Note that all yellow highlights were done by Bill Hyde and not the original authors/editors.

Opinion

HOW TO FIX THE SUPREME COURT

The Supreme Court is supposed to be a counterweight to the will of the majority. But it may need constraints. Here are six ways to reform the courts — and one argument that we shouldn't change a thing.

How We Got Here

Introduction by Emily Bazelon

Ms. Bazelon is a staff writer at The New York Times Magazine.

In the 1803 case Marbury v. Madison, the Supreme Court took for itself the power to determine the meaning of the Constitution. Ever since, the federal courts have used judicial review, selectively, as a counterweight to majority rule.

The court has hit historic high points by siding with minorities that lack political power, especially to expand civil rights. The signature example is the unanimous 1954 ruling that called for an end to legally mandated school segregation in Brown v. Board of Education — a ruling embraced by every recent nominee to the court, across the ideological spectrum.

But the court has also gone historically off course in making major counter-majoritarian moves — and been smacked down for it by the elected branches. In the aftermath of the Civil War, Congress passed a law requiring the Southern states, in order to re-enter the Union, to allow Black people, as well as white, to vote to ratify the 14th Amendment, which promised equal rights.

When this pillar of Reconstruction was challenged in the case Ex Parte McCardle, Congress worried that the Supreme Court would strike it down. So it stripped the court's jurisdiction over Reconstruction and raised the number of justices to nine. (It was the third time Congress had changed the number of justices during the 1860s.)

During the early 20th century, a period called the Lochner era, the court discredited itself by putting the interests of corporations above those of workers by striking down laws that regulated the workplace. And in the Great Depression, when the Supreme Court blocked key parts of the New Deal, the justices found themselves in a standoff with President Franklin Delano Roosevelt, who asked Congress to raise the number of justices to 15.

But it was neither the president nor Congress who blinked first. It was a conservative justice who changed sides in 1937 to uphold another New Deal law, followed by a second who soon announced his retirement.

In the decades after that clash, some liberals and conservatives argued for the court to exercise judicial modesty, or humility, by largely refraining from undoing the work of the elected branches. But once an ideological

bloc on the court has a majority, its members (and their supporters) tend to forgo restraint in favor of wielding its power.

Liberals celebrated a series of victories during the Warren court era of the 1960s and ’70s. Into the current decade, they came to rely on the court to protect civil rights and prevent the establishment of religion, even when doing so was out of step with the views of the public.

Now they’re waking up to the downside of judicial supremacy — the opposite of restraint — in the hands of a conservative majority that is expanding to six. One of the most telling moments at Amy Coney Barrett’s confirmation hearing was her refusal to say whether she thinks Medicare — the long-established and popular health insurance benefit — was legal.

Democrats emphasized the threat a Justice Barrett could pose to another increasingly popular health care law, the Affordable Care Act. They know that if conservative justices strike it down in a suit that’s scheduled for argument on Nov. 10, they risk overplaying their hand much as the conservative majority did in the 1930s.

The ramifications go far beyond the A.C.A. An emboldened conservative court can move the law once again to favor corporate power — over consumers, employees and the very will of people.

Are liberals sounding an alarm now because they fear the impending results, not the principle, of judicial overreach? In part, yes, but that’s not the whole story.

There is also a structural critique of the Supreme Court’s role. The justices can lag somewhat behind the elected branches. They can, and often should, be the protector of minorities whom the majority may trample (including religious groups, a current concern of conservatives). But if the court yanks the country too far from the elected branches, the Constitution gives Congress the power to rein in the court.

The most pressing question now is whether the conservative majority will issue rulings on voting, the census, redistricting and other foundations of fair and free elections that threaten the majoritarian nature of American democracy itself. If the conservative justices take these steps, they will entrench the power of the Republican Party that gave them their seats just as an increasingly multiracial electorate shifts away from the current Republican coalition.

Even now, Republican dominance over the court is itself counter-majoritarian. Including Amy Barrett, the party has picked six of the last 10 justices although it has lost the popular vote in six of the last seven presidential elections, and during this period represented a majority of Americans in the Senate only between 1997 and 1998 (if you count half of each state's population for each senator).

