

Center for American Progress



Structural Reforms to the Federal Judiciary

Restoring Independence and Fairness to the Courts

By Danielle Root and Sam Berger May 2019

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Introduction and summary

Discussions of the federal judiciary often focus on the substance of decisions made—which side wins and which side loses—and rightly so. These individual opinions are frequently of incredible importance, not just to the parties involved but in shaping the law more broadly. Yet this focus on substantive decisions has obscured deeper structural factors at play in the nation’s federal judiciary. Structural problems—such as lack of judicial diversity, ideologue judges, and lack of judicial accountability—undercut the courts’ legitimacy and have tangible negative effects on judicial decision-making. Instead of protecting everyday Americans by serving as a check on abuses of power, too often the federal courts have become a tool for carrying out the agendas of special interests and corporations.

Structural problems with the judiciary have always existed to varying degrees. But they have been exacerbated in recent years due to an ongoing campaign by conservatives to take control of the federal courts, often through procedural changes that have significant effects but garner little public attention. The problem has now reached a crisis point. Conservatives have shown a willingness to abandon any and all norms to undermine the judicial nominations process and pack the courts with judges who will help them realize political goals they cannot achieve through the political process. These judges have proven more than willing to carry out the task, supporting the most specious of legal claims in order to skew the system in favor of conservative interests and even prevent many Americans from accessing the courts at all.

Progressives need to consider policies to combat the ideological bias of the courts. This report outlines the current problems in the federal judiciary and then discusses two types of structural reform: changing the composition and authority of the courts and changing the rules that dictate who has access to them.

Discussions about changing the composition and authority of the courts have garnered greater attention recently as a result of conservative efforts to pack the courts. Some proposals have been debated for a considerable amount of time, such as term limits for judges and justices. Others are newer additions that have arisen as the legal community grapples with the reality of conservative norm-breaking, such as altering the structure of the Supreme Court.

At this point, the most important step is to move past the question of whether to consider significant reforms and begin discussing their relative merits. To that end, this report does not seek to identify a specific preferred policy solution. Instead, it discusses the strengths and weaknesses of a number of proposals, including changing the structure of the Supreme Court by adding justices or creating a rotating panel of justices; reducing the influence of ideologue judges through proposals such as term limits; and changes to improve judicial accountability.

The report next addresses how to eliminate judicial and legislative roadblocks that curtail access to justice for society's most vulnerable and rig the system in favor of the wealthy and powerful. Here, the policy discussions have already been ongoing for a number of years. The report outlines specific steps policymakers can take to restore plaintiffs' ability to bring class action suits, limit forced arbitration, restrict the abuse of secret settlements and record sealing; expand the ability of private entities to bring suits to enforce federal law; and restore simpler pleading standards.

The structural reform proposals detailed in this report are not exhaustive; but they would take substantial steps to address some of the serious problems in the judiciary. As important as the reforms themselves, policymakers must recognize the urgent need for bold structural changes to the judiciary.

The need for structural reform in the federal judicial system

There is growing recognition of the need to reform the U.S. judicial system, including the Supreme Court. Scholars, judges, and even some 2020 presidential candidates have suggested everything from expanding the number of judges who sit on the federal bench to imposing term limits on judges.¹ The serious consideration being given to these judicial reform proposals reflects deep concerns about the institution and a recognition that reform is needed.

In part, these issues are the result of long-standing problems in the judiciary, which has historically favored the interests of the rich and powerful over society's most vulnerable. For example, in the 1800s, the Supreme Court benefited white landowners and businesspeople by ruling that African Americans were not American citizens and by upholding "separate but equal" racial segregation and discrimination.² Between 1905 and 1918, the Supreme Court struck down important labor laws, including those establishing humane work hours and banning child labor.³ Later, it upheld a Virginia law permitting the sterilization of people with disabilities, the criminalization of same-sex relationships, the internment of Japanese Americans, and severe penal punishments targeting people of color.⁴ More recently, the Supreme Court sided with powerful corporations by prohibiting workers and consumers from bringing class action lawsuits and by allowing the wealthy to drown out the voices of everyday Americans through corporate dark money contributions.⁵

To be sure, there have been brief periods during which the Supreme Court has robustly protected the American people—including those who are most vulnerable—notably under the leadership of former Chief Justice Earl Warren.⁶ Looking at the entirety of American history, however, the court has more frequently served to check social progress rather than advance it.

Unreflective judges lead to out-of-touch judgments

The courts' favoritism toward wealthy, often white, Americans and its hostility toward the interests of underrepresented groups is, at least in part, a product of the judiciary's very makeup. The federal bench has long been dominated by white male elites. The first African American was not appointed to the Supreme Court until 1967, and the first woman was not appointed until 1981.⁷ While diversity on the lower federal courts has improved substantially, the Supreme Court remains a particularly unrepresentative institution; it currently has only two people of color—22 percent—and three women, 33 percent.⁸ Moreover, justices on the highest court are significantly older than the general populace, with most between the ages of 64 and 86 years old.⁹ Compared with the rest of the United States, the Supreme Court is exceptionally nondiverse.

There is of course a difference between descriptive and substantive representation.¹⁰ Descriptive representation is when an institution physically resembles the population it has authority over, while substantive representation involves acting in a constituency's substantive interests. Certainly, some Supreme Court justices and federal judges have been fierce advocates for the rights of people of color, women, and the LGBTQ community even though they did not personally identify with those groups.

