

OFF-BALANCE:

Five Strategies for a Judiciary That Supports Democracy

REPORT BY **TODD N. TUCKER**
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Executive Summary

America's founding generation was wary of judicial power. Embittered by abuses by unelected judges in England, they imported and invented myriad tools for citizens to check and balance judicial discretion. Inherent in courts is a risk that judges get too far out of step with the public's opinion and needs. That danger is mitigated by active oversight by the people's representatives.

The controversial confirmation of Brett Kavanaugh underscored the Supreme Court's democratic deficit. While the bench makes policy decisions that affect all Americans, four out of five members of its conservative majority were nominated by presidents swept into office despite losing the popular vote. Two members of the majority were confirmed despite serious sexual assault or harassment allegations made by women—who, collectively, make up the majority of the population. Social science research has shown that the Roberts Court is the most pro-business, anti-worker, anti-consumer court in modern history. Polls indicate low or declining support for the Court among Black Americans, Latinx Americans, women, and the public at large.

Because justices are among the most important rule-writers for the U.S. economy and democracy, policymakers in the new Congress need to determine how to rebuild public confidence in the Court. The stakes are high. As inequality corrodes our government and economy, the Court can either block urgent remedial action or help encourage it. This paper outlines five strategies that legislators of either party can deploy to strengthen Court accountability:

1. Adding justices to the bench through Court expansion;
2. Removing justices through impeachment;
3. Changing the jurisdiction of the Court;
4. Ignoring or overriding Court decisions; and
5. Rewriting the Constitution to allow term limits, elect justices, or eliminate judicial review.

Some of these strategies are controversial, but all have precedents. We summarize the pros and cons of each option, then describe and weigh these options in light of historical and contemporary examples. All are means to accomplish a needed re-balancing of the Court's role in public life.



Among our key findings:

Federal Level

- Congress has the power to expand the number of justices on the Court and has done so eight times in U.S. history. Because it has been so long since we've expanded the Court, we now have the same number of justices as we did before the Civil War, even though our population has grown over 1,700 percent. If the number of justices had kept pace with population growth, we'd have a Court of 77 justices, instead of the nine we have today.
- Congress has the power to impeach justices, and has done so eight times in U.S. history. In fact, all successful impeachments were of judges, and none were of executive branch officials. The most recent judicial impeachment was in 2010, which nearly half of the currently sitting senators participated in. The last four judicial impeachments (all since 1986) were while current Senators like Mitch McConnell and Chuck Grassley were in office.
- One of the most compelling ideas for Court reform would add a new justice every two years, with each justice serving a total term of 18 years.

State Level

- Lawmakers in eight states have proposed changes to their state supreme court size in the 2010s alone. Seven of these were Republican efforts, and two were actually signed into law (Arizona and Georgia).
- States have been active at defying Supreme Court decisions and federal law. At least 129 pieces of proposed state legislation last year target LGBTQ rights, seven states enacted gun rights bills, and 18 states defied the Affordable Care Act. These efforts were all by Republican lawmakers. Additionally, a bipartisan group of at least 30 states defy federal marijuana laws.



“The change of one vote would have thrown all the affairs of this great nation back into hopeless chaos. In effect, four justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring nation. . . . The Court has been acting not as a judicial body, but as a policymaking body. . . . We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself.”

— President Franklin D. Roosevelt, *Fireside Chat on the Reorganization of the Judiciary*, March 9, 1937

Why Court Reform Is Imperative

Supreme Court justices are among the most important rule-writers for the U.S. economy and democracy. Long after constituents have called their member of Congress, legislators have cast their vote, presidents have signed bills, and agencies promulgate regulations, it is courts and judges that decide whether the majority’s agenda is allowed to stand. In short, while culture war issues like flag burning may attract more public attention, economic rule-setting is the Court’s relative priority.

Out of 8,894 Supreme Court decisions in the postwar era, 27 percent (2,393) dealt with economic activity, labor issues, or taxation. Combined, that tops any other issue area on the Court’s docket, with the runner-ups being criminal issues (23 percent), civil rights (16 percent), and judicial procedure (14 percent). Within the category of economic activity, the top issue area is antitrust and merger decisions, which determine how big and interconnected business gets to be. These account for 18 percent of the caseload (302 cases). Not far behind are decisions on natural resources, which account for seven percent of the cases (116) (Author’s calculation based on Spaeth et al. 2018).

Despite—or perhaps because of—its power to shape our political economy, today’s Court is facing a crisis of legitimacy. While justices are not themselves directly accountable to voters, their legitimacy rests in part on the notion that the officials who appoint and confirm them are. Yet four of the conservative justices that now make up a majority of the Court have been appointed by presidents that have not won the popular vote, and two were nominated and confirmed despite credible claims of sexual harassment or assault that emerged as part of the confirmation process. And, partially due to both rising life expectancy and the strategy of appointing relatively young justices, Supreme Court justices are serving longer and longer terms. This contributes to a disconnect between the ideologies of the justices and



the officials Americans elect to represent them in Washington. For instance, democratic President Barack Obama served two terms of office and presided over a Court that started out conservative, stayed conservative, and was conservative the day he left office.¹

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Over the last 18 years—since the Supreme Court declared George W. Bush the winner of the 2000 elections despite losing the popular vote—the wedge between the justice system and voters’ will has widened. In 2000, only 29 percent of Americans disapproved of the job the Supreme Court was doing. By 2016, this topped 50 percent for the first time in the history of Gallup’s polling (Gallup 2018). Looking at specific cases, this gap becomes even clearer. Fifty-nine percent of Americans support a ban on corporate election ads—the same percent that supports federal requirements for states to expand Medicaid. Yet in both cases, the Supreme Court ruled otherwise (Ansolabehere and White 2018). Looking at specific demographics, the divide is starker still. When asked whether the Court should be abolished, whether its jurisdiction should be stripped, whether judges who rule against the majority should be removed, or whether Court decisions should be politically dictated, Blacks and Latinx Americans are highly significantly more likely than white Americans to agree (Gibson and Nelson 2018). Women view the most recent Kavanaugh confirmation episode as more likely to get them to support Democrats (Barnes and Guskin 2018). For the first time in 15 years, the Court outranks the state of the economy in influencing voters’ ballots (Pew 2018). Today, substantial parts of the rules governing American life are now being written by Court officials with weak popular support—a deeply unstable state of affairs.

The recent debate over the confirmation of now-Justice Brett Kavanaugh comes on top of a series of 5-4 decisions by the conservative majority that have reshaped American democracy and our political economy in both subtle and profound ways. After the 2010 *Citizens United v. Federal Election Commission* decision, spending by elite CEOs on elections

¹ I am indebted to Rebecca Gill for articulating this important point.



increased markedly (Hansen and Rocca 2018). The 2018 *Janus v. AFSCME Local 27* decision will make labor organizing in the public sector similarly as difficult as the uphill climb faced by private-sector workers. The 2011 *AT&T v. Concepcion* and 2013 *American Express v. Italian Colors* cases ensured that monopolists will be able to keep class action and small businesses' claims out of the courts and in arbitration, even when arbitration proceedings are prohibitively expensive (Moses 2017).² And the 2014 *Burwell v. Hobby Lobby* decision allowed closely held corporations to discriminate against female employees on the basis of corporations' supposed religious beliefs.

These cases are not outliers. Out of 12 cases where the U.S. Chamber of Commerce took a position in the last term, it attained its favored result in 11. According to political scientist Lee Epstein, "At least 14 cases this term likely would have come out the other way had the Senate let Garland through" (Liptak and Parlapiano 2018). Indeed, according to earlier analysis by Epstein, economist William Landes, and former judge Richard Posner, the Roberts Court (even seven years in) was the most pro-business court in modern history, with individual justices that rank at the very top of pro-business orientation since World War II (Epstein, Landes, and Posner 2012). Figure 1 graphically illustrates this shift. Pre-Roberts, the Court took the conservative position (anti-worker, anti-consumer) an average of only 40 percent of the time. The average during the Roberts Court is 56 percent, topping 60 percent in four terms for the first time in postwar history. With the harder-right Kavanaugh replacing the more-moderate Anthony Kennedy, the conservative Chief Justice John Roberts will now represent the Court's swing vote—a marked shift to the right.