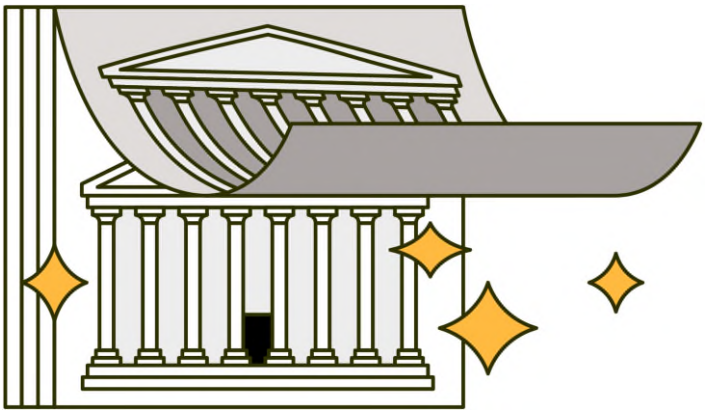
That's a dangerous proposition for our constitutional order. The court can hold its conservative impulses in check with an eye to the future. Or it can ramp up a power struggle with the other branches that in the end — Marbury or no Marbury — it is destined to lose.

Correction: An earlier version of this article described incorrectly the Brown v. Board of Education ruling. It called for an end to legally mandated school segregation, not desegregation.

Create a New Court

By Kent Greenfield

Mr. Greenfield is a professor at Boston College Law School.



The Supreme Court needs saving. And most Americans not named Trump or McConnell know it. With President Trump's third appointment to the court, Republican presidents have picked 16 out of the last 20 justices though the Democrats have won more votes in six of the last seven presidential contests.

I love the court. I clerked there; I teach about it. I am the author of a treatise about its rules and procedures. But it is now diminished. The Supreme Court has become too partisan and unbalanced to trust it with deciding the most important issues of our day.

The way to save the court is to create another one.

The United States should join scores of other nations, including Germany and France, and create a specialized court to decide constitutional questions. The most contentious and important legal issues — whether states can ban abortion, or whether the president can refuse subpoenas or mandate travel bans — should be shifted from the Supreme Court to a new court created to decide such issues.

Creating a United States Constitutional Court is the big idea that has evaded Democrats looking for possible cures to the court's politicization.

This court would be made up of judges from other federal courts, selected by the president from a slate generated by a bipartisan commission to create legitimacy and balance. The judges would serve limited terms, then return to their previous courts. Staggered terms would guarantee each president several appointments.

There are other approaches to restore the court's legitimacy, but they all have problems. If Democrats retake the Senate and the White House, they could add new justices, but "court packing" would worsen the problem and invite a response by Republicans when the tide turns. Term limits for justices would require a constitutional amendment and would not cure the court's imbalance for decades.

In contrast, a special constitutional court can be achieved by statute, adopted by Congress and signed into law by a new president. And it is unquestionably constitutional.

Congress is squarely within its authority to create a constitutional court, just as it has created the federal courts of appeals, the district courts and the United States Court of International Trade.

Congress also has control, as Article III of the Constitution makes clear, over the Supreme Court's jurisdiction to review decisions of lower courts. Its appellate authority is subject to "such exceptions, and under such

regulations as the Congress shall make." Congress has taken advantage of this power a number of times in history, making major adjustments to the scope of the court's appellate review as recently as 1988.

How would the new court gets its cases?

With few exceptions, the Supreme Court now hears only those cases it chooses. Most of those — about two out of three — turn on interpretations of federal statutes or regulations. Those sorts of cases would remain at the court. If the court gets them wrong, Congress can respond with new laws or regulations.

But the court's constitutional mistakes cannot so easily be rectified. Nor can the taint of partisanship that now accompanies them. Congress can require the Supreme Court to refer cases it accepts that turn on constitutional questions to the constitutional court. This would mimic the main structural benefit of Supreme Court supremacy — establishing a national uniformity in matters of constitutional rights and authority.

In addition, Congress could amend an existing but seldom-used law allowing federal courts to ask the Supreme Court for advice on constitutional questions embedded in pending cases. Instead, the constitutional questions could be referred to the Constitutional Court and then sent back to the referring court after resolution.

The new court should have an even number of judges (eight is good), ensuring it would never rule with a bare majority. The court would be powerless to strike down a statute on constitutional grounds with a tie vote. When the constitutional court did reach a decision, Congress could limit the Supreme Court's ability to hear an appeal unless a supermajority of justices, seven of nine, voted to hear it. (Now it takes only four votes to hear a case.)