That said, having individuals in power who look like or share characteristics with the broader U.S. population furthers the perceived legitimacy of the courts and their decisions. As recognized by Daniel Goldberg, the legal director at the Alliance for Justice: "In an increasingly diverse country, citizens have a right to walk into a courtroom and see judges who are deciding life-and-death issues that look like them."¹¹

Moreover, ethnic and gender diversity on the bench has been shown to positively impact decision-making. As described by Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit, it is "inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them."¹²

Studies show that female judges on federal appellate courts are more likely to rule in favor of plaintiffs in sexual harassment and discrimination cases than male judges.¹³ Similarly, black judges are more likely to rule in favor of affirmative action programs than their nonblack counterparts.¹⁴ The mere presence of female and black judges on federal appellate courts can positively impact decisions made by other judges in certain cases.¹⁵ One study found that having at least one female judge on an appellate court panel more than doubles the likelihood that male judges will find for plaintiffs in sexual harassment cases.¹⁶ And in sex discrimination cases, the presence of a female judge

triples the likelihood that male judges will find for plaintiffs.¹⁷ Regarding racial diversity, a study found that the presence of a black judge on an appellate panel increases the likelihood that a nonblack judge will rule in favor of an affirmative action program by roughly 20 percent.¹⁸ Another study found that the presence of at least one African American judge on an appellate panel increases the likelihood that white judges will find for plaintiffs in cases involving violations of Section 2 of the Voting Right Act.¹⁹

Racial, ethnic, and gender diversity have improved on the lower courts in recent years, particularly under the Obama administration, but that trend is retrograding. Of the active federal judges appointed so far under the Trump administration, more than 80 percent are white, while more than 70 percent are men.²⁰

Adding to the Supreme Court's representation issue, eight of its nine justices graduated from either Harvard or Yale Law School.²¹ Justice Ruth Bader Ginsburg began her legal studies at Harvard before graduating from the equally prestigious Columbia University.²² Moreover, most of the justices are millionaires who followed almost identical paths to their current post, such as clerking at the Supreme Court and working at prestigious law firms or within administrations before being appointed to a lower federal court.²³ The median net worth of Supreme Court justices in 2017 was estimated at roughly \$1.9 million, compared with \$97,300 for all U.S. families.²⁴

The judiciary's elitism fosters a culture of favoritism that determines who has access to the courts. A 2014 Reuters investigation found that from 2004 to 2012, a group of 66 elite attorneys were six times more likely to have their cases heard by the Supreme Court than all other attorneys who filed cases before the court. Of those 66 lawyers, 63 were white and only eight were women.²⁵ Many of these attorneys worked on behalf of corporate interests and had personal or professional connections to the justices.²⁶ According to the *Reuters* report, this show of favoritism fosters "a decided advantage for corporate America, and a growing insularity at the court."²⁷

The increasingly partisan nature of U.S. courts

Lack of diversity is only part of the explanation for bias in the judiciary. Partisan manipulation has also played a definitive role in creating an institution designed to protect the economic interests of the rich and powerful over everyone else. Reforms to fix the broken judicial system are often rebuked as attempts to politicize the courts. Yet conservatives have been working for decades to turn the federal judiciary into a partisan tool to achieve conservative ends. Their efforts, while largely successful in accomplishing their goals, have severely undermined the proper role of the courts.

The influence of conservative interest groups on the federal judiciary

Two of the most influential conservative groups that have attempted to change the composition of the courts have been the Heritage Foundation and the Federalist Society.²⁸ These groups exercised significant influence during the Reagan administration, which relied heavily on both organizations to recommend judges for the federal bench and shape legal policy.²⁹ The two groups have continued playing substantial roles in appointing conservative judges in subsequent administrations, including that of President Donald Trump.³⁰ Today, all five conservative Supreme Court justices have ties to the Federalist Society.³¹ By January 2019, more than 80 percent of Trump's appellate circuit court appointees had current or prior membership in the Federalist Society.³²

The Federalist Society and the Heritage Foundation are not the only conservative interest groups with outsize influence over the federal courts. The U.S. Chamber of Commerce—whose board is comprised mainly of corporate leaders—is hugely powerful as well.³³ Cases in which the chamber or its litigation arm, the U.S. Chamber Litigation Center (USCLC), is involved have a high likelihood of being accepted by the Supreme Court and a 70 percent chance of receiving a favorable ruling since Chief Justice John Roberts took the bench in 2005.³⁴ There is a very cozy relationship between the USCLC and the conservative legal establishment; for example, a lawyer who helped Roberts through his confirmation hearings during the Bush administration went on to become one of the USCLC's top litigators.³⁵

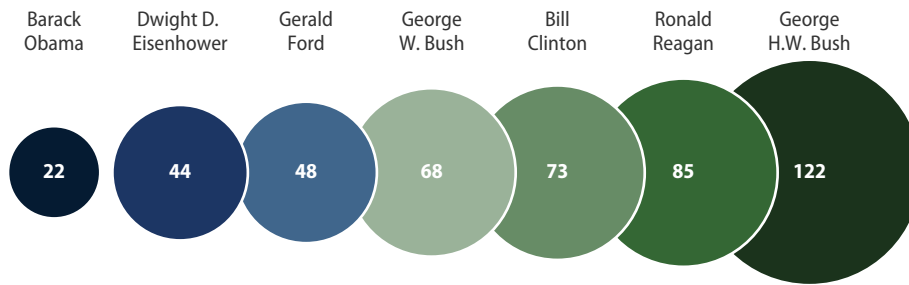
While conservatives have long made the appointment of judges who share their rigid ideology a primary political goal, their efforts to control the judiciary have accelerated in recent times. The most striking example has been a robust conservative court packing scheme that has played out in the Senate since 2014.

First, under the leadership of conservative Sen. Mitch McConnell (R-KY), the Senate majority stole judicial seats by delaying and denying confirmation of judges nominated by then-President Barack Obama. The most egregious example came in 2016 with the refusal to even consider the nomination of Judge Merrick Garland for the Supreme Court. Just 10 days after Justice Antonin Scalia's death in February 2016—before President Obama had even named Garland as a possible replacement—McConnell and his fellow Senate Republicans declared that they would not consider any nominee made by the Obama White House.³⁶ The Garland incident was only the tip of the iceberg, however: Over the course of Obama's final two years in office, lawmakers confirmed fewer judges than at any other time of divided government in the past half-century.³⁷

FIGURE 1

Divided government has not always meant slow judicial confirmations

U.S. Senate judicial confirmation totals in the last two years of presidential administrations where the Senate and the president were of opposing political parties



Sources: Federal Judicial Center, "Federal Judicial History," available at https://www.fjc.gov/history/home.nsf/page/research_categories.html (last accessed April 2019); Federal Judicial Center, "Biographical Directory of Article III Federal Judges, 1789-present," available at <https://www.fjc.gov/history/judges/search/advanced-search> (last accessed May 2019).

