



Myth Busters:

The Facts about Supreme Court Expansion

BY LAURA WILLIAMSON

MYTH:

Expansion will undermine the Court's legitimacy and politicize the institution.

Public trust in the U.S. Supreme Court is already deeply undermined. More than 2 decades of divisive decisions have threatened our representative democracy, weakened Congress's protections for the fundamental right to vote, undermined racial justice, and favored the interests of the wealthiest corporations and individuals at the expense of the rights of working people. Public confidence in the impartiality of the Supreme Court has been further eroded by the nominations of the last 3 associate justices, which were themselves highly politicized processes marked by Republican desertion of historical norms meant to guard against such undemocratic and partisan machinations in service of securing a supermajority on the Court committed to their extremist agenda.

It's true that a Supreme Court that is perceived as partial, partisan, and unfair—and which has lost its legitimacy in the eyes of the American people—cannot fulfill its duty to deliver equal justice under law. But that argument only underscores the need for reform, because that is already the reality of the public's perception of the U.S. Supreme Court.

- Just **36 percent of Americans** have high confidence in the Supreme Court, down 14 percentage points from 2 decades ago. Nearly two thirds (64 percent) reported having “none,” “very little,” or only “some” confidence in the institution.¹
- In a poll conducted after the Supreme Court’s controversial decision on the Texas abortion law, more than half (56%) of registered voters—including 61 percent of Independents and 90 percent of Democrats—expressed support for Court expansion, saying the Supreme Court “has become too conservative, and that it is time to add seats to the Supreme Court to provide more balance that better represents America.”²

Only fair and principled decisions that protect civil and human rights and advance justice for all Americans can restore balance and legitimacy to the Court. The current Court has been captured by a radical conservative majority that has already shown its willingness both to subvert democratic processes in order to roll back fundamental rights and protections, especially those of people of color, LGBTQ people, workers, and other marginalized communities, and to write into law protections for corporate interests and the wealthy.

Recent decisions from this Court are increasingly divorced from any principled jurisprudence, and they mirror the agenda of the Republican party to an alarming extent. Further, this captured Court reflects neither the political makeup nor the rich diversity of the American public. A Court that is co-opted by a political process will never—and should never—have legitimacy as an independent branch of our government. We need more justices who will apply precedent and principle, and to balance the current radicalism of the Court and restore its legitimacy in our system of government. Expansion of the Supreme Court by 4 justices who better reflect both the ideological makeup and the demographic composition of the American populace will make the institution more representative of the American people, increase the likelihood of decisions that protect rights, and help to restore the legitimacy of the institution.

MYTH:

The Court may be a threat now, but it has been an important defender of the rights of Black and brown people in the past. Delegitimizing this important backstop of the rights of vulnerable people is dangerous.

While the period of the Warren Court was an important moment for the Court in championing civil rights and justice, it was just that—a moment. Outside that era and a few important decisions like *Brown*, the U.S. Supreme Court has by and large been a regressive institution that has threatened or all-out attacked the rights of Black and brown people and other social and political minorities.

1. Gallup, “Supreme Court,” 2021, <https://news.gallup.com/poll/4732/supreme-court.aspx>.
 2. Navigator, “Most Americans Oppose the Texas Abortion Ban,” September 16, 2021, <https://navigatorresearch.org/most-americans-oppose-the-texas-abortion-ban/>.

In its infamous *Dred Scott* decision (1857), the Court banned Congress from restricting the spread of slavery and from giving Black people the rights of citizenship. In addition to helping to spark the Civil War, the Court's regressiveness on race restricted the promise of Reconstruction. In *Cruikshank* (1876) and related cases over the subsequent decades, the Court said Congress had no power to punish lynch mobs or protect voting rights from state disenfranchisement. In a series of cases decided in 1883 (*the Civil Rights Cases*), it restricted Congress from passing anti-discrimination laws, considerably weakening the Reconstruction Amendments. In *Plessy* (1896), among the most infamous decisions in Supreme Court history, the Court found it "natural" for a state to enforce segregation based on race, ushering in more than a half-century of state-sanctioned apartheid in the South. In the early 20th century, it prevented Congress from banning child labor (*Hammer*, 1918, and *Child Labor Tax Case*, 1922). During the Great Depression, a series of decisions (*Schechter Poultry v. United States*, 1935, among others) initially overturned key New Deal policies aimed at worker protection and economic recovery. In 1976, with *Buckley*, and again in 2010 with *Citizens United* and 2013 with *McCutcheon*, the Court eviscerated attempts to regulate campaign finance and created a right for wealthy, corporate interests to drown out the voices of everyday people in our elections. In 1995, its decision in *Adarand* cramped the federal government's ability to enact race-conscious remedies for racial discrimination. In *NFIB*, the landmark Affordable Care Act (ACA) decision in 2012, it undermined the ACA, depriving