Congress could also create a sunset provision for the court — 20 years perhaps, after which the court would end unless Congress renewed it. In the meantime we can reform the Senate's confirmation process, pushing the Supreme Court to become the dispassionate body that the Constitution's framers envisioned.

The Supreme Court needs a breather — a chance to reboot. The United States Constitutional Court would give it that.

Give Justices Term Limits

By Steven G. Calabresi

Mr. Calabresi is a professor at the Pritzker School of Law at Northwestern and a visiting professor at Yale Law School.

Supreme Court justices often try to retire during the presidency of someone sympathetic to their jurisprudence. Of course, that doesn't always work: Justice Antonin Scalia, for whom I clerked, died after almost 30 years on the court trying to wait out President Barack Obama, and Justice Ruth Bader Ginsburg died after nearly 27 years on the court trying to outlast President Trump.

Over all, though, strategic retirements give the justices too much power in picking their own successors, which can lead to a self-perpetuating oligarchy. The current system also creates the impression that the justices are more political actors than judges, which damages the rule of law. It may even change the way the justices view themselves.

That is why we need to permanently reform the broken process for selecting Supreme Court justices. My proposal is a constitutional amendment that would create a single 18-year term for each of them.

No other major democracy in the world gives the justices on its highest court life tenure, and nor do 49 of the 50 states. The longest terms are more like the 12-year terms served by German Constitutional Court justices. Countries and states that do not have term limits have mandatory retirement ages; many jurisdictions have both.

The unpredictable American system of life tenure has led to four presidents picking six or more justices and four presidents selecting none, as happened with Jimmy Carter. This gives some presidents too much influence on the Supreme Court and others too little.

It also leads to justices remaining on the Supreme Court when they are unable either physically or mentally to do the job, though this was not the case with Justices Ginsburg and Scalia. Allowing lengthy tenures on the Supreme Court — from 1971 to 2000, for instance, justices who left the court had served an average of 25.6 years — ignores Lord Acton's admonition that "power tends to corrupt, and absolute power corrupts absolutely." Though, of course, this was not the case with Justices Ginsburg and Scalia.

The solution is for Republicans and Democrats to unite in supporting a constitutional amendment that fixes the size of the Supreme Court at its current nine justices, each of whom would serve an 18-year nonrenewable term, staggered so that one seat opens up during the first and third years of a president's four-year term. One-term presidents would be guaranteed two appointments; two-term presidents would get four. Each two-year Senate session would consider a nominee.

Given the length of this term, longer than for judges on the high courts of any other constitutional democracy, the justices would be amply independent.

Presidents would no longer have the incentive to pick comparatively young nominees — say, someone 45 to 50 years of age — to project their influence decades into the future. Justices would lose their power to help pick successors who share their views by retiring strategically.

In the case of early retirements or deaths, the president would nominate and the Senate would confirm a replacement to fill out the unexpired term with no possibility of reappointment.

Under this approach, for instance, Amy Coney Barrett would serve an 18-year term. The eight other justices would draw lots as to who serves terms of two, four, six, eight, 10, 12, 14 or 16 years as the amendment goes into effect.

Failure to confirm a justice by July 1 of a president's first or third year should lead to a salary and benefits freeze for the president and all 100 senators, and they should be confined together until a nominee has been approved. The vice president would act as president during this time, and the Senate would be forbidden from taking action whatsoever on any of its calendars.

This approach would end what has become a poisonous process of picking a Supreme Court justice. It would depoliticize the court and judicial selection, and thus promote the rule of law.

Don't Let the Court Choose Its Cases

By Melody Wang

Ms. Wang is a student at Yale Law School.

In his June Medical Services v. Russo concurrence, Chief Justice John Roberts emphasized that because the Louisiana abortion regulation at issue was "nearly identical" to a Texas statute that the court struck down four years ago, the same facts commanded the same result. But Justice Roberts then outlined a friendlier legal standard for abortion regulations.

Read between the lines, and his message was clear: Bring me a different case, and *then* we can move the ball on abortion.

Because the justices select the cases they hear in a freewheeling process known as certiorari, they can issue calls to action and expect results: Lawyers, tuned into the court's every palpitation, are "primed to respond" by offering cases that justices invite.