Next, the Senate majority used a whole host of tricks to quickly fill judicial seats with extreme ideologues once President Trump took office in January 2017. The Senate rejected its own procedures and precedent by abandoning what is termed the “blue slip” process that gave home-state senators a say in judicial nominations and by allowing Supreme Court justices to be appointed along strict partisan lines. Under McConnell’s leadership, Senate Republicans even went so far as to hold confirmation hearings during Senate recesses.³⁸

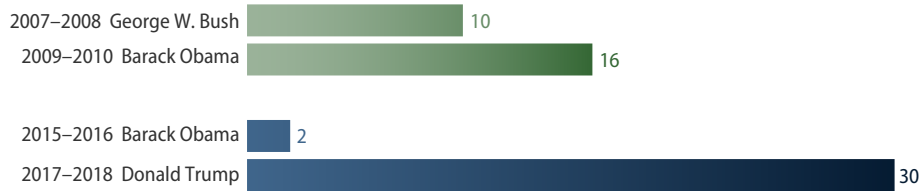
As illustrated by Figure 2, the strategy worked. While Obama saw his appointment power virtually nullified by McConnell and his Senate allies, Trump has been able to ram through a slew of controversial judges. Of the more than 110 federal seats left open by conservative lawmakers while Obama was in office, more than 80 percent have already been filled by Trump during his first two years in office.³⁹ Trump has confirmed more circuit judges than any other administration in recent memory.⁴⁰

In making an end run around the normal judicial confirmation process, conservative lawmakers have overlooked nominees’ questionable writings and statements on women, race, and LGBTQ rights, as well as lack of legal experience.⁴¹ Although grass-roots campaigns have succeeded in keeping some of the most controversial nominees off the federal bench, a number of unqualified judges have been pushed through.⁴² And these Trump appointees, according to *USA Today* reporter Richard Wolf, already “are having an impact on issues ranging from civil rights and campaign spending to public prayer and the death penalty.”⁴³

FIGURE 2

Conservative federal court packing in action

The number of appellate judges confirmed by the U.S. Senate, 2007–2010 and 2015–2018



Source: Federal Judicial Center, “Biographical Directory of Article III Federal Judges, 1789–present: U.S. Court of Appeals,” available at <https://www.fjc.gov/history/judges/search/advanced-search> (last accessed April 2019).

Conservatives’ efforts to shape the courts have been hugely effective for them. Since Chief Justice Roberts was appointed in 2005, 92 percent of the Supreme Court’s conservative bloc’s 5-4 decisions have benefited conservative and corporate interests.⁴⁴ These cases restricted voting rights, empowered the corporate takeover of federal elections, and weakened protections for unions and workers.⁴⁵

In addition to substantive rulings that benefit conservative special interests, federal judges and conservative policymakers have created procedural rules that actively prevent certain groups from gaining access to courts in the first place, such as limiting plaintiffs’ ability to bring class action lawsuits and expanding the reach of forced arbitration. These decisions have had tangible effects on people’s lives—particularly low-income people and communities of color—and make it virtually impossible for ordinary citizens to hold corporations and corrupt government officials accountable.

Fixing the problems in U.S. courts through structural reform

The problems in the federal court system go beyond specific substantive rulings; they are structural. The courts have been packed with conservative judges, and those judges are making it harder and harder for vulnerable people to realize their rights through the judicial system. These structural problems necessitate structural solutions.

The first step is to reduce bias on the courts. One way to address the issue starts with the type of people nominated and confirmed to be federal judges. To be sure, judges are not and cannot be wholly impartial. They are human and, like all people, have biases that affect their decision-making. But efforts can be made to ensure that

judges have a broader range of lived experiences so that they do not systemically skew their decisions to the detriment of the less powerful. To that end, progressives should focus on nominating and confirming fair-minded judges with diverse backgrounds, rather than narrow-minded conservative elitists.

Given the breadth of the problem, however, policymakers also need to consider more far-reaching approaches, such as undoing conservative court packing, reducing the influence of partisan judges, and ensuring greater judicial accountability.

In addition, efforts must be taken to ensure that the federal judiciary works for more than merely corporations and the wealthiest few. All Americans deserve a fair chance to bring their claims before federal courts, regardless of net worth or insider connections. Barriers to justice—such as forced arbitration, arbitrary pleading standards, and other obstacles—must be eliminated. Restoring access to the courts is necessary to address corporate abuse and government wrongdoing, as well as to fully realize civil and economic rights.

Reforming the makeup of federal courts and improving access to justice are important and mutually dependent goals. For instance, restoring Americans' ability to access federal courts through class action lawsuits or private rights of action is all for naught if those cases are not being overseen by fair and impartial judges. Similarly, ensuring that federal courts are fair makes little difference if people are kept from having their cases heard. By implementing reforms in both areas—altering the makeup of the federal bench and improving access to the courts—the judicial system can be rebuilt and justice can be restored.

Restoring fair-mindedness to the federal judiciary

As partisanship has deepened and conservative court packing has picked up steam, reformers have responded by putting forth numerous recommendations for addressing these issues. Proposals have run the gamut from imposing term limits on federal judges and Supreme Court justices to changing the structure of the court itself. To date, most of the debate has focused on whether significant reform is needed or wise. But to have a truly informed discussion, policymakers need a more detailed understanding of available options so that they can evaluate their strengths and weaknesses—and the extent to which suggested proposals are properly responsive to the problem at hand.