millions of low-income Americans, including many Black and brown people, of the chance to have health insurance through Medicaid expansion. In *Shelby* (2013) and most recently in *Brnovich* (2021), the Court first struck down and then severely weakened Congress's protections against racial discrimination in voting, leaving millions of Black and brown voters subject to racist voter suppression. And in *Whole Women's Health* (2021), the Court allowed a radical abortion ban to go into effect in Texas, preventing most abortion-seekers in the state—including many Black and brown Texans—from accessing the reproductive care they need.

In these recent cases, a bare majority of the Court—which is to say, a tiny handful of unaccountable, unelected justices—are overriding the democratic decisions of the Congress and the president. And they are doing so in favor of a radical ideological vision aligned with the fringes of the American political spectrum, and against the interests of the masses.

Far from a bulwark for the rights of Black and brown people or other communities subject to discrimination, the Supreme Court has throughout history posed much more of a threat, and done significantly more damage, to the rights and well-being of these communities. As Harvard law professor Nikolas Bowie put it in his recent testimony to the Presidential Commission on the Supreme Court, "if you look at the history of the judicial review of federal legislation, the principal 'minority' most often protected by the Court is the wealthy."³

3 Nikolas Bowie, "The Contemporary Debate over Supreme Court Reform: Origins and Perspectives," White House, June 30, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf>

MYTH:

Expanding the Court could create a “race to the bottom,” with future Congresses and administrations of a different party retaliating by further packing the Court.

This argument is based on the faulty assumption that one political party has not already shattered democratic norms and undermined the legitimacy of the Court. To the contrary, one party has already created a mess of the federal judiciary; the need to expand the Supreme Court is a direct result of actions they have already taken. Further, on top of stealing 2 Supreme Court seats in the last 5 years—and employing unprecedented obstructionism to block Obama nominees to lower federal courts before ramming through hundreds of Trump nominees—Republicans are also packing state-level Supreme Courts where their control is threatened, including in Montana, Arizona, and Georgia.

The last several years have made clear that, no matter the rules or norms, Republican leaders will stop at nothing to seize and cling to control, and they certainly do not wait for Democrats to move first. They have shown over and over again that they will do what is necessary to maximize their power, whatever the consequences for democracy. And they are banking on the fact that defenders of democracy believe so deeply in norms that we will not fight back, in spite of their blatant court-stealing schemes of the last several years.

Reform is needed on multiple fronts to depoliticize and re-legitimize the Court, including term limits and adoption of a judicial code of ethics. Such reforms alone, however, are not enough—as they will take decades to achieve full effect and will not be sufficient to address the partisan power

grabs of the last several years—to create a Court that better reflects the political and demographic makeup of the nation, or to protect the civil rights that are under such threat by this Court. Expansion is key to restoring the legitimacy and integrity of the Supreme Court in the current moment. Avoiding much-needed reforms today in the hope that Republicans will not further politicize the Supreme Court in the future when it serves them is a recipe for surrendering any prospect of restoring and protecting the fundamental rights the Court has already discarded.

MYTH:

We have business before the Supreme Court, and therefore we cannot take a public position on SCOTUS reform.

The sad reality, due both to the Court’s gutting of our most important legal tools for voter protection and to the outright hostility it has demonstrated to voting rights, workers’ rights, reproductive rights, immigrant rights, and racial justice, among other rights, is that all of our civil rights shops are going to have less and less business before the Supreme Court moving forward. This was already true before the *Brnovich* decision, but in limiting the protection offered by Section 2 of the Voting Rights Act and further weakening the Act overall, the Court has further narrowed the avenues through which we can leverage the judicial branch to protect the voting rights of millions of Black and brown Americans. Even if we do find ourselves in front of the Supreme Court attempting to protect voters using the few tools that remain, there is no reason to believe a policy position one of

our organizations has taken—or refrained from taking—will make this Court’s far-right majority more or less likely to uphold the fundamental right to vote. They have already proven their utter unwillingness to do this, and they have even shown themselves willing to create arbitrary legal tests out of thin air to advance their extreme anti-democracy agenda, as evidenced most recently by the Court’s *Brnovich* decision.