It is worth noting that this rightward shift is not only a problem of a conservative majority. The Court's liberal justices regularly side with business against popular interests. A follow-up study by Epstein and colleagues concluded that "the four Democratic appointees serving on the Roberts Court are far more business-friendly than Democratic appointees of any other Court era. Even more surprising, the Democrats vote in favor of business at significantly higher rates than Republican appointees in all the other chief justice periods since 1946" (Epstein, Landes, and Posner 2017). This pro-business posture has extended to cases like *BG Group v. Argentina*, where the liberal justices backed companies' right to sue foreign governments over their dislike of regulation (a stance rejected by conservative Chief Justice John Roberts) (Tucker 2018). In *Brakebill v. Jaeger* (2018), liberal justices Stephen Breyer and Sonia Sotomayor joined a conservative majority to allow North Dakota voter ID laws to stand. Critics argue that these restrictions will disenfranchise Native American voters in a pivotal Senate election where they would have been expected to provide the margin of victory to the Democratic incumbent (Pogrund and Somnez 2018). The *Brakebill*

² Technically, *Italian Colors* was a 5-3 decision, as Justice Sotomayor did not participate.



decision comes after Breyer and Elena Kagan voted with conservatives in 2012 to declare the Affordable Care Act's Medicaid expansion unconstitutional (Fontana 2018).

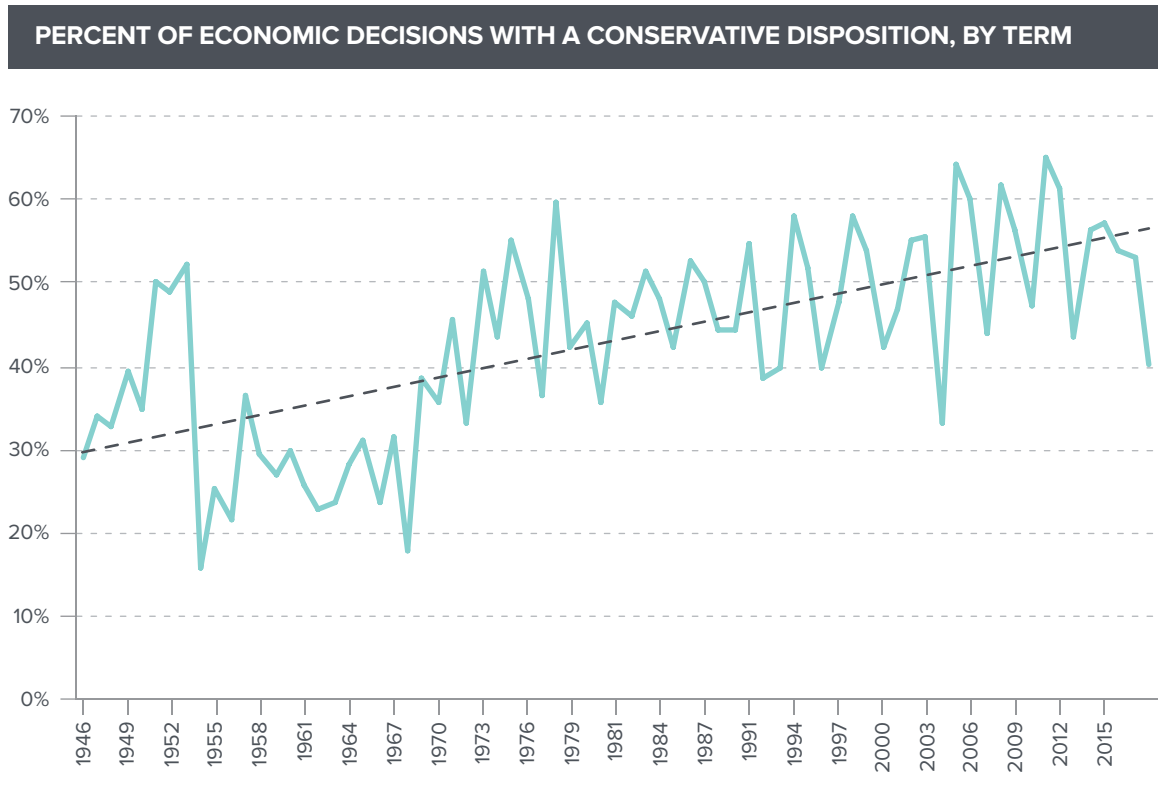


FIGURE 1 Author's calculations, using Spaeth et al. 2018

In short, the Supreme Court, in its current form, has become a barrier to achieving the political, social, and economic progress that most Americans want to see from the government. The current structure of the Court encourages and allows justices to side with elites without having to face political consequences of their decisions. This is why some type of structural reform to close the democratic deficit is so important.

The next Congress will face the unenviable task of how to promote more democratic accountability on the Supreme Court. In the sections that follow, we lay out five strategies for doing so.

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OPTION ONE

Add Justices through Court Expansion

Pro: Can be and has been done by Congress. The shape and size of the judiciary is politically determined, and changes to (or threats to change) the composition seem to have been effective at promoting morally and socially desirable outcomes. More justices could provide more diverse viewpoints. Has a record of being tried and implemented at the state level.

Con: Might require a veto-proof majority. May result in an ever-increasing and unsustainable increase in the number of justices added whenever the party in control of Congress changes hands.

There's nothing in the Constitution specifying the number of judges.

The Constitution spells out a shared power between the executive and legislative branches on staffing the courts. Article II, Section 2(2) establishes that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.”

Yet nothing in the Constitution spells out just how many justices there should be. As a result, Court expansion and contraction (and proposals to do so) have been a recurring feature of U.S. political life. Congress—by statute and majority vote³—sets the number of justices that serve at any given time. On eight occasions, Congress has voted to change the number of seats on the Supreme Court. In 1789, there were initially only six justices, and statutes over the years had specified five, seven, eight, and even ten seats. Nine justices were not the norm until 1869. These changes are detailed in Table 1 (see Appendix). Because presidents can veto these judiciary acts and have the nomination power, these changes are easiest when Congress and the president are from the same party or otherwise agree on the change.

³ This paper does not address the filibuster, which (without reform) poses its own hurdles to majority rule (Reynolds 2017).



The shape and size of the early judiciary was politically determined.

In the early days of the Republic, Federalists saw judicial power as a means of building legitimacy for the national government—as judges would come into contact with a wider swath of the population through their day-to-day activities in court. Moreover, these forebears of today’s Republican Party saw judicial power as a to-be-desired substitute for military presence on the home-front. The crystallization of this agenda was the Judiciary Act of 1801, which created a system of 16 circuit court judgeships and eliminated the need for Supreme Court justices to spend half the year “riding circuit” to hear appeals from the district courts. The Jeffersonians (the forebears of today’s Democratic Party) opposed this agenda, and so they repealed the 1801 Act and replaced it with their own: the Judiciary Act of 1802. In the process, they eliminated the 16 judgeships—even though this violated the Constitution’s ban on the removal of judges in the absence of impeachment proceedings. Justice Samuel Chase was concerned that the repeal of the 1801 Act was unconstitutional and thought that the Court had the power to overrule it. Jeffersonians blocked this move by eliminating the Court’s winter session, passing the 1802 Act in the interim, and launching impeachment proceedings against Chase (Engel 2011). While the latter effort did not culminate in a conviction, it sent a warning to justices to be modest in their jurisprudence. The message was received. For decades, only a few congressional acts (two to five, depending on the counter) were deemed unconstitutional on their face. Compare this to the 1990s, when the Court overruled Congress dozens of times in that decade alone (Kramer 2005; Keck 2017).

Confrontations over court size happen at moments of moral crisis.

The second major confrontation over court size came in the 1860s. In *Dred Scott v. Sandford* (1857), the Court ruled that the Missouri Compromise Act of 1820, by prohibiting slavery north of the 36th parallel, amounted to a taking of the property of slaveholders. Lacking in persuasive argumentation, the decision is regularly ranked as one of the worst Supreme Court decisions of all time, and Abraham Lincoln campaigned on a platform of overriding it. During the famous Lincoln-Douglas debates in 1858, Lincoln argued that, “the Dred Scott decision, as it is, never would have been made in its present form if the party that made it had not been sustained previously by the elections.” Referring to Democrats’ success in 1852 and 1856 elections, Lincoln drew a clear line between the agenda of justices’ nominating parties and their decisions on the Court (Simon 2007).



In response, Lincoln and his allies took a number of size- and composition-related steps to neutralize and remake what they saw as the slave power of the Court. First, in 1862, he cut in half the number of justices that would have to come from the South by reorganizing the nine circuits. Second, that same year, he filled three vacancies on the Court with northern justices. Third, in 1863, he expanded the Court to include a tenth justice—also from a non-slave state (California). Fourth, he refused to enforce *Dred Scott*, banning slavery in the territories and issuing passports to Black Americans. Finally, in 1864, he appointed his Treasury Secretary Salmon Chase as chief justice.