In evaluating structural reforms to the Supreme Court and the federal judiciary, several factors should be considered. To the greatest extent possible, reforms should discourage future norm-breaking, such as stealing judicial seats by effectively nullifying a president's appointment authority. Norm-breaking is discouraged by undoing its beneficial effects for the norm-breakers; if the beneficial effects are allowed to stand, lawmakers will continue to ignore legal and procedural norms when it suits them, without fear of repercussion. For instance, judicial reform proposals that accept the current packed Supreme Court as a baseline encourage further norm-breaking. Moreover, proposals that make it harder to overturn precedents established by the packed court do the same.

Another important factor to consider is whether a specific proposal is likely to increase or decrease politicization of the Supreme Court, either because it creates more moderating influences on the court or because the influence of individual partisan justices is reduced. Moreover, proposals should be evaluated as to the extent they would be stable over time. This includes assessing the risk that a proposal would result in escalating policy responses from those opposed to it and the likelihood that any attempted escalating response would be successful within a reasonable time period. Policymakers should also be attentive to the extent that the success of a proposal relies on adherence to norms, given the lack of such adherence in recent times.

Finally, in light of the difficulty of passing a constitutional amendment—which requires a level of support that is unrealistic in today's hyperpartisan political climate—proposals must be evaluated on their constitutionality if enacted via statute.

When it comes to the various options for restoring fair-mindedness to the judiciary, the authors evaluate the following proposals:

- Changing the structure of the Supreme Court by:
 - Creating a Supreme Court comprised of a rotating panel of justices
 - Creating an ideologically split Supreme Court
 - Addressing conservative court packing by adding justices to the Supreme Court
- Curbing the influence of ideologue judges by:
 - Establishing term limits for federal judges and Supreme Court justices
 - Creating an independent commission for recommending federal judicial nominees
 - Limiting Supreme Court jurisdiction
- Strengthening judicial accountability by:
 - Expanding judicial ethics requirements and extending them to Supreme Court justices
 - Creating a panel responsible for enforcing recusals and other ethics requirements

Changing the structure of the Supreme Court

Creating a Supreme Court comprised of a rotating panel of justices from the appellate courts

In responding to concerns over individual justices' immense power and the bias of the current Supreme Court, one approach is to create a Supreme Court made up of a rotating panel of justices—including judges from lower federal courts—responsible for hearing cases.⁴⁶ Under this proposal, every Court of Appeals judge would also be an associate justice of the Supreme Court. A panel would be chosen at random from among the pool of all appellate judges and current justices, and that panel would hear and decide cases for a set time period, after which a new panel would be constituted. A separate panel would be responsible for reviewing and granting certiorari.

During this time, selected judges could temporarily vacate their positions on lower federal courts so that they would not be responsible for two full caseloads. Any vacancies left on lower federal courts would be filled by judges serving in semi-retired “senior status.” Alternatively, if the term were short enough, selected judges could retain their lower court caseloads while traveling to hear oral arguments and deciding certiorari.⁴⁷ This proposal could be combined with a requirement that judges reach supermajority consensus to overturn a federal statute.⁴⁸

Such a proposal would limit the ability of any one justice to exercise outsized influence, as they would hear and vote on only a limited number of cases. It would make it harder for ideological judges to drive certain views through the certiorari process, since it would be a different panel that would hear the cases. In addition, it is possible that such an approach would lead to a more modest Supreme Court that more closely hews to precedent, given that the members would only temporarily be hearing cases as members of the Supreme Court before returning to their appellate circuits.

Rotating panels would also help prevent the judicial favoritism toward certain lawyers or groups that currently plagues the court.⁴⁹ Incorporating judges from different jurisdictions would mitigate this problem since new justices would likely be less familiar with the usual power players and therefore less inclined to grant them special treatment. Moreover, because the panel's composition would change regularly, patterns of favoritism would be less likely to emerge. Ultimately, the result would be a fairer and more objective bench.

Furthermore, rotating panels could help address diversity concerns. Although a number of circuit court judges attended Ivy League law schools, many did not, hailing instead from state and local universities.⁵⁰ Judges from lower federal appellate courts also have a broader array of professional experiences: Some have previously served in the military, been employed as public defenders, worked as policy experts, or had jobs in state and local government.⁵¹

Creating a rotating panel of justices does not raise significant constitutional concerns since it would allow for judges to “hold their Offices during good Behaviour,” as required by the Constitution.⁵² The only change would be to add a significant number of judges from the lower federal courts to the Supreme Court and then create a means of having the larger court hear cases, in line with how other federal courts operate.⁵³ However, it is worth noting that some questions about this approach have been raised, particularly with respect to whether the role that the current justices would have on such a court would be consistent with the office to which they were appointed.

There is also the concern that, rather than eliminating politicization, this approach could actually expand it with respect to circuit nominations. Nomination fights over appellate judgeships would be more intense given the greater influence any one appellate judge could wield as part of a Supreme Court panel. Conservatives have already targeted and prioritized appellate court openings—hence their efforts to prevent Obama from appointing appellate judges and then change the rules to ram through Trump's nominees. This proposal could exacerbate those fights and lead conservatives to try to appoint even more extreme nominees.

In addition, this proposal would not address the harmful effects of conservative court packing to date since the precedents set by the current packed Supreme Court would remain, and likely prove much more difficult to overturn.

There are practical considerations as well. Establishing a rotating panel of Supreme Court justices could instill greater randomness into court decisions, causing significant swings in the law that would be detrimental to society as a whole. It could lead to far too many Supreme Court precedents being overturned, or far too few. Furthermore, it is always possible that the composition of a randomly selected bench would end up being even more extreme or less diverse than the current court—though with the addition of a supermajority requirement for overturning statutes, the extent of the negative impact of such a panel would be lessened.

Creating an ideologically split Supreme Court

The Supreme Court's nine-justice composition guarantees complete power and authority over the nation's laws—and millions of people's lives—to any five justices who share the same beliefs. This, of course, says nothing of the immense power wielded by “swing” justices, such as retired Justices Anthony Kennedy and Sandra Day O'Connor.⁵⁴ Reliable voting blocs mean that the majority does not have to engage in meaningful debate or discussion with the other justices. As a result, ideological majorities have been able to establish extreme precedent that hurts everyday Americans.