The certiorari process means that, unlike lower courts that may merely "call balls and strikes," in Justice Roberts's memorable framing, the Supreme Court controls who's at bat. Through this power, justices can promote their own agendas by choosing cases that operate as tools to bend the law to their preferences.

Taking away this power — to determine the issues it decides and on what terms it decides them — is America's best option to curb the court's activism, and restore its legitimacy.

To see how the justices stage adjudication, look to Justice Samuel Alito's vendetta against agency-shop union agreements, which require employees to pay dues even if they do not join the union that represents them. In 2012, Justice Alito ventured beyond the issues in Knox v. Service Employees International Union to intimate that the First Amendment wholly bars agency-shop fees for public employees.

Litigants then brought forth three cases that cumulatively crippled these agreements for public-sector unions, ultimately dealing them a deathblow in Janus v. American Federation of State, County and Municipal Employees. Justice Elena Kagan, writing in dissent in Janus, criticized her colleague's "six-year campaign" to reach this result.

When the court engages in this running conversation with litigants, it works to bend the law toward its political preferences — and thus outside its proper role of serving as a passive adjudicator.

The court couldn't always do this. For the first 100-odd years of the Republic, the court had to review every case that litigants appealed. Only with the Judiciary Act of 1925 did the court begin to exercise vast discretion over its docket.

Just as Congress granted this power, so can Congress take it away. Removing the court's docket-control power — and instead allowing randomly selected panels of appellate judges to select cases — would restrain judicial activism by taking the Supreme Court out of the driver's seat. While the court may still have self-aggrandizing incentives, it could no longer direct the progression of the law because another body would decide which cases it hears.

Lower-court panels could ensure that the agenda-setting power remains dispersed. With a constantly changing membership, they cannot pursue an ideological agenda.

Interposing random appellate panels as gatekeepers would also deter opportunistic litigants from ramming through changes whenever they find a sympathetic composition of justices and from fashioning cases to appeal to justices' idiosyncrasies. The random panels would instead encourage parties to develop sound legal arguments with broad appeal, serving to promote the rule of law.

Appellate judges are also better situated than the justices to pick cases. As Justice Ruth Bader Ginsburg wrote, the Supreme Court's "main trust" is "to repair fractures in federal law." Who better to identify these fractures than appellate judges with localized knowledge? What's more, appellate judges already exercise similar discretion when they select cases for their entire circuit court to hear — they choose cases to ensure uniformity in the law and to address questions of "exceptional importance."

Finally, reforming the certiorari process is constitutionally rock solid, and would stabilize the judiciary in a way that court-packing cannot. As even Senator Bernie Sanders has conceded, court-packing would produce political whiplash. "Packing the courts is a great idea when you're in power," he said. "Not such a great idea when your political opponents are in power."

It is also superior to jurisdiction-stripping, through which Congress can remove entire domains from judicial review. Whereas jurisdiction-stripping surrenders unchecked discretion to the executive, reforming certiorari maintains the judiciary's potential to check the political branches of government while tempering judicial activism.

To be sure, the details of this gate-keeping proposal matter, but the principles are simple. The appellate panels must be random and change at least every term. They should be convened to allow for deliberation, precisely identify the questions presented for appeal and explain why they select cases. And if liberals are concerned about the conservative bent of federal judiciary, we can require supermajority thresholds for the panels to take cases.

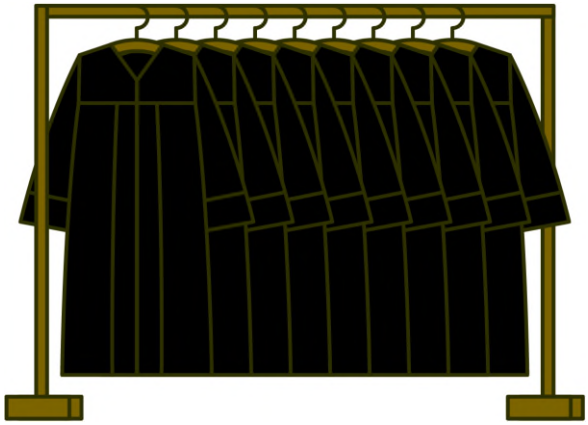
Certiorari reform is part of a larger conversation about political change and the mechanics of power. Policy ambitions are constrained by the ecosystem of institutions that check our political choices. The Supreme Court can undermine democratically enacted choices, and sometimes it should. But we need to ensure that its decisions to invalidate statutes and overrule precedents are legitimated through sound legal reasoning.

