so would require capturing the presidency and both chambers of Congress, and the power of the contemporary, radicalized Republican Party relies on the unique characteristics of the American political system as it exists today, which privileges rural, reactionary interests. If reforms are made, a truly majoritarian system would be unlikely to produce today's crop of Republican radicals.

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ENDNOTES

1. See, e.g., Pack The Courts, Supreme Court May Invalidate H.R. 1 (2019) [hereinafter “May Invalidate H.R. 1”]; Pack The Courts, Supreme Court May Invalidate D.C. Statehood (2019)
2. See, e.g. Adam Liptak, *Court Under Roberts is Most Conservative in Decades*, N.Y. Times, Jul. 24, 2010, <https://www.nytimes.com/2010/07/25/us/25roberts.html>.
3. See, e.g., Janus v. Am. Fed’n of State, Cty., and Mun. Emps., 138 S. Ct. 2448 (2018) (holding that the First Amendment prohibits mandatory agency fees in public sector unions); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (upholding the enforcement of employee arbitration agreements that prohibit collective arbitration).
4. See, e.g., Burwell v. Hobby Lobby Stores, Inc, 134 S. Ct. 2751 (2014) (holding that contraceptive equity regulations issued under the Affordable Care Act violate the Religious Freedom Restoration Act); Ledbetter v. Goodyear Tire & Rubber Co, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5 (2009) (limiting the ability to challenge gender discrimination in pay under the Civil Rights Act of 1964); Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding state laws prohibiting an abortion procedure deemed the safest in certain circumstances by the American College of Obstetricians and Gynecologists).
5. See, e.g., Shelby County v. Holder, 570 U.S. 529 (2013) (striking down a core component of the Voting Rights Act of 1965); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (blocking a race-conscious school desegregation plan).
6. *The Supreme Court vs. Democracy*, The Ezra Klein Show (Jul. 2, 2018), <https://art19.com/shows/the-ezra-klein-show/episodes/498bccf1-abb5-4040-b7e5-6336b4f37e92>.
7. See, e.g., Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. Times, Aug. 22, 2018, <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html>; Jeffrey Rosen, *The Unregulated Offensive*, N.Y. Times, Apr. 17, 2005, <https://www.nytimes.com/2005/04/17/magazine/the-unregulated-offensive.html>. For more on the history of the conservative legal movement, see generally Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (2015); Steven Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (2010).
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9. See, e.g., Carol Anderson, *One Person, No Vote: How Voter Suppression Is Destroying Our Democracy* (2018).
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