For instance, during an era of unprecedented mass shootings and corporate power, the Supreme Court's conservatives have limited gun safety laws and crippled unions.⁵⁵ Voting rights laws have been curtailed, while voter suppression tactics reminiscent of Jim Crow have been upheld.⁵⁶ These cases could have turned out differently had the conservative majority been compelled to persuade at least one of the more liberal justices to join them.⁵⁷ Since Chief Justice Roberts joined the Supreme Court in 2005, its conservative justices have handed down 79 5-4 decisions along partisan lines.⁵⁸

To address this, the Supreme Court could be expanded to ensure an equal number of justices appointed by presidents of the two major political parties.⁵⁹ Such an approach could also seek to correct for conservative court packing by adding two justices appointed by the next Democratic president and then having the next Republican president appoint one more justice, resulting in a 12-person split court.

An evenly split Supreme Court would eliminate the unfettered power of ideological majorities and result in fewer extreme decisions, since it would require justices to compromise and engage robustly with those on the bench who do not share their ideological views. To reach majority consensus, justices would have to find middle

ground or narrow the scope of their rulings. However, an ideologically split Supreme Court would likely lock in many troubling precedents since it would be less likely that this newly formed court would reach consensus to overturn them.

Some critics also worry that such an arrangement would effectively render the Supreme Court unable to operate and create problems with legal uniformity across the country. But law professor and Supreme Court scholar Eric Segall argues that this fear is likely overstated:

“The Supreme Court decides only about 75 cases a year, amounting to fewer than 1 percent of all federal cases. We don’t worry about uniformity in the 99 percent of cases the Court never hears ... Moreover, if a national rule is urgently needed for economic or other reasons, the justices will in all likelihood recognize that need and act accordingly, especially if an evenly divided court were to be a permanent aspect of our legal system.”⁶⁰

One very significant concern with this approach is how to ensure that the balance would be maintained over time, given that it would either require presidents of both parties to honor the system or the partisan representation requirements to be written into statute, raising challenging legal issues.

One option is to have a bipartisan commission provide presidents with a list of potential nominees from which to choose. For instance, if a Democratic president needed to appoint a Republican justice to balance out the Supreme Court, the commission’s Republican members could provide a list of options.⁶¹ Alternatively, the list could be drafted by Senate leadership of the opposing party.⁶² This arrangement, however, would either give rise to the potential for gaming or, if the president was required to choose from the provided list, raise serious constitutional concerns and likely invite a court challenge.

Another proposal along these lines is to expand the size of the Supreme Court to 15, with five justices appointed by a Republican president, five justices appointed by a Democratic president, and five justices selected unanimously or by supermajority from the lower courts by the other 10 members.⁶³ The additional justices would be appointed two-years in advance before decisions on certiorari are decided and would be limited to one-year nonrenewable terms.⁶⁴ If the 10 members were unable to unanimously select five judges to serve with them, then the Supreme Court would hear no cases that term.

Requiring sitting Supreme Court justices to reach unanimous or supermajority consent on new appointees would help to ensure that only judges with moderate temperament round out the court, as they would have to be acceptable choices to most of the sitting justices. However, this proposal raises the same concern about how the balance would be maintained over time, and perhaps most importantly, there are serious questions as to how the 10 members could select the remaining five justices in a constitutionally defensible manner.⁶⁵

Addressing conservative court packing by adding justices to the Supreme Court

Another approach is to address conservative court packing head-on. On March 16, 2016, following the death of conservative Justice Antonin Scalia, President Obama nominated Merrick Garland, chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, to fill Scalia's vacant seat on the Supreme Court.⁶⁶ At the time, Republicans controlled the Senate—the congressional body responsible for confirming federal judicial nominees. In theory, this should not have been a problem, since Supreme Court justices had often been confirmed during times of divided government in the past.⁶⁷

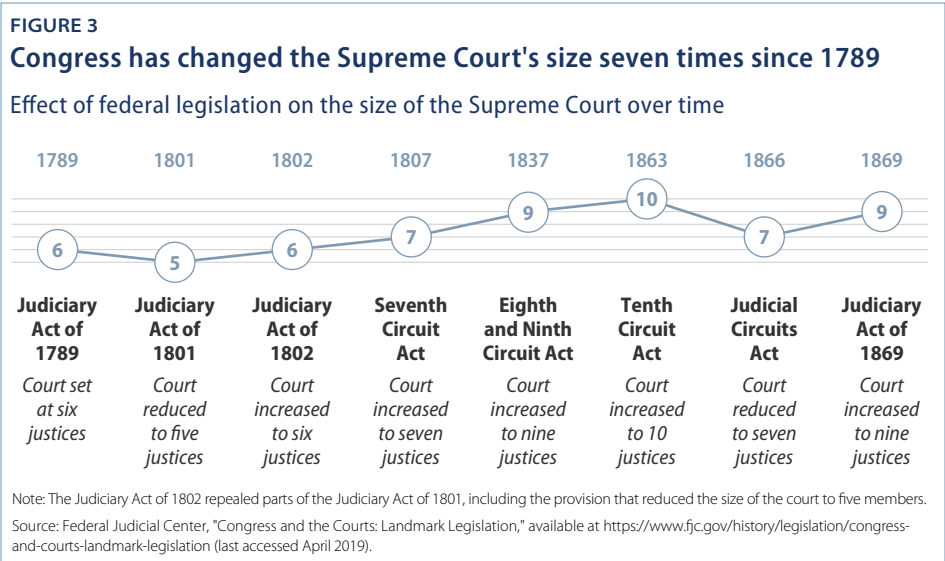
Yet while constitutional norms demanded consideration of Garland's nomination, Senate Majority Leader McConnell and his fellow conservative senators refused to do so. An Obama nominee would have altered the balance of the Supreme Court so that, for the first time in nearly 50 years, conservative appointees would not be the majority on the court.⁶⁸