After Lincoln's death, Radical Republicans continued his legacy of remaking the Court. In 1866, they reorganized the circuits yet again, so that only a single justice would come from the South. They also shrank the size of the bench down to seven, so that the Democratic president Andrew Johnson would not have any vacancies to fill. Finally, once Johnson was out of office, they passed an 1869 Act to expand the Court back to nine justices. This allowed Republican Ulysses Grant to fill four vacancies.

Even threat of Court expansion can help produce jurisprudence that is less pro-business.

Perhaps the most significant Court expansion effort was one that never actually happened.

During the so-called “Lochner era” from the 1890s through Franklin D. Roosevelt’s (FDR) famous Court packing threat in 1937, justices bent on crimping the growth of the administrative state offered libertarian interpretations of substantive due process. The 1905 case that gave the era its name had voided New York’s maximum hours law for bakers, on the grounds that it interfered with workers that might wish to labor for longer. This overall orientation carried into the 1930s. From 1934 to 1936, the Supreme Court heard 14 cases against New Deal policies and ruled against nine. The casualties included the 1933 National Industrial Recovery Act (NIRA)—which had promised, among other things, to bring unions to much of American industry.

The early New Deal-era Court’s hostility to government activism did not neatly cut across partisan lines: The four-member conservative bloc included two Democrats, and the two swing justices were Republican. Even the three ostensibly liberal justices were unreliable allies. All three had joined three unanimous rulings against the New Deal issued on May 27, 1935, which came to be called Black Monday. These included decisions against NIRA (*A.L.A. Schechter Poultry Corporation v. United States*) and FDR’s firing of a conservative commissioner on the Federal Trade Commission (FTC) (*Humphrey’s Ex’r v. United States*). Liberal lion Louis Brandeis even authored the decision against mortgage moratoria, finding



them to be an unconstitutional seizure of banks' private property ([*Louisville Joint Stock Land Bank v. Radford*](#)). Another liberal, Benjamin Cardozo, was the only one to dissent in an earlier NIRA case ([*Panama Refining Co. v. Ryan*](#)), a dissent he described as but a “narrow” point of difference with the other eight justices.

Had such precedents been allowed to stand, much of the basic federal legislation Americans now take for granted would have been impossible to build. FDR had long sensed this, considering early in his first term a number of options to restrict the Court's judicial review powers. Yet public opinion was generally sour on these ideas—the Court was associated with the integrity of the Constitution itself (Leuchtenberg 1996). Nonetheless, FDR had triumphed in the 1936 elections, winning all but two states and the highest share of the popular vote in the history of the two-party system. He returned to office determined to find a way to unstick the New Deal.

On February 5, 1937, Roosevelt proposed the Judicial Procedures Reform Act, a bill that would have empowered him to appoint a new justice for every sitting one who refused to retire within six months of his seventieth birthday. At the time, six justices were already older than that, so the move would have expanded the Court to fifteen.

The president had timed that announcement to precede the February 8 oral arguments in [*NLRB v. Jones & Laughlin Steel Corp.*](#), which dealt specifically with the 1935 Wagner Act's prohibition on discrimination against union members and more generally whether the federal government could regulate labor relations. Roosevelt's [March 9 radio fireside chat](#) further addressed his aims, noting how his 1933 financial crisis response had only narrowly survived Court review:

“The change of one vote would have thrown all the affairs of this great nation back into hopeless chaos. In effect, four justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring nation. . . . The Court has been acting not as a judicial body, but as a policymaking body. . . . We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself.”

The effect of FDR's threat was immediate. Within weeks, in what came to be called “the switch in time that saved nine,” the two swing votes joined with the three liberals to uphold



the Wagner Act and Washington State’s minimum wage law.⁴ By 1941, emboldened with serious legal protections for the first time, union density doubled (even before the U.S. entry into World War II, when industrial mobilization led to further gains). And by that time, enough retirements and deaths had taken place to allow Roosevelt to appoint a majority of the court. For the rest of Roosevelt’s presidency, the Court blessed 100 percent of the New Deal initiatives identified by Calvert.

Court expansion is democratic and could be done in a stability enhancing way.

There is a more contemporary reason why policymakers might consider expanding the size of the Supreme Court. In all of the previous Court expansion episodes, there was the equivalent of one justice for every 5 million Americans. In contrast, today, there is one justice for every 35 million Americans. (The change over time is shown in Figure 2.) While justices do not represent people in the same way that legislators do, they nonetheless set policy through judicial review and interpretation. Having only nine voices to set the priorities for 328 million Americans limits the diversity of perspectives that the justices consider. If we were to have similar proportions between citizens and justices as those President Lincoln established, we would have 77 justices today. Seen in that light, 15 justices (proposed by FDR and a number common to many Court reform proposals) does not seem like so many. To avoid tit-for-tat spirals between the political parties, the expansion of the Court could be stretched out over several election cycles. (Though this would ultimately only be stable if both parties trusted the other—which may take a constitutional amendment of the kind explored later in this paper.)

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⁴ As historians have noted, one of the two justices to flip had already done so (on the Washington State minimum wage law) by the time the court packing plan was formally announced (Shesol 2010). Nonetheless, the NLRB decision did post-date the announcement, and the Court’s pattern flipped from mostly hostile to the New Deal to 100 percent supportive—a striking pattern, even if definitive proof of the precise impact of the court expansion plan is difficult to establish.



NUMBER OF AMERICANS REPRESENTED BY EACH JUSTICE, 1790-PRESENT

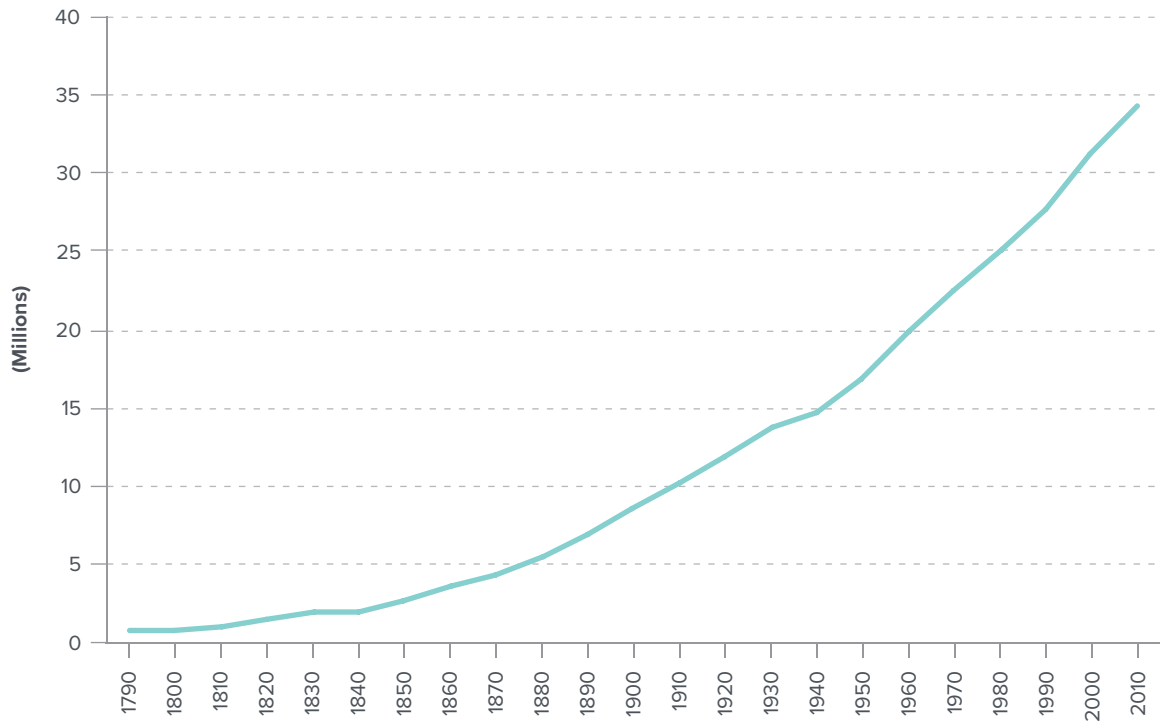


FIGURE 2 Source: Author's calculations

Policymakers have initiated court expansions at the state level.