Today’s Supreme Court simply is not the site of relief for civil rights that it has been at moments in the past. Instead, it is deeply hostile both to civil rights and economic justice, and to the very project of public interest litigation. And given the ages of most of the members of the far-right majority, the only way to change that reality without waiting decades—and wreaking unimaginable harm on people of color and other communities at whom this Court has taken aim—is to expand the Supreme Court.

MYTH:

Instead of expanding the Supreme Court, we should focus on lower court expansion.

It is critically important to expand the lower courts to bring their capacity in line with current caseloads and to better reflect the American people. Representative Hank Johnson recently introduced legislation in the House ([H.R. 4886](#)) that would add 203 federal district court seats, to be filled immediately, and we hope companion legislation to add seats to the circuit courts will come soon.

Unfortunately, expanding the lower courts is not enough. Even with lower federal courts more reflective of the American people, the current Supreme Court will still

have the last word in ruling on the most highly charged and high-impact issues of our time, from voting rights and worker power to abortion access, LGBTQ rights, and climate change. We must be under no illusions on how the current Supreme Court will address and decide many of these issues. Further, with increasing frequency, we do not actually even get to understand how the Court decides these issues. Over the past few years, the radicalism of the court has also manifested in the dramatic growth of the “shadow docket,” cases in which the Court intervenes—issuing stays of favorable district court or appellate rulings or vacating unfavorable rulings—in a summary fashion, without briefing or argument, in order to advance their agenda without even basic process and transparency. Just in the last few months, the Court used a one-page order to vacate a decision to extend an eviction moratorium, putting millions of low-income Americans at risk of experiencing homelessness, and to deny a stay of a radical law which, in blatant defiance of *Roe v. Wade*, makes it virtually impossible for most people to access an abortion in Texas.

Expanding the lower federal courts and the Supreme Court are not mutually exclusive. In fact, they are mutually reinforcing. Organizing and advocacy that goes into SCOTUS expansion can reinforce lower court expansion, and vice versa. There is too much at risk to rely solely on lower court expansion. We must put energy into both.

MYTH:

SCOTUS expansion is too radical and will not happen. It's not worth putting resources into.

First, it is worth remembering that the radicalization of the Court has already taken place, at the hands of the Republican party. In 2016, Senate Republicans shattered norms by holding open the seat of the late Justice Scalia, who passed away a full 9 months before the election, leaving the Court without a full bench and often deadlocked 4-4 for 14 months. Even though President Obama quickly nominated a highly qualified replacement, Judge Garland was denied a hearing for 293 days, and Scalia's seat was ultimately filled by a president who lost the popular vote. In 2020, in direct opposition to their own position just 4 years earlier that the winner of the election should fill the vacant Supreme Court seat, Senate Republicans rammed through Justice Barrett's nomination to replace Justice Ginsburg—who passed away scarcely more than a month before Election Day—just one week before the election. These acts were radical, and they demonstrate a clear disdain for the democratic process and the will of the American people. Expanding the Court now, to neutralize these power grabs and bring its makeup better into alignment with the makeup and views of the American people, is no more radical.

The only reason that change aimed at righting the wrongs of our democracy and advancing civil rights has ever happened is because the people have demanded it. It is only through the investment of time, energy, and resources by organizations like ours that any proposals that advance greater justice have ever become reality. It is true that expanding the Supreme Court is a very significant undertaking, but it is absolutely necessary. The Supreme Court, as currently constituted, is a direct threat to the rights

and well-being of millions of Americans, especially Black and brown Americans, and to representative democracy itself. Further, any success of our political movements in securing rights and benefits in Congress is under threat by this Court. For those of us who care about equality, democracy, and civil rights, this Court is an existential threat. We must begin now to build the movement that will eventually create the environment in which expansion becomes possible, to mitigate that threat and to protect the civil rights victories of the last few decades and moving forward.

MYTH:

The proposal to expand the Court by 4 seats is just a political power grab, since that's the number needed to ensure a majority of justices are appointed by Democrats.

Four is the number of additional justices needed to create a pro-democracy, pro-people majority on the Court. While the Court is not and has never been a democratic institution, the justices who make up its bench over time are themselves more or less inclined to support the ultimate goal of democracy: political equality. Between *Citizens United* and *McCutcheon*, *Shelby*, and *Brnovich*—and its hostility toward voting changes made by states trying to keep voters safe while ensuring all ballots were counted during a deadly pandemic—the hyper-conservative majority on the Court has shown itself to be openly hostile to political equality and to the laws that promote it. This Court is openly hostile to a democracy of, by, and for the people. And 3 of those decisions came before the stolen seats of 2016 and 2020 were replaced by even more conservative justices, meaning we've likely yet to see the full consequences of this anti-democracy majority.