The refusal to even consider Garland's nomination drew widespread criticism across the political spectrum. In a letter to Senate leadership, 350 legal scholars warned that the refusal to consider Supreme Court nominees "is contrary to the process the framers envisioned in Article II, and threatens to diminish the integrity of our democratic institutions and the functioning of our constitutional government."⁶⁹ In a *Time* op-ed, former Gov. Jon Huntsman Jr. (R-UT) and former Sen. Joseph Lieberman (I-CT) wrote: "There is no modern precedent for the blockade that Senate Republicans have put in place. Even highly-contentious nomination battles in the past ... followed the normal process of hearings and an up-or-down vote."⁷⁰ A March 2016 poll found that two-thirds of Americans, including 55 percent of Republicans and 67 percent of Democrats, wanted the Senate to hold a hearing for Garland's nomination, with most Americans saying that he should be confirmed to the Supreme Court.⁷¹

The effort to steal this Supreme Court seat had real implications for the American people. Because of the Senate’s refusal to fill Scalia’s vacancy, the Supreme Court operated with only eight justices for over a year. During that time, it deadlocked on important cases, including one that would have prevented the inhumane deportation of immigrant families.⁷² Ultimately, however, conservative efforts to pack the courts paid off for them. Justice Neil Gorsuch was appointed by President Trump and confirmed by the Senate on April 7, 2017, securing conservative control over the Supreme Court.⁷³

To address this conservative court packing, policymakers could seek to undo its effects by expanding the size of the Supreme Court under the next progressive president in order to allow for the appointment of additional justices.

This approach is wholly consistent with the Constitution, which provides that, “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,”⁷⁴ but does not set the size of the court. In fact, the size of the Supreme Court has fluctuated; since the court was set at six members in 1789, Congress has altered the Supreme Court’s size seven times.⁷⁵



Correcting prior partisan court packing has historical precedent. In 1800, after Thomas Jefferson was elected president, the outgoing majority party in Congress—the Federalists—decreased the size of the Supreme Court from six to five members in order to prevent him from filling a vacancy on the court. Once Jefferson’s party assumed control of Congress, it restored the six-member Supreme Court, so that Jefferson could make an appointment, and eventually increased the court to seven members in 1807.⁷⁶

The more well-known historical example, however, is that of former President Franklin Delano Roosevelt. In 1937, Roosevelt threatened to expand the Supreme Court from nine justices to as many as 15.⁷⁷ He had grown frustrated by the court’s obstruction of his New Deal initiatives. By stacking the court with appointees of his choice, Roosevelt hoped that New Deal policies would be implemented without delay. While Roosevelt faced significant political opposition to this proposal, shortly after announcing his intentions, conservative Justice Owen Roberts joined with the progressive justices in *West Coast Hotel Co. v. Parrish*.⁷⁸ Roberts’ decision to switch allegiances in upholding minimum wage requirements in *West Coast Hotel Co.*, and his subsequent votes to uphold New Deal policies in a number of other cases, is known as “the switch in time that saved nine.”⁷⁹

This approach has the benefit of directly addressing the issues caused by conservative court packing, including harmful precedents established by the current packed Supreme Court. However, there are worries that adding justices to the court could result in a judicial arms race between conservatives and progressives in which each side seeks to expand the size of the court when it has the ability to do so.⁸⁰ Indeed, concerns about a judicial arms race deserve careful consideration. If the court is expanded, it is possible—or even likely—that upon retaking power, conservatives would seek to further expand it. At some point, a continued back and forth might lead to public frustration and concern. Therefore, compared with other reforms, this approach would likely be less stable over time and could potentially harden the recent politicization of the court.

The American public could also end up viewing the Supreme Court as nothing more than another political body, weakening respect for and trust in its rulings. Because it lacks both the “purse” and “sword,” the federal judiciary relies upon the perceived legitimacy of its decisions.⁸¹ The public could construe the addition of more justices as another political power grab and, in turn, lose confidence in the third branch. This risk is likely heightened by the significant public attention that would attach to any effort to add justices. Moreover, adding justices would not reduce the significant role that chance plays in the makeup of the Supreme Court, as an unexpected vacancy could shift the power balance in the court to either direction.

But these concerns must be viewed in light of the current reality: Conservatives are already engaged in a massive court packing effort that has politicized the judiciary to an unprecedented degree. The question is not whether to pack the courts but how to respond to it.

Following conservatives' successful efforts to prevent Garland's nomination from being considered, the impact of changes to the number of justices on the Supreme Court on people's respect for the rule of law is uncertain. While there are no recent examples, policymakers can note that the Supreme Court's size has been altered in the past and that these changes have neither undermined its authority nor its ability to function. Moreover, they should consider that concerns about the court are likely to arise in the absence of any action too, as the conservative-packed Supreme Court over- turns or undermines popular long-standing rights and democratically enacted laws.

It is worth noting that this proposal has application beyond the Supreme Court as well; given conservative efforts to pack the appellate courts, policymakers could adopt a similar approach to that issue by adding new circuit judgeships.

Curbing the influence of ideologue judges

Establishing term limits for Supreme Court justices and federal judges

Setting term limits for Supreme Court justices and federal judges is a particularly popular reform among legal scholars and the public alike.⁸² The United States is unique in that it is the only democracy whose federal judges enjoy life tenure.⁸³ Moreover, significant changes in life expectancy since the late 18th century mean that the impacts of judicial life tenure are far different than at the time of the nation's founding. Over the past 170 years alone, average life expectancy in the United States has increased from an average of about 38 years to nearly 80 years.⁸⁴ As a result, Supreme Court justices are serving significantly longer terms than their early predecessors.