The 50 state supreme courts vary in membership between five and nine justices. Several state policymakers have been very active in introducing Court expansion or size changes at the state level, including:

- **Arizona:** Republicans in the Arizona legislature passed a bill expanding the Arizona Supreme Court from five to seven members, thus giving two additional appointment opportunities to Republican Governor Doug Ducey. The legislative sponsor explained the change as creating “greater opportunity for diversity on the court, there will be more legal minds looking at critical issues and hopefully the opportunity to take on more cases and a diversity of opinion” (Sanchez 2016).
- **Florida:** Republican legislator Bill Posey introduced a bill to expand the Florida Supreme Court from 7 to 15 justices after the Court ruled against the use of public money for vouchers for use in Catholic schools (Raftery 2013).

- **Georgia:** Republican Governor Nathan Deal signed legislation expanding the Georgia Supreme Court from five to seven. This allowed him two additional appointments, at a time when the jurisdiction of the Court was shrinking. A former chief justice explained the decision in the following terms: “I know a number of people who believe that if the court contained more ‘friends,’ more cases would be decided the way they want them to be” (Bluestein 2016).
- **Iowa:** In 2009, the Iowa Supreme Court unanimously ruled in favor of gay marriage rights. Republican legislators responded by proposing to expand the size of the court from seven to nine members. Other bills exposed justices to impeachment if they did not rely solely on selected sources of law (Leonard 2016). Additionally, Republican anti-abortion groups organized to successfully oust three of the justices who supported the ruling. According to The Des Moines Register, it was the first time any Iowan supreme court judge had lost their retention election since 1962 (Schulte 2010).
- **Michigan:** One of the only recent times that Democrats led a court expansion was in Michigan, but this effort was derailed after a union website posted a slideshow explaining the move as part of an agenda for “Changing the rules of politics in Michigan to help Democrats” (Yeoman 2016).
- **Montana:** Republican lawmakers pushed to reduce the Montana Supreme Court from seven to five members in order to overburden the court’s docket and press it into embracing tort reform (Raftery 2011).
- **North Carolina:** Republican lawmakers attempted to shrink the size of the state’s Court of Appeals in order to deny the Democratic governor an opportunity to fill vacancies (Raftery 2017c).
- **Oklahoma:** Republican lawmakers proposed shrinking the state supreme court from nine to five over anger at abortion rulings (Raftery 2017a).



OPTION TWO

Remove Justices through Impeachment

Pro: Judicial impeachment can be and has been done by Congress. Impeachable offenses cover moral failures, lying, and other troubling behaviors, such as allegations of sexual misconduct. Impeachments are not subject to presidential veto or Court review.

Con: Convictions require two-thirds of the Senate—a high bar. Is a justice-specific, rather than a systematic, response. Observers may doubt whether Republican senators would support impeaching a justice nominated by a fellow Republican—although recent history has instances of Democrats doing so for Democratic-appointed judges.

Impeachment is constitutional.

The U.S. Constitution follows its British forebears in allowing for impeachment of public officials. Article I, Section 2(5) states that “The House of Representatives ... shall have the sole Power of Impeachment,” while Article I, Section 3(6) reads that “The Senate shall have the sole Power to try all Impeachments.” Article I, Section 3(7) specifies the consequence of impeachment: “removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”

Judges can be and have been impeached.

While much contemporary discussion of impeachment focuses on proposed removals of presidents, judges are, in fact, the only officials that have ever been convicted. All of the [successful impeachment convictions](#) in U.S. history (eight) were against judges, who also represented a majority of the nineteen impeachments handed down by the House of Representatives. This makes sense: The monarchy-averse founders were so distressed by even four-year presidential terms that they gave Congress the ability to remove them mid-course, so of course they would feel doubly cautious about lifetime judicial appointments—[one of only two job](#) specifications (the other being a non-diminishable salary). Table 2 (see Appendix) lays out all eight convictions made by the U.S. Senate for the entirety of U.S. history. Alcee Hastings, a judge impeached in 1989, perhaps inadvertently gave an indication as to why the impeachment power is so important. In his defense at the Senate trial, he suggested that “an article III judge has a property right” in his post (Bingaman 1989, 20). Nothing could be further from the founders’ intent.



Impeachment is a remedy for political misbehavior, not criminal.

Impeachment is designed to punish political and administrative offenses. As Alexander Hamilton wrote in the Federalist 65, the Senate’s impeachment jurisdiction relates to “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”

This understanding has carried through to the present day. In the words of a member of the House of Representatives managing a recent Senate impeachment trial,

“Impeachment, as all precedents indicate, is not a criminal proceeding. Rather, the Constitution establishes and the framers, the Congress and constitutional scholars have consistently concluded-that impeachment is a remedial proceeding designed to protect the institutions of Government and the American people from abuse of the public trust. In this country, impeachment has never functioned as a criminal process. Impeachment does not require an indictable offense as a basis for removal from office. Impeachment does not require proof beyond a reasonable doubt to establish the allegations. Impeachment does not call for trial by jury. Impeachment is not subject to presidential pardon. And above all, the purpose of impeachment is not to punish an individual, but rather to preserve and protect our constitutional form of Government” (Bingaman 1989, 38).

In sum, impeachment is not and need not be triggered by the committing of a crime.

Article II, Section 4 of the Constitution specifies that all civil officers of the U.S. (which includes both judicial and executive branch officials who take an oath of office) “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” High crimes and misdemeanors are not defined, but the term comes from the law of England, where it was used on numerous occasions to impeach ambassadors and other officers of the crown. According to a recent scholarly review of English impeachment cases, impeachable high crimes and misdemeanors included misappropriation of funds, appointing unfit officers, using lawsuits as threats, not paying governmental bills, detaining political enemies, and signing harmful treaties (Sunstein 2017).

While that review concluded that there were legal limits on the impeachment power, the controlling case (*Nixon v. U.S.*) found that impeachment was a non-justiciable political question solely for Congress to resolve. Indeed, the justices asked in that case whether an



impeachment could be handed down “without any procedure whatsoever,” simply because senators thought that a judge was “a bad guy.” Both the solicitor general and majority opinion seemed to agree that this was possible.⁵

Justice Brett Kavanaugh Has Arguably Committed Impeachable Offenses

The last four impeachments—all, since 1986, fairly recent—were over some version of judges making false statements. The first impeachment conviction (in 1804) was over drunkenness influencing judicial conduct, while the second (in 1862) was over meddling in politics. Brett [Kavanaugh](#)—whom senators have accused of [lying under oath](#), [playing politics](#), and possibly [having a drinking problem](#)—could fit the historic pattern.

Truthfulness is paramount. In a recent impeachment case, House managers noted that, “Because truth is such an indispensable element of our judicial system, with federal judges entrusted with the important task of assessing credibility and finding the truth in cases that come before them, the notion of permitting a proven liar to sit on the bench strikes at the heart of the integrity of the judicial process.... [While a judge may have a] personal interest in retaining the high privilege of serving as a federal judge ... this was less important than private rights of liberty and property at stake in criminal and even some civil cases ... a lesser standard of proof helps to ensure that public confidence in the integrity of the judiciary will not be compromised. This is not simply an employment dispute between Congress and [a judge]. The preeminent public interest in an untainted judiciary must be recognized in an impeachment proceeding” (Fowler 1989, 88, 93). In other words, while executives may be impeached for maladministration, justices are particularly impeachable for anything that brings into question their propensity to tell the truth—and nothing but the truth.

In that case, House managers gave weight to the fact that a judge’s allegedly perjury in a “closing statement to the grand jury was not spontaneous, but was prepared in writing by [the judge] prior to his grand jury appearances....” (Fowler 1989, 78). In other words, lying under oath—especially when part of the lie was not spontaneous but was written down in a premeditated fashion by a judge—could be grounds for removal. In Kavanaugh’s case, he swore under oath in his opening statement on the day of testimony over Dr. Christine Blasey Ford that “I wrote [this statement] myself yesterday afternoon and evening, [and] no one

⁵ Legal scholar Aziz Huq has suggested two additional avenues to effectively remove Kavanaugh from the Court. First, a new president could appoint and the Senate could confirm his appointment to a lower federal court. Second, Congress could pass a law authorizing a panel of judges to review whether he has met the “good behavior” standard. As Huq admits, neither approach has been used in a Supreme Court context (Huq 2018).



has seen a draft or [sic] it except for one of my former law clerks.” Thus, the statement was both intentional and his alone. If any part of that testimony were later found to be a lie or misrepresentation, this would be the type of behavior that has preoccupied Congress in the past.