For too long, we have blindly entrusted the court with this responsibility. We now need to create mechanisms to ensure that follows through.

(Threaten) to Pack the Courts

By Aaron Tang

Mr. Tang is a professor at the University of California, Davis School of Law.



Calls by Democrats to expand the Supreme Court are certainly understandable. But they also carry risk. Republicans would surely retaliate at the next opportunity, escalating a destructive cycle of constitutional hardball.

That doesn't mean Democrats should unilaterally disarm, however. It may sound counterintuitive, but serious threats to name more justices to the court could lead to a more moderate and legitimate court.

A credible threat to pack the court would create powerful incentives for the current justices to moderate their views on important issues and preserve the court's credibility.

That is what happened in 1937, when President Franklin D. Roosevelt threatened to add six justices to neutralize the court's conservative majority. Faced with the prospect of serving the rest of his career in the minority of a delegitimized court, Justice Owen Roberts became more restrained in his antagonism to the New Deal.

The path to a self-correcting court is steeper today than it was in 1937. Conservatives held a bare 5-4 majority then; with Amy Coney Barrett on the bench, two conservative justices would have to rein in their views. Moreover, today's court faces a wider array of deeply divisive social and political controversies. How can the court decide these cases in a way that earns the public's approval?

In a forthcoming law review article, I identify a promising approach supported by a surprisingly rich tradition of the court's own precedents: In hard cases, rather than relying on theories like originalism or living constitutionalism, the court often rules against the side that has the strongest options for avoiding harm after defeat. By ensuring that the losing group can protect its interests in other ways, the court minimizes the harmful effects — and backlash — from its decisions. I call this approach the "least harm" principle.

Significantly, three of the court's conservatives followed this very approach to decide some of the last term's most important cases. Two of these decisions involved subpoenas seeking financial records about President Trump. Chief Justice John Roberts wrote them; he was joined by Justices Neil Gorsuch and Brett Kavanaugh.

The court ruled against the president in Trump v. Vance, permitting a New York prosecutor's subpoena to proceed. It did so precisely because Mr. Trump could "avail himself of the same protections available to every other citizen" by challenging the subpoenas as overbroad or in bad faith.

By contrast, the court ruled in Mr. Trump's favor in a second case involving subpoenas issued by the Democratic-controlled House of Representatives. Those subpoenas were challengeable, the court explained, to the extent that the House had better ways to obtain the information it needed, either from other sources or by subpoenas that were narrower in scope.

Justice Gorsuch's landmark opinion protecting L.G.B.T. employees from discrimination also drew on the least harm principle by explaining that religious employers who oppose the ruling might avoid harm by seeking exemptions under the Religious Freedom Restoration Act or Free Exercise Clause.

And Chief Justice Roberts followed the same approach in the DACA case, which blocked the Trump administration's attempt to end a program protecting roughly 700,000 young immigrants known as Dreamers from deportation. The court noted that the administration could try to rescind DACA again, so long as it offered a more well-reasoned explanation for doing so.

Each of these cases raised legal questions on which reasonable people disagreed. Given this uncertainty, the Supreme Court respectfully acknowledged each side's interests and ruled against the group with the best strategies for minimizing harm from its loss — leaving the losing side little reason to assail the court.

No wonder, then, that the court concluded last term with its highest public approval rating in over a decade, including the narrowest partisan gap Gallup has ever recorded between Republicans (60 percent) and Democrats (56 percent). Each side's losses felt temporary — and thus bearable — precisely because the court's decisions reminded them that there were other ways to protect their interests.

Of course, progressives won't win every case before a harm-minimizing Supreme Court. But the primary goal shouldn't be liberal victory by any means necessary. That is the attitude that conservatives weaponized.

Instead, progressives should play the long game. By threatening to pack the court, they can put much-needed pressure on the conservative justices to moderate their views and to consider which side will suffer the least harm — and thus earn the public's confidence.

If they don't, there will be time to turn to other options.

Pack the Courts

By Larry Kramer

Mr. Kramer is a former dean of Stanford Law School.