U.S. Supreme Court justices who served between 1789 and 1828, on average, held their posts for less than 10 years, vacating the bench before the age of 60.⁸⁵ Meanwhile, justices appointed after 1980 who have since left, on average, served for more than 25 years and remained on the Supreme Court until they were close to 80 years old.⁸⁶ If these trends persist, nearly half of the justices currently serving on the Supreme Court will remain on the bench until at least 2035.⁸⁷

A July 2018 Morning Consult/Politico poll found that 61 percent of Americans approve of term limits for Supreme Court justices, including 67 percent of Democrats and 58 percent of Republicans.⁸⁸ Even some current Supreme Court justices, such as Chief Justice John Roberts and Justice Stephen Breyer, have expressed support for term limits.⁸⁹ In a 1983 White House memo, Roberts wrote, “Setting a term of, say, 15 years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence.”⁹⁰

Congress does not necessarily need to pass a constitutional amendment to establish term limits for federal judges. Rather, term limits may be established through simple legislation. Article III, Section 1 of the U.S. Constitution states that federal judges “shall hold their Offices during good Behavior.”⁹¹ This provision has been interpreted as granting life tenure to federal judges. The Constitution is noticeably silent, however, on what is meant by “Offices.” In other words, the Constitution is clear that federal judges must remain on the judiciary until death, retirement, or impeachment but says nothing about judges remaining at their original posts.

A number of proposals for term limits have emerged over the years, but the most popular is for 18-year nonrenewable terms.⁹² Supreme Court justices who complete their term would be assigned senior nonactive status and fill in for other justices who are forced to recuse themselves. Alternatively, they could choose to be reassigned to one of the circuit or district courts. Judges serving on other federal courts could similarly be delegated to senior nonactive status once their term expires. Regardless of their new posts, judges would retain their original salaries. And if they were to die or retire before their term expired, the sitting president would be empowered to appoint a temporary justice from the circuit or district courts to fill the open position until the term of the former justice was set to expire. Once a permanent replacement was appointed, temporary judges would go back to serving on the federal court from which they came.

With 18-year nonrenewable term limits, new Supreme Court justices would be appointed every couple years, giving presidents of both major parties equal opportunity to influence the court’s composition. This would help to avoid the problem of allowing a single president to dictate the makeup of the federal judiciary for a generation simply by entering office at an opportune time. It should also help to alleviate “the destructive warfare” that has become commonplace in Supreme Court confirmation fights.⁹³ Under the current nine-member configuration, presidents serving consecutive terms could have an outsized influence on the Supreme Court, particularly if sitting justices retire or pass away unexpectedly. To the extent this is a concern, however, term limits could be coupled with an expansion of the Supreme Court to ensure that no single president is able to appoint a substantial percentage of justices.

There are a number of benefits to term limits. They have the potential to increase diversity by allowing for new appointments while simultaneously diminishing the influence of any one judge, since judges would be cycled in and out more frequently. Term limits could also ease concerns over elderly judges with health problems presiding over cases late in life.⁹⁴

However, term limits would not directly address the current partisanship on the Supreme Court and, given that most conservative justices were recently appointed, would not reduce the impact of conservative court packing.

They would also have the potential to increase partisanship and create conflicts of interest. One of the strongest arguments in favor of life tenure is that it insulates federal judges from such conflicts, especially from potential employers who come before their chambers.⁹⁵ For judges who choose to seek employment elsewhere—particularly in the private sector—strong ethics requirements must exist to protect against conflicts of interest. Once they retire, judges could be prohibited from working on behalf of corporations or organizations, including subsidiaries, that were parties in any case they oversaw.

Lifetime bans of this kind may seem harsh but are vitally important in protecting the integrity of the judiciary, given federal judges' immense power. Judges vacating the bench should be required to recuse themselves in cases where potential employment has been discussed with one of the parties. Recusals should apply regardless of whether a hard offer has been extended.

The more challenging issue is how to deal with judges who view their limited time on the bench as an audition for political office or some other position within the political ecosystem. It is not clear how to design recusal requirements to address this concern, and it could create an even more politicized judiciary than already exists.

In addition to these concerns, while some scholars believe statutory term limits pass constitutional muster, others disagree.⁹⁶ There are ways to address the issue that do not raise any such concerns, but such approaches are very problematic. For example, some scholars have suggested that instead of passing legislation requiring term limits, the president and Congress could refuse to nominate and confirm judges who do not formally pledge to serve limited terms.⁹⁷ As described by law professor Robert Bauer: "Over time, a custom or expectation would develop. No law would be necessary to assure that justices act in the socially accepted fashion, just as no president served more than two terms for almost 150 years after Washington."⁹⁸

While this approach could work in theory, it would likely lead to substantial issues in practice. Nonlegislative options are open to significant risk of gaming, particularly in a hyperpartisan environment. For instance, the only enforcement mechanism would be for Congress to impeach a judge that violates the commitment—a particularly challenging proposition. And any president could simply choose to ignore the requirement provided the Senate does not object. Given that the precipitating factor for discussing these types of court reforms is that partisans have repeatedly violated norms in the nomination and confirmation of judges, it seems unlikely that a reliance on norms would fix the issue.

Creating an independent commission for recommending federal judicial nominees

Currently, the president has complete discretion over federal judicial nominations. Presidents often seek advice from trusted advisers and the U.S. Department of Justice.⁹⁹ But mostly, the process is motivated by the president's personal preferences and ripe for undue influence by outside groups with their own agendas.¹⁰⁰ The end result is a nomination process that prioritizes ideologues over character and competency.

The partisan nature of the process can hurt the courts' credibility. President Trump, for example, made clear beginning in 2016 that he would nominate only Supreme Court justices who were recommended by the Federalist Society and would overturn *Roe v. Wade*.¹⁰¹ Statements of this kind, coupled with Trump's propensity to demand loyalty from those he places in coveted positions, have raised legitimate questions over the independence of Justices Neil Gorsuch and Brett Kavanaugh.¹⁰²

One way to minimize partisan influence over judicial nominations is to create an independent commission tasked with recommending qualified judges for appointment to the federal bench. The commission could be comprised of retired judges from the district and circuit courts, as well as representatives from the American Bar Association (ABA). Experts in judicial ethics could be appointed to lend an academic perspective on ethical trends and historical red flags. Similar commissions are used to appoint judges to courts in several states and other democracies.¹⁰³

In addition to ensuring that judicial nominees are objectively qualified and even-tempered, the commission could help improve judicial diversity by placing an emphasis on recommending judges belonging to historically underrepresented groups with diverse backgrounds and experiences.