Another impeachable offense is falling short of high standards. In then-Senator and now Judiciary Committee Chairman Chuck Grassley’s (R-IA) words in voting for the impeachment conviction of a federal judge, “To be entrusted with a lifetime office that has the potential power of depriving individuals of their liberty and property, is, indeed, a very great responsibility. Consequently, a Federal judge must subscribe to the highest ethical and moral standards. At a minimum, in their words and deeds, judges must be beyond reproach or suspicion in order for there to be integrity and impartiality in the administration of justice and independence in the operation of our judicial system” (Fowler 1989, 448). In the most recent impeachment hearing, Jeff Sessions—then the Republican senator from Alabama and Trump’s former attorney general—stated that the accused’s “behavior should serve as a reminder to the President of the critical importance of vetting his nominees and as a reminder to this body that a thorough confirmation process is imperative. The process should always emphasize character, integrity, mental and emotional health, and high morals” (Ibid, 617).

Another type of impeachable offense is demonstration of poor judgment of the kinds of behaviors that might bring embarrassment to the government. In a joint statement in the most recent Senate impeachment case in 2010, Senators Claire McCaskill (D-MO) and Orrin Hatch (R-UT) noted that nominees for judgeships are asked “whether anything in his personal life could be used by someone else to intimidate or influence him, could be publicly embarrassing to him or the President, or could affect his nomination.” In that case, a judge did not disclose potentially damaging information, such as a corrupt kickback scheme with bail bondsmen. In his defense, he argued that he did not disclose this information because he did not think that he had done anything wrong. McCaskill and Hatch wrote that the judge “was never asked whether he personally thought anything in his personal life was improper or embarrassing. There would be little value in asking such a question. [The judge] was asked whether anything in his personal life could be viewed by others, or by the public, as embarrassing or, more importantly, affect his nomination. Not only is that important information for the confirmation process, but it is information that in most cases can come only from the candidate or nominee.” The senators argued that the judge had awareness that some of his actions could be seen in a negative light, as evidenced by his efforts to conceal them from the Senate. They concluded that, “This dishonest participation in the confirmation process undermined the integrity of that process and possibly deprived the Senate of information that would have mattered in considering his nomination. His



negative answers to questions he was actually asked were material and demonstrably false” (McCaskill 2010). In Kavanaugh’s case, impeachment officers could argue that his misrepresentation of slang terms and evasive tactics deprived the Senate of useful information and thus undermined the integrity of the process.⁶

Impeachment cannot be undone by the president or courts.

Unlike normal legislation, the president may not veto an impeachment. Article II, Section 2(1) limits the president’s pardon power to the granting of “Reprieves and Pardons for Offences against the United States, *except in Cases of Impeachment*” (emphasis added).

Similarly, the Supreme Court cannot review impeachments. Hamilton’s Federalist 65 gave various reasons why the founders gave impeachment powers to the Senate, rather than the Supreme Court:

“It is much to be doubted, whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy.... The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.”

In other words, the severity of the impeachment punishment necessitates that dozens of senators, rather than a handful of judges, be convinced of the merits.

In 1993, the Court affirmed in *Nixon v. U.S.* that impeachment involves a non-justiciable political question. The case was decided after Walter Nixon—an impeached judge—challenged his treatment by the U.S. Senate. Chief Justice William Rehnquist—a conservative judge—determined that “Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate

⁶ The fact that Kavanaugh’s alleged rape attempt pre-dated his judicial service would not be a bar against impeachment. The Senate convicted Judge Thomas Porteous for “pre-federal” activities by margins of 96-0 and 69-27.



the ‘important constitutional check’ placed on the Judiciary by the Framers.... Nixon’s argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.” In other words, because justices can be impeached, it would be inappropriate for them to be able to counteract their own impeachment.

Parties—most recently Democrats—have voted to impeach judges of their own party.

Some observers might question whether Republican senators would vote to convict Republican-appointed justices. While a valid political question, the historical precedent is clear. While the first five impeachment convictions (1804 to 1986) were handed down by Senate majorities of the opposite party to that of the president that initially appointed the judge on trial, the three most recent impeachments (1989 to 2010) were by a Democratic-controlled Senate of a Democratic-appointed judge. Thus if, say, Republicans wished to provide impeachment votes for Republican-appointed Kavanaugh, they would be acting consistently with the most recent history.

That is not to say that impeachment is easy or even likely: The process is highly demanding. The Constitution creates several hurdles to impeachment. As Chief Justice William Rehnquist wrote in *Nixon v. U.S.*, the founders created two “safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge. This split of authority “avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalence of a factious spirit in either of those branches.” The second safeguard is the two-thirds supermajority vote requirement. Hamilton explained that “[a]s the concurrence of two-thirds of the senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.” As the Senate has rarely been two-thirds composed of members of the same party, impeachment has thus always by necessity been a bipartisan affair.⁷

⁷ One could make a principled democratic argument that—were a party to be so electorally successful that it persuaded voters to give it two-thirds of the Senate seats—it would be within its rights to impeach the entirety of the Court to make way for its own selections to the bench. After all, it would be deeply counter-majoritarian to have a court rule against the policy priorities of such an overwhelming expression of the voters’ will. As a historical matter, there have been only two periods when one party has had super-majority control of the Senate: the Republicans in the 1860s and Democrats in the 1930s. Thus, the Humphrey and Ritter impeachments could have been driven through with just one party’s support.



Moreover, public opinion may sour on high-profile impeachments. Before Republicans began impeachment proceedings against President Bill Clinton, the Arkansan had 40 percent approval ratings. By the time the process wound up, approval had rallied to nearly 70 percent. Among those that opposed impeachment, high percentages saw Clinton's supposed misconduct as a private (not a public) matter, and the impeachment process as a political vendetta by partisan Republicans (Jacobson 2000).



OPTION THREE

Limit the Court's Ability to Hear Certain Categories of Cases by Changing Its Appellate Jurisdiction

Pro: Is a common and constitutional way that Congress exercises checking and balancing of the Court. Has a record of being tried and implemented at the state level.

Con: Might require a veto-proof majority. Can seem overly technical, which may inhibit democratic participation and public awareness.

Changing the Court's jurisdiction is constitutional.

If the public is concerned that the Court is approaching certain legal questions (say corporate regulation or racial justice) in a systematically biased way, there's a straightforward way to remedy this: deny them the opportunity to hear those cases. This is constitutional. The Constitution does not precisely define the Supreme Court's appellate jurisdiction (i.e., ability to hear appeals from lower courts), providing only that it extends to cases and controversies arising under federal law "with such Exceptions, and under such Regulations as the Congress shall make" (Article III, Section 2(2)). While the Court early on determined that it has a hard prohibition on giving legal advice to the other branches of government, much of the exact scope of its appellate powers has varied over time.

In *Bank Markazi v. Peterson* (2016), the Roberts Court has interpreted Congress' power as fairly broad, going up to and including legislating a change in rules that could affect the outcome of litigation already pending before the Court (so long as it does not dictate a case-specific outcome). A Congressional Research Service review of legal scholarship and court-curbing legislation (mostly if not all by Republicans) concluded that the outer boundary of jurisdiction-stripping is murky—as even constitutional questions might be susceptible to being removed from Court oversight (Thomas 2005). That is not to say that there might not be pushback from plaintiffs and the Court itself, only that jurisdictional changes have a precedent.



Congress changes the Court’s jurisdiction regularly—often for rebalancing purposes.

Jurisdictional adjustments are common exercises of congressional power. One of the most effective jurisdiction strippings came in 1932, when a coalition of progressive Republicans and Democrats passed the LaGuardia-Norris Act. It provided that: “No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute” unless five specific exceptions are met. This blunt restriction on judicial power was fairly effective. In University of Washington political scientist George Lovell’s telling:

“Even judges who appeared to be quite hostile to organized labor had a difficult time ruling that employers met the entire gauntlet of procedural and jurisdictional limitations specified in the statute [...] Even when confronted with provocative and violent behavior that judges would have routinely enjoined as ‘coercive’ or ‘unlawful’ a decade earlier, judges adhered to the statutory procedures and refused to issue injunctions when they could not make the required findings of fact” (Lovell 2003, 180-182).