Additionally, the proposal to add 4 seats brings the size of the Court into alignment with the number of circuit courts, which is itself a nod to the history of Supreme Court expansion. The last 5 times that Congress has added seats to the Court, it has set the number to match the number of circuits that existed in the federal court system. Today, there are 13 circuit courts, and so it makes sense to follow precedent and set the number of justices at 13.

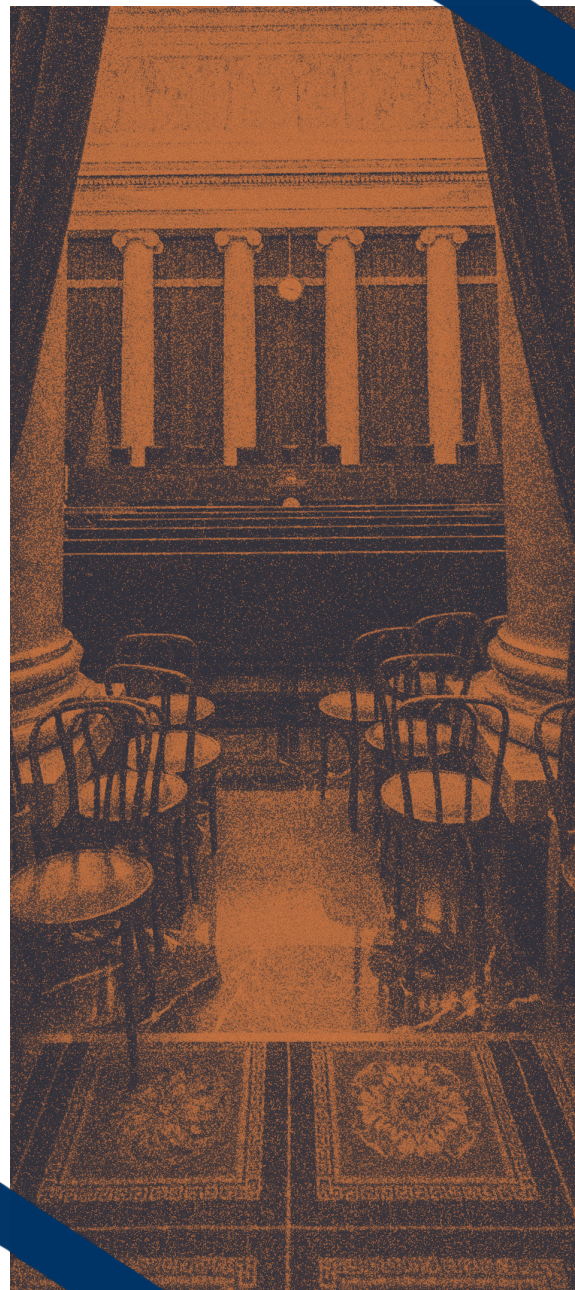
MYTH:

The Court is a regressive institution that has never been a site of power building for Black and brown communities. We should be focusing on organizing and securing wins outside the courts—our political institutions will follow if we build enough power.

It's true that the judiciary will never be the vanguard of the movement to build an inclusive democracy and equitable economy. But, as currently constituted, the Supreme Court is poised to play a tremendously destructive role in efforts to advance justice and build power for Black and brown people. We must reform the Court to mitigate the damage it is already doing to undermine the hard-fought gains of recent decades and to block further progress.

There is no reason to believe the current Court will respond to public opinion or organizing. The Supreme Court is already inherently a deeply undemocratic institution, and the makeup of the current Court is the result of partisan manipulation pursued for the precise purpose of creating a conservative majority that would withstand electoral gains and eviscerate progressive policy wins.

That capture means that we do not have the luxury of disengaging with the Court. Protecting the rights and well-being of the communities in the Court's crosshairs—and preserving and extending progress on all our issues—depends on our ability to mitigate the damage this Court is prepared to do.





Demos is an organization that powers the movement for a just, inclusive, multiracial democracy. Through cutting-edge policy research, inspiring litigation, and deep relationships with grass-roots organizations, Demos champions solutions that will create a democracy and economy rooted in racial equity

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