The judicial nominations process offers perhaps the most effective way to improve diversity on the federal bench. Former President Obama recognized this during his tenure in office. Of federal judges appointed by Obama, 42 percent were women

and 36 percent were nonwhite.¹⁰⁴ No other administration came close to the rate at which Obama appointed women and people of color to the bench.¹⁰⁵ Unfortunately, Trump has moved in the opposite direction, with very little diversity among his nominees. It is crucial that future administrations reverse Trump's recent trend and instead follow Obama's lead in prioritizing diverse candidates for federal judgeships.

While there are certainly benefits to an independent commission for nominating judges, there are also some real practical concerns to this approach. An independent commission could only serve in an advisory role; Congress could not limit the president's power granted under the Constitution by giving the commissions the authority to actually nominate judges.¹⁰⁶ This means that a president could simply choose to ignore the commission's recommendations. To address this concern, a process could be designed to incentivize the president to choose someone from the commission's non-binding list—for example, allowing nominees recommended by the commission to be confirmed with a simple majority in the Senate, while all other nominees could require supermajority approval.

However, even this modified proposal has issues. It would not address conservative court packing, as it would operate only prospectively. Moreover, it would heavily rely on compliance with norms, since the Senate could always change its rules to confirm nominees through a majority vote regardless of whether they were chosen from the commission's list. As with other norms-based approaches, this proposal seems unlikely to have a significant impact in the current environment.

Limiting the jurisdiction of the Supreme Court

Rather than reduce the partisanship of the Supreme Court itself, a more extreme proposal would simply limit the ability of the court to hear certain cases.

Congress has the authority to narrow federal courts' jurisdiction, otherwise known as court stripping. Article III, Section 2 of the U.S. Constitution requires the Supreme Court to have original jurisdiction over limited classes of cases.¹⁰⁷ Specifically, the Supreme Court has original jurisdiction "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction."¹⁰⁸ Congress' authority to limit the appellate jurisdiction of other federal courts derives from the "judicial vesting clause" and the "congressional powers clause" found in articles I and III of the U.S. Constitution.¹⁰⁹ Article III, Section 2's "exceptions clause" gives Congress power to limit the Supreme Court's appellate jurisdiction.¹¹⁰

The Supreme Court has occasionally recognized Congress' power to limit its and other courts' appellate jurisdiction.¹¹¹ That said, there is limited case law on the subject. As a result, the line between permissible and unconstitutional court stripping is unclear and hotly debated among legal experts.¹¹² For example, the Supreme Court has said that Congress cannot direct judges to decide cases in specific ways but can amend federal law in ways that are determinative of active cases.¹¹³ In other instances, the Supreme Court has asserted that court stripping is limited in situations implicating due process rights and regarding the applicability of retroactivity to final judgements.¹¹⁴ Even here, however, precedent is vague at best.

Debate in the Supreme Court over Congress' court-stripping power

The 2018 case *Patchak v. Zinke* illustrates the lack of clarity on Congress' court-stripping powers.¹¹⁵ *Patchak* involved the legality of a 2009 statute—the Gun Lake Trust Land Reaffirmation Act—which prohibited federal courts from hearing cases involving an ongoing dispute between the U.S. Department of the Interior (DOI) and a parcel of land called the “Bradley Property.” The statute went further, directing that any federal cases related to the Bradley Property “shall be promptly dismissed.”¹¹⁶ The central question was whether the Gun Lake Act was an abuse of Congress' power. A plurality of the Supreme Court found that the act was constitutional, reasoning that it simply modified existing law; whereas federal courts previously had authority to review cases involving DOI and the Bradley Property, “Now they do not.”¹¹⁷ In other words, the statute did not go as far as requiring federal courts to decide cases for one party over another. The dissent saw things differently. To them, Congress violated Article III of the Constitution when it required judges to dismiss cases like *Patchak* outright. Although the act did not direct courts to find for plaintiffs or defendants per se, automatic dismissal has the practical effect of benefiting one party over another.¹¹⁸ Justices Sonia Sotomayor and Ruth Bader Ginsburg wrote a separate concurrence, arguing that the law was not a court-stripping statute at all but merely restored the United States' sovereign immunity.

There are a few different approaches to court stripping: Congress could potentially prohibit the Supreme Court from hearing certain types of cases or try to revoke its appellate jurisdiction altogether and permit the court to hear only those cases the Constitution explicitly requires.¹¹⁹

This proposal to limit the reach of the current Supreme Court raises a number of serious concerns. It would make it difficult to undo existing precedent that would still be binding on lower courts. There is also a high risk of partisan escalation if the Supreme Court were stripped of jurisdiction over a limited set of cases, as opposed to being restricted only to original jurisdiction. Conservatives would likely respond by stripping the court of jurisdiction over more cases, and progressives would later likely respond in kind—eventually leading to very limited jurisdiction for the court.

In addition, court stripping would lead to diverging legal policy across the country since the Supreme Court could not address circuit splits. While other proposals would make it harder for the Supreme Court to overturn lower court decisions, this approach would make it impossible. So even in the most egregious cases, lower court decisions would be the final word.

There are real concerns that such an approach could disproportionately affect historically underrepresented groups. For instance, in certain regions, lower federal courts could severely limit reproductive rights or the rights of LGBTQ people. Leaving determinations of law in the hands of regional courts would not be a problem for Americans privileged enough to move to more favorable areas, but it would leave vulnerable people without critical resources and access to justice.

Strengthening judicial accountability

In addition to reducing partisanship on the Supreme Court by changing its makeup, steps can be taken to ensure that the justices and other federal judges are less susceptible to special interest influence.

There is currently no binding code of conduct for Supreme Court justices.¹²⁰ At the same time, the aspirational code applicable to other federal judges is inadequate. The absence of strong ethics requirements and enforcement mechanisms results in conflicts of interests being left unaddressed