According to an analysis by Cornell University political scientist Dawn Chutkow, Congress has passed roughly 250 laws in the postwar period denying jurisdiction to the Court—ranging from matters like environmental regulation to policing. She finds that jurisdiction-stripping has increased over time, accounting for as high as 3 percent of all public laws in 2005 (the most recent year for which she has data) (Chutkow 2008).

These changes have often been motivated to better align judicial outcomes with political priorities. For instance, in the 1860s, Republicans introduced over 20 bills to curb the Democratic-dominated court after the controversial Dred Scott decision. In the 1930s, Democrats introduced around 40 to challenge the Republican-dominated court. Then, after *Brown v. Board of Education* (from 1955 to 1961), Southern Democrats introduced about 80 pieces of legislation to curb the desegregation-friendly court. In the decades after that (1962 to 1980), Republicans used court-curbing legislation to attract Southern and Catholic voters and legislators to their side. By the 1980s, Republicans were responsible for most court-curbing legislation (Nagel 1964; Nichols, Bridge, and Carrington 2014; Bridge 2016; Bridge and Nichols 2016). A more recent analysis of every bill introduced in the House of Representatives from 2009 to 2017 identified 40 court-curbing efforts—over three-fourths of which were initiated by Republicans over issues like gay marriage (Bell 2018). Additionally, Republicans have been active since 1940 in attempting to weaken the Ninth Circuit—considered the most liberal circuit (Moyer and Key 2018).



In short, by changing the Court’s appellate jurisdiction, policymakers could make its pro-business orientation matter less.

Policymakers in several states have been active on changing court jurisdiction.

In 2018, Arizona Republican Governor Doug Ducey signed into law a bill that amended the state-level Administrative Procedure Act. The measure targets Chevron deference by Arizona courts, requiring that judges “decide all questions of law ... without deference to any previous determination that may have been made on the question by the agency.” While Chevron refers to a federal law doctrine, courts in Arizona and 35 other states have adopted it as a framework to govern state regulators (Reilly 2018). Elsewhere, Republican lawmakers in Georgia and Texas have proposed new business courts that would take corporate oversight out of the established court system. In each case, the business judges would be appointed by the governor (both Republican at the time) without a vote in the State Senate (Raftery 2018).



OPTION FOUR

Ignore or Override the Court

Pro: Allows a targeted response to specific objectionable decisions. In case of ignoring Court, does not require specific legislation. Has been a regular feature of American life at federal and state level.

Con: In case of formal override, requires specific legislation and effort by Congress. Is a case-by-case, rather than a systematic, response.

The founding generation anticipated that the Court would be weaker than the other branches of government.

During the U.S. constitutional debates, the forerunners to today's Democratic Party (the Jeffersonian anti-Federalists) were concerned that judges would "be able to extend the limits of the general government gradually, and by insensible degrees..." They feared constitutional interpretation would "commonly take place in cases which arise between individuals, with which the public will not be generally acquainted. One adjudication will form a precedent to the next, and this to a following one [even though] these cases will immediately affect individuals only" (Brutus 1788). Alexander Hamilton—the grandfather to today's Republican Party—did not contest the point, but argued only that the legislature's purse and executive's sword would rein in any danger from the judiciary: "It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (Hamilton 1788). While it remains the case that the Court lacks independent enforcement power, the Court gradually expanded its power in ways that Brutus feared—most notably by establishing judicial review of legislation (though this wasn't explicitly provided for in the Constitution).

At key moments of U.S. history, policymakers ignored the Court.

To guard against the dangers of absolute judicial supremacy (where Congress and the executive branch are forced to follow Court orders no matter how objectionable or misguided), many American politicians and legal thinkers have embraced forms of departmentalism—where each branch of government had co-equal (or at least shared) authority to interpret the Constitution. In the words of legal scholar Larry Kramer,



departmentalism advocated that, “Each branch could express its views as issues came before it in the ordinary course of business: the legislature by enacting laws, the executive by vetoing them, the judiciary by reviewing them. But none of the branches’ views were final or authoritative. They were the actions of regulated entities striving to follow the law that governed them, subject to ongoing supervision by their common superior, the people themselves” (2005).

Departmentalism has sometimes had catastrophic results. In 1832, the Supreme Court ruled in *Worcester v. Georgia* that the Cherokee Nation was sovereign and that only the federal government—not the state of Georgia—had the authority to regulate land rights and regulation with the tribes. President Andrew Jackson was reported to respond, Chief Justice “John Marshall has made his decision; now let him enforce it!” It is unclear if the president in fact said this, though he did make a comment with less flair but the same meaning: “[T]he decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate” (Paul 2018). What followed was the forced removal of the Trail of Tears, which caused the death of thousands of native peoples.

Lincoln took a more intermediate position in the wake of the *Dred Scott* decision. In 1858 senatorial debates, Lincoln argued that politics should inform enforcement of court orders. In the analysis of Bates College political scientist Stephen Engel, “elections could be taken as evidence of the status of a given constitutional interpretation. If judicial decisions contradicted the principles of the party most recently victorious at the polls, then politicians could legitimately not enforce the decision beyond the claimants until the ruling became more settled... Lincoln created time to ignore the broader implications of a ruling and avoided undermining judicial authority entirely. If an election registered discontent with a ruling, then the status of the law on the question addressed by the case remained unsettled” (2011, 184). As noted above, Lincoln refused to enforce *Dred Scott*.

After the Supreme Court’s desegregation decision in *Brown v. Board of Education*, politicians and movement leaders throughout the South advocated tactics, such as lay interpretation, interposition, and nullification to push back. Ironically, like Lincoln before them, these racists argued that the Court’s decision could not be good law if it were not popularly accepted (Rubin and Elinson 2018). These tactics were federalized in the 1980s, when Republicans in the Reagan and two Bush administrations boldly asserted their rights to offer their own views of what the Constitution required. Reagan’s Attorney General Edwin Meese, for instance, asserted in 1987 that “constitutional decisions need not be seen as the last words in constitutional construction” (Johnsen 2004). Even today, tactics ranging from foot-dragging to outright defiance have been a regular feature in American life. While executive branch agencies rarely if ever defy Court orders, they may do the bare minimum to comply (Spriggs 1997).



Congress regularly overrides decisions with which it disagrees.

Implicit ignoring of Congress raises constitutional questions in a way that the relatively common explicit override does not. One study found around 200 cases of legislative override of judicial decisions in the postwar period. These were not only congressional disagreements with the Court's interpretation of statute; of the 200 instances, roughly 16 percent related to cases decided on constitutional terms (Uribe, Spriggs, and Hansford 2014).

Defying or ignoring federal law is common at the state level.

The last few decades have been replete with formal and informal resistance at the state level to federal law. These include:

- **Gay rights:** Republican legislators across the U.S. have been active introducing measures to curtail gay rights. In 2017, 129 pieces of anti-gay legislation were introduced, including some that target the Supreme Court's *Obergefell v. Hodges* (Moreau 2018).
- **Gun rights:** Republican lawmakers in Alaska, Arizona, Idaho, Kansas, Tennessee, Utah, and Wyoming have enacted so-called "firearms freedom bills," which prohibit federal regulation of guns within the state and assert that they are only bound by the interpretations of the Constitution's interstate commerce clause as existed at the time of their admission into the union. Excepting Alaska, these interpretations far predate the New Deal, when the Court redefined interstate commerce broadly so as to allow the growth of the administrative state (Levinson 2016). In 2013, Kansas went even further, making federal officials who attempted to enforce federal law subject to felony charges in the state. Five years later, the statute is still on the books and courts have not ruled on its constitutionality (Hegeman 2018).
- **Health care:** After the passage of the Affordable Care Act, Republican legislatures in 18 states passed laws or state constitutional amendments barring the employee and employer mandates. Republican legislatures in 10 states barred ACA implementation without a vote of approval in the state legislature (Cauchi 2018).



- **Marijuana:** Nine states and Washington D.C. have legalized marijuana under state law: Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington. An additional 13 states have decriminalized marijuana, while 30 states allow medical marijuana. These moves are in defiance of the federal ban on the possession and distribution of marijuana, which remains classified as a Schedule 1 drug under the Controlled Substances Act (Lopez 2018).
- **Property rights:** After the 2005 *Kelo v. City of New London* decision (which restricted the instances in which governments have to compensate property owners impacted by re-development efforts), 45 states enacted eminent domain laws that implicitly or explicitly pushed back on the Court's interpretations (Somin 2015).



OPTION FIVE

Rewrite the Constitution

Pro: Delivers greater stability and does not require support of the president. Forces a nationwide conversation about fundamental values—which can enrich democracy.