Democracy depends on norms as well as law, and respecting established norms is essential in a diverse society. The norms that get layered on top of laws are what enable groups with fundamentally different ideas and objectives to live and work together. And if the past decade has taught us anything, it is that a politics of abandoning norms to win today's battle is mutilating our democracy.

So, yes, Republicans had the legal power to refuse a hearing to Judge Merrick Garland even though he was nominated nearly eight months before the 2016 election, just as they had the legal power to ram Amy Coney Barrett's nomination through the Senate Judiciary Committee two weeks before the Nov. 3 election.

And yes, they had the legal power to do so even while offering disgracefully hypocritical justifications: denying Judge Garland a hearing because, they said, legitimacy required waiting for an election that was close in time, while rushing through a last-minute appointment for Judge Barrett lest they lose an election that's much, much closer. But both acts betrayed a ruthless willingness to politicize judicial selection in extreme ways that upended long-established norms.

Liberals say that if Joe Biden wins the election, Democrats should answer by adding justices to the Supreme Court. Republicans respond with faux outrage that this would politicize the judiciary. But they have already politicized the judiciary. The question is whether only one side should play that game. Besides, not only is enlarging the Supreme Court legal, its size has changed seven times over its history.

Adding judges would be a political response to a political act. But the extremes to which Republicans have been willing to go leave the Democrats no other choice. Not for revenge or because turnabout is fair play, but as the only way back to a less politicized process.

This is a lesson we learned decades ago from economists and game theorists: Once cooperation breaks down, the only play to restore it is tit-for-tat. It's the only way both sides can learn that neither side wins unless they cooperate.

President Trump and the Republicans are unapologetic about discarding longstanding cooperative rules for making judicial appointments. Should they lose the election after succeeding in putting Judge Barrett on the court, it becomes incumbent upon Democrats to respond in kind. Paradoxical as it sounds, tit-for-tat, hard ball for hard ball, would set the stage for constructing a judiciary we can once again respect.

Adding two to four new justices is one way to do this, but there are others that are less disruptive and just as effective. Democrats could also create a fair process that regularizes Supreme Court appointments in a way that removes the incentives to play these games.

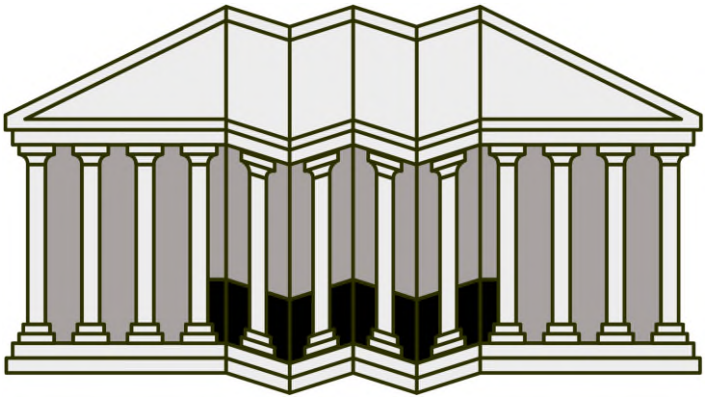
In 2005, the law professors Roger Cramton of Cornell and Paul Carrington of Duke proposed adding a new justice each Congress, with the nine most recent appointees deciding cases on the court's regular docket. The others would remain on the bench, with their full salaries and tenure, and perform all the other duties of Article III judges: filling in when one of the nine is recused or unavailable, deciding cases in the district or circuit courts, helping administer the judicial branch, and possibly participating in the process of selecting cases for the Supreme Court to decide.

It's an easy fix that creates de facto term limits without running afoul of the Constitution, reduces the stakes for any single appointment, and assures that cases are not being decided by judges who are well past their useful shelf life. It protects judicial independence and is fair to all sides, while reducing the likelihood of a court that is ideologically extreme or out of sync with the rest of society.

Expand the Lower Courts

By Leah Litman

Ms. Litman is an assistant professor at the University of Michigan Law School.



The vast majority of cases never reach the Supreme Court. They are resolved in the federal trial courts and federal courts of appeals: The appeals courts alone handle more than 50,000 cases each year. Since the Supreme Court hears arguments in fewer than 100 cases each year, almost all of these lower-court decisions will be final. Any court reform — indeed, any democracy reform — requires more lower federal courts.

So while most of the attention on court reform has focused on the Supreme Court, revamping the lower federal courts is important, too.

A larger roster of lower federal courts would ensure that more cases are resolved by judges who better reflect the democratic values and diversity of our country. It would also decrease the likelihood of the increasingly conservative lower federal courts significantly altering the law without the kind of public scrutiny that accompanies Supreme Court decisions.

Article III of the Constitution gives Congress the power to expand the number of lower federal courts. But in the last 30 years, it has not authorized any additional court of appeals judgeships and has added only a few dozen or so district court judgeships.

Yet in that time, the population of the United States has grown by almost a third, the number of cases in district courts has increased by 38 percent and appeals court filings have increased by 40 percent. The number of felony cases is also up by 60 percent. As a result, in some places, litigants must wait over three years after filing a case to have their day in court.

Expanding the lower federal courts also provides a necessary counterweight to Senate Republicans' efforts to place as many of their preferred judges on those courts as possible. While much attention has focused on Senator Mitch McConnell's success in stacking the Supreme Court, he has been equally, if not more, successful in stacking the lower federal courts. President Trump has appointed over 160 judges to the federal trial courts, and more than 50 judges to the courts of appeals. Democrats have not yet been able to respond in kind.

By way of comparison, President Barack Obama appointed only 55 judges to the courts of appeals over eight years. This is no accident. The Republican-controlled Senate refused to consider any of the seven court of appeals nominees that Mr. Obama advanced in the final two years of his presidency.

Senators Mike Lee, Lindsey Graham and John Cornyn accused President Obama of attempting to "pack" the lower federal courts when he merely nominated judges to fill vacancies; Senator Chuck Grassley and Tom Cotton, then in the House, supported bills that would have reduced the number of judgeships on the Court of Appeals for the District of Columbia Circuit to prevent Mr. Obama from filling vacancies there. Last year, Senator McConnell claimed credit for preserving judicial vacancies for President Trump.

Amy Coney Barrett ultimately filled one of those seven appeals court openings after Senator McConnell refused to consider Mr. Obama's nominee to that seat, Myra Selby, the first woman and the first African-American to serve on the Indiana Supreme Court.

Appointing a large number of judges from different professional backgrounds to appeals courts would help ensure a deep bench of diverse potential nominees when vacancies arise on the Supreme Court.

Increasing the number of lower federal courts is also an essential component of democracy reform. If the Democrats take the Senate, they will need to attend to the lower courts as part of their efforts to ensure fair elections. Consider just a few recent decisions where federal courts have undermined democracy. In Texas League of United Latin American Citizens v. Hughs, three of President Trump's appointees on the Fifth Circuit Court of Appeals allowed the governor of Texas to limit the number of absentee ballot drop boxes to one per county.

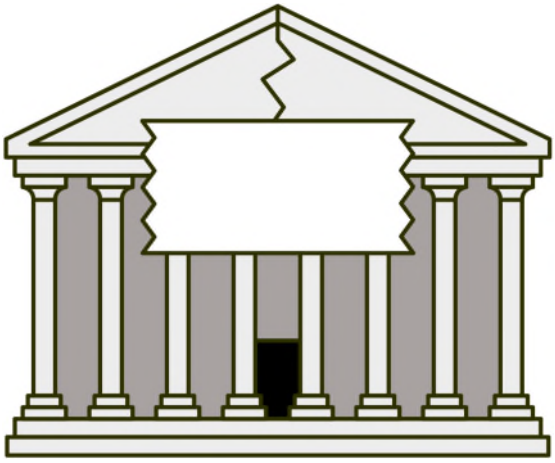
In Democracy North Carolina v. North Carolina State Board of Elections, a Republican-appointed district judge blocked a state measure that would have made it easier for voters to correct missing witness signatures on their ballots. As one court of appeals judge ominously warned, these decisions are part of "the concentrated effort to restrict the vote" and authorize disenfranchisement. Expanding the federal courts to include more civil rights lawyers and public interest lawyers on the bench would mean that the courts would not be controlled by judges unwilling to enforce democratic principles.

The Constitution undoubtedly gives Congress the power to expand the lower federal courts. At this point, the health and well-being of our constitutional democracy require Congress to exercise that power.

Keep the Courts the Same

By Randy Barnett

Mr. Barnett is a professor at the Georgetown Law Center.



In the past two decades, both Republicans and Democrats have repudiated several important Senate norms governing "advise and consent" to judicial selection. First came the Senate Democrats' widespread use of the filibuster to oppose President George W. Bush's judicial nominations. When Republicans did the same to President Barack Obama's judicial nominees, Democrats changed Senate rules by a simple majority, or what was called the "nuclear option" — itself a violation of a Senate norm — to abolish the filibuster for lower-court judges.

Then it was the Republicans' turn to escalate. First, they denied Judge Merrick Garland of what had come to be a Senate norm in 20th century: a hearing and a vote on his Supreme Court nomination — leaving the seat open for 11 months. They then used the "nuclear option" procedure to end the filibuster for Supreme Court nominations.

Bad as these breaches to Senate norms have been, they did not alter our most fundamental constitutional norms. But this is not true of some proposals now being made by some Democrats, which could effectively change our form of government.

The norm against court packing

For over 150 years, the Supreme Court has consisted of nine justices, a number set by Congress. This norm of nine is supported by another that is more fundamental: the norm against changing the number of justices solely to achieve a partisan or ideological advantage. Violating this norm is called "court packing."

When President Franklin Roosevelt proposed to expand the court to stop it from obstructing his political agenda, he was spurned by his own party, which held a huge majority in Congress. He ultimately achieved his aim by normal means: appointing eight new justices (and elevating one to chief justice) who shared his constitutional vision.

The aim of court packing, then and now, is to enlist the court as a politically partisan actor. Once packed, the court will let the partisan majorities in Congress that packed it exercise unconstitutional powers; and it will impose the ideological agenda of one party on states that are controlled by its rival.

But once the norm against court packing is gone, there is no limit on how often it will be used by each party when it controls both Congress and the presidency. If Democrats expand the number of justices in 2021, Republicans will do the same when they have the power.

The rulings of such a court would be rightly be perceived as entirely dependent on the will of the political branches. Once politicized in this way, it is hard to see how the perceived legitimacy the Supreme Court as a court of law could be sustained — or why a court so composed should have power to review the constitutionality of laws.

The norm of judicial independence

Supreme Court justices have always held their offices on "good behavior." This means they can be removed only by impeachment in the House and conviction in the Senate, which has never happened.

From both the left and the right, we hear calls for "term limits" for justices. This should require a constitutional amendment, but some claim it can be accomplished legislatively by moving older justices to a form of "senior status" or by some other device.

Lifetime tenure serves the fundamental norm of judicial independence in many ways. For instance, justices do not concern themselves with life after being a justice. But if justices are demoted to judges, they will be more inclined to retire after their demotion. Without the norm of lifetime service, justices are more likely to rule in ways that will maximize their future employment prospects. Once again, this will decrease their independence and increase the political nature of their rulings, undermining the perceived legitimacy of the court.

The norm of bipartisanship in the Senate

Neither of these proposals is likely to be adopted without ending the norm that it takes 60 votes in the Senate to close debate on legislation. While the judicial filibuster is now gone forever, some form of supermajority requirement to end a filibuster of proposed legislation has remained a norm of the Senate for some two centuries. The legislative filibuster requires bipartisan agreement before major legislation can be passed. Ending it will lead to a fundamental change in the norm that the Senate provides a bipartisan check on the partisanship of the House of Representatives.

Taken together, the repudiation of these three constitutional norms strikes at the fundamental "checks and balances" that are a defining characteristic of our constitutional structure. Without them, we will have something approximating a parliamentary government — the political system favored by many academics over that provided by our Constitution.

The tit-for-tat violations of Senate norms that have led us to this point — bad as they have been — simply do not justify so sweeping a transformation of our form of government. At the least, such a change should be openly acknowledged and debated. We should not pretend that the way to preserve our constitutional norms is to destroy those that are the most precious.

And once these fundamental norms are abandoned for partisan advantage today, there is no natural stopping point. We simply cannot know what other of our most basic norms will then be called into question. As we have seen in countries such as Venezuela and Poland, that's how constitutional norm destruction works. The United States is not immune from its effects.

Some people believe that the court already acts "politically," so why not treat it as such? They may believe that our norms have already been busted beyond repair and that politics is already a brutish war of all-against-all.

But the reality is that things can quickly get much, much worse. Court packing and term limits for justices are just the first steps down a steep and slippery slope.

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