Con: Requires support of three-quarters of the states.

The Constitution can be and has been amended.

While the previous five strategies could be accomplished by Congress, there are other court reform proposals that would require a constitutional amendment. Article V establishes the following procedure:

“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.”

Thus, there are four methods of amending the Constitution:

1. Two-thirds of state conventions propose and three-fourths of state conventions ratify;
2. Two-thirds of state conventions propose, and three-fourths of state legislatures ratify;
3. Two-thirds of both houses of Congress propose, and three-fourths of state conventions ratify; and
4. Two-thirds of both houses of Congress propose, and three-fourths of state legislatures ratify.

The first and second methods have never been used, the third method was used once (in the case of the 21st Amendment repealing prohibition in 1933), and the fourth method was used for the other 26 amendments.



Even proposed amendments can lead to social change.

Congress has sent four proposed amendments to the states that are still pending: the 1789 Congressional Apportionment Amendment, the 1810 Titles of Nobility Amendment, an 1861 pro-slavery amendment, and the 1924 Child Labor Amendment. Additionally, two failed to achieve the requisite support in the allotted timeframe: the 1972 Equal Rights Amendment and the 1978 DC Voting Rights Amendment. Currently, 34 states would have to approve for any proposed amendment to become valid.

Additionally, members of Congress have proposed over 12,000 amendments to the Constitution that were never approved, and hundreds of petitions have been filed by states with Congress demanding various changes. Even unsuccessful efforts—like the Equal Rights Amendment and the bid to overturn the Supreme Court on school prayer—can lead to political mobilization that can put pressure on Congress and the courts to change the law (Hartley 2017). A recent example is the Move to Amend campaign, which, as of 2018, has gotten 19 states and 784 localities to adopt resolutions opposing the *Citizens United* decision and/or corporate personhood more broadly (Woodel 2018).

There are numerous ideas to amend the Constitution to change the Court’s role and rules.

A range of other proposals for court reform require constitutional amendments.

First, Richard Davis, a political scientist at Brigham Young University, has advocated electing Supreme Court justices. He argues that modern confirmation processes already is less austere than the founders imagined, with intense public and media scrutiny. The ultimate deciders of the process, however, remain a narrow band of elites. This has all the downsides of elections without the upsides. In a new model, presidents could put forward three candidates, which the Senate would scrutinize and make recommendations on. Voters would go to the polls every two years to pick among the three candidates. Like in other electoral contexts, the top vote-getter would win. In another variation, voters would cast ballots only if 60 percent of the Senate did not agree on a nominee (Davis 2006). Judicial elections have precedent at the state level. Only Massachusetts, New Hampshire, and Rhode Island give automatic tenure to confirmed state Supreme Court judges. New Jersey, which grants tenure if a judge is reappointed after an initial seven-year term, balances this by allowing for judicial recall.

In addition to constitutional amendments, implementation of the process would have to be carefully thought through. One study of Nevada’s system of judicial performance



evaluations (which are used to inform voters casting ballots for or against judges) found that these systematically discriminated against female and non-white members of the bench (Gill, Lazos, and Waters 2011). Additionally, ethics standards would be needed to discourage justices from pandering to the public in negative ways. For instance, research shows that states with elections for judges (whether partisan or non-partisan) lead to higher rates of death penalty convictions (Canes-Wrone, Clark, and Kelly 2014). Perhaps more worrying is the possibility that judicial electioneering and campaign fundraising in a post-*Citizens United* landscape would lead to even more influence for private actors to influence court decision-making (Watkins and Lemieux 2015)—which now occurs mostly through ideational channels (Ash, Chen, and Naidu 2018).

Second, the Supreme Court could be completely refashioned to involve a much more significant role for appellate court judges. Legal scholars Daniel Epps and Ganesh Sitaraman (2018) have proposed making all 179 appeals judges also associate justices of the Supreme Court. Every two weeks, a different group of nine of the 179 would be randomly selected to hear Supreme Court cases. Alternatively, the scholars suggest having a 15-member court, with five partisan Democrats and five partisan Republicans that would be expected to vote with their party. The tie-breaking votes would be cast by five appellate judges, promoted up into the Supreme Court for one-year terms by agreement of the other 10 justices. These proposals draw on practices already common at the appellate level and in international courts.

Finally, judicial review could be eliminated altogether. This need not mean eliminating courts. Instead, it could amount to a formalization of the Jeffersonian notion of departmentalism. Mark Tushnet of Harvard Law School has proposed what he calls an End Judicial Review Amendment (EJRA), which would state that, “Except as authorized by Congress, no court of the United States or of any individual state shall have the power to review the constitutionality of statutes enacted by Congress or by state legislatures.” In this model, courts would focus on scrutinizing executive branch misbehavior—either through contravention or misapplication of statute. Congress would not be totally off the hook either. Under the EJRA, courts would continue to offer their opinion on the constitutionality of legislation, but Congress would not have to nor be expected to automatically follow it (Tushnet 2005). Although this idea is controversial, it would raise the stakes of congressional elections—a useful way to boost voter participation from its current low levels.



One proposal with significant scholarly support is 18-year term limits and a new justice every two years.

Appointing justices are a significant part of what motivates voters and interest groups to turn out and vote in presidential elections.⁸ Yet, there is substantial unpredictability in the process. Because the Constitution provides lifetime tenure during good behavior, the public must wait for justices to resign or die in order to fill a vacancy. Some presidents, such as the Republican William Howard Taft, are able to nominate five justices in a single term. This ensured that, though Taft stepped down in 1913, his nominees on the Court served for years beyond—one serving until 1937. Others, like the Democrat Jimmy Carter, are unable to nominate even a single justice. Bill Clinton, George W. Bush, and Barack Obama each served eight years but appointed only two justices a piece. That's the same amount as Trump has appointed in 22 months.

One solution that has attracted significant scholarly support: create a justiceship every two years. In 2017, a group of legal scholars under the banner of the Fix the Court organization proposed a more automatic process where presidents would automatically appoint a new justice in the first and third year of their terms. By default, the nine newest justices would hear the cases, while justices that have served 18 years would be shifted into a senior judge role. In the event of an early vacancy, the president could appoint a justice at earlier times than Year 1 and 3 of their term, but it would count towards their term-maximum of two appointments. If more than two early vacancies occurred in a single presidential term, the Senate would have discretion as to whether to fill the vacancy (i.e., ex-justices would be brought back into service to fill the role) (Fix the Court 2017).

One solution that has attracted significant scholarly support: create a justiceship every two years.

There are several benefits to the Fix the Court proposal. First, by removing the element of chance involved in waiting for justices to resign or die, regular appointments would give both parties a fairer shot of shaping the court's trajectory. Second, it builds on existing practice. In response to Roosevelt's court-packing initiative, a 1937 judicial reorganization act allowed justices to transition into senior judge status. All four of the living retired justices now play a senior judge role, serving on lower court cases as needed. Before that, nine justices retired and conducted judicial work in lower courts. A change in this rule to

⁸ However, polling data show that is asymmetric. Of 2016 voters who said that the Supreme Court was "the most important factor" in casting their vote, 56 percent voted for Trump, while only 41 percent voted for Clinton (Coaston 2018).



extend the senior judge role onto the Supreme Court would only require a change in statute (Gryskiewicz 2014), though a constitutional amendment would put this major overhaul (essentially forced senior justiceships) on firmer ground.

Versions of this proposal have been around a long time. In 1938, after the Roosevelt administration's court-packing threat, George Washington University legal scholar Charles Collier proposed a 12-member court with 12-year term limits, where justices would thereafter be transferred to circuit courts (Collier 1937). In the 1980s, an 18-year term was floated (Oliver 1986). In the 2000s, a follow-up to the 18-year term was floated with greater detail and justification, including stop-gap appointments in the event of a premature departure that would serve only for the remainder of the vacating justice's term (DiTullio and Schochet 2004). This proposal would not completely eliminate so-called "strategic retirements," as a justice who was inclined to retire before their full 18-year term was up could choose to leave at a time when their political party was in office.

But both the Fix the Court and closely related alternatives are better for judicial independence than proposals that allow for renewable terms (which would encourage justices to curry favor with politicians—a threat to judicial independence) or only have very short terms (which would limit each justice's ability to make a mark on the institution—one of the rewards of choosing judgeships over private practice). And while some European courts have mandatory retirement ages for justices (Epstein, Knight, and Shvetsova 2001), the U.S. system would allow older but distinguished jurists the opportunity to leave a mark.

This proposal addresses some of the downsides to tactics like court-packing, and can be thought of as a resolution to a prisoner's dilemma in game theory. Presumably, neither Republican nor Democratic policymakers wish to see endless cycles of escalation—yet neither want to be the party that foregoes the tactic if the other party engages in it. By locking in a cooperative solution, the regularization of appointments could amplify whatever electoral advantage either party is believed to have.

This proposal amounts to a kind of quota to ensure more equal representation—something that has been tried at state level—whereby each political party gets a certain number of seats (assuming that they trade off holding power roughly every eight years). Ten states currently have some form of geographic diversification requirement on their courts. Florida, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Oklahoma, South Dakota, and Tennessee pick their justices from districts—sometimes matched up with congressional districts. Last year, Oklahoma proposed creating four at-large seats on the state supreme court—two of which would need to come from rural countries (Raftery 2017b).



Conclusion

The Roberts Court is the most pro-business, anti-worker, anti-consumer Supreme Court in modern history. This tilt will only be compounded by the two most recent additions to the Court: Neil Gorsuch and Brett Kavanaugh. Policymakers wishing to rebalance the Court's composition or alter its ability to strike down pro-worker, pro-consumer laws have ample reasons for doing so. This paper has laid out five broad categories of strategies for democratizing the judiciary, including expanding the number of justices on the Court, lowering the number of justices on the Court through impeachments, changing the Court's appellate jurisdiction, ignoring or overriding specific Court decisions, and amending the U.S. Constitution.

Each of these strategies has precedents in U.S. history, though each comes with specific advantages and disadvantages explored above. Adding justices or changing the Court's jurisdiction have a history of being effective (both legally and as threats), but require a cooperative precedent or veto-proof majorities. The same hurdle confronts legislative override of Court decisions, which has the added complication of targeting only a case or set of cases at a time (rather than an overall bias of the Court). The easiest for Congress to legally do on its own—impeachment—is politically difficult. Though impeachment is a political process for political wrongdoing, the public seems to have little appetite for high-profile impeachment attempts over what is arguably private misconduct. Articles of impeachment thus benefit from a close nexus to judicial acts, such as personal traits that lead to specific (say) anti-worker or anti-women rulings. That is not to say that even the best-laid impeachment plans are easy: The two-thirds vote hurdle in the Senate presents a formidable barrier. Changing the Constitution is more difficult still, requiring three-quarters of states to agree. The simplest strategy (ignoring the Court's decisions) would invite a constitutional crisis and therefore would be on the most solid ground if public opinion was firmly behind the lawmakers and law enforcers defying the Court.

As the experience of FDR shows, even suggesting that the Court be reformed can contribute to the realignment of legal decisions with popular priorities.



Notwithstanding these obstacles, active debate around and the introduction of Court reform proposals are an indispensable part of protecting American democracy. As the experience of FDR shows, even suggesting that the Court be reformed can contribute to the realignment of legal decisions with popular priorities. Or as American abolitionist Wendell Phillips once said, “Law is nothing unless close behind it stands a warm living public opinion. Let that die or grow indifferent, and statutes are like waste paper, lacking all executive force.” Fearful of judicial and royal tyranny, America’s founding generation gave us ample tools to check and balance the judiciary. We should not be afraid to use them.



Appendix

COURT EXPANSIONS AND CONTRACTIONS, 1789-PRESENT			
Act	Number of Justices	Size Justification	Partisan Dynamics
Judiciary Act of 1789 (1 Stat. 73)	Six	Two justices had to sit with one district court judge in each of three circuits.	The south was represented in two of three circuits.
Judiciary Act of 1801 (2 Stat. 89)	Five, through attrition	Eliminated need for justices to ride circuit, which was considered a hardship. Created circuit court judges.	Passed by Federalists in lame duck session, and repealed by Jeffersonians after (arguably unconstitutionally).
Judiciary Act of 1802 (2 Stat. 156)	Six	One justice rode each of six circuit.	The south was represented in two of six circuits.
Seventh Circuit Act of 1807 (2 Stat. 420)	Seven	New states and a new circuit.	The south was represented in three of seven circuits.
Eighth and Ninth Circuits Act of 1837 (5 Stat. 176)	Nine	New states and new circuits.	The south was represented in four of nine circuits. This went up to six in subsequent acts.
Tenth Circuit Act of 1863 (12 Stat. 794) / Judiciary Act of 1862 (12 Stat. 576)	Ten	New state (California) needed a new circuit.	New justice not from the South. Reorganized circuits so there would be two Southern justices.
Judicial Circuits Act of 1866 (14 Stat. 209)	Seven, through attrition (got to eight over three years)	Reorganized circuits so that there would be only one Southern justice.	Radical Republicans wanted to deny Southern-sympathizer Andrew Johnson any appointments.
Judiciary Act of 1869	Nine	To match circuits.	Radical Republicans comfortable with giving several appointments to Ulysses Grant.

TABLE 1



ALL SUCCESSFUL IMPEACHMENT CONVICTIONS BY THE U.S. SENATE, 1789-PRESENT

Official	Position	Date of Senate Conviction	Party of Appointing President	Conviction Basis	Partisan Dynamics
John Pickering	Judge of U.S. District Court for the District of New Hampshire	March 12, 1804	George Washington (Independent). Judge was a federalist.	Evaded the law and deprived the U.S. of revenue by returning a government-seized vessel to a businessman who lacked proper paperwork. Also, "being a man of loose morals and intemperate habits", lacking "essential qualities in the character of a judge." (Meaning drunk on the bench) (19-7)	N.H. Federalists kept him from being declared insane, in order to hold onto seat. Jeffersonians impeached without amending Constitution to allow for removal for insanity.
West Hughes Humphrey	Judge of the three U.S. District Courts for Tennessee	June 26, 1862	Franklin Pierce (D)	Making a speech encouraging secession (38-0), participating in ordinance of secession (38-0), war preparations (32-4), opposing U.S. power (27-10), refusing to hold court (38-0), operating as a confederate judge and illegally detaining U.S. citizens (35-1, 35-1, 35-1)	Impeachment pushed through by GOP after South's secession.
Robert Wodrow Archbald	Judge of U.S. Commerce Court and U.S. Court of Appeals for the Third Circuit	January 13, 1913	William Taft (R)	Pressured railroad and coal litigants before him to invest in his speculative endeavors in dumps and coal (68-5, 60-11, 42-20), then coordinating opinions with litigants' attorneys (52-20); accepted gifts from others to help lobby companies (66-6)	Impeached by a Democratic Congress.
Halsted L. Ritter	Judge of the U.S. District Court for S.D. of Florida	April 17, 1936	Calvin Coolidge (R)	Accepting money from property developers that he didn't declare on his taxes (56-28)	Impeached by a Democratic Congress.
Harry Claiborne	Judge of U.S. District Court for the District of Nevada	October 9, 1986	Jimmy Carter (D)	Committed tax evasion in two years by failing to report money he earned as an attorney before his judicial confirmation (87-10, 90-7) thereby reducing public confidence in the judiciary (89-8). He was serving a prison sentence but kept his judicial post until his impeachment.	Impeached by a Republican Senate and Democratic House.
Alcee Hastings	Judge in U.S. District Court for S.D. of Florida	October 20, 1989	Jimmy Carter (D)	Agreed to take money from a mobster in exchange for a lenient ruling (69-26), and lied to a district court about various aspects of the ploy and cover-up (68-27, 69-26, 67-28, 67-28, 69-26, 68-27, 70-25)	Impeached by a Democratic Congress.
Walter Nixon	Chief Judge of S.D. of Mississippi	November 3, 1989	Lyndon Johnson (D)	Lied to a federal grand jury in writing and verbally over using judicial leverage to help keep a business partner's 2,200-pounds-of-marijuana-smuggling son out of jail (89-8), including that he "never talked to anyone" about it when he had (78-19)	Impeached by a Democratic Congress.
Thomas Porteous	Judge of E.D. of Louisiana	December 8, 2010	Bill Clinton (D)	Engaged in pay-to-play schemes with a law firm while a state and federal judge and then failed to recuse himself (96-0) Had a corrupt relationship with a bail bondsman while a state and federal judge that included accepting gifts, expunging felony convictions (69-27) Lied in and about bankruptcy filings (88-8) Lied to FBI and Senate during background check about above (90-6)	Impeached by a Democratic Congress.

TABLE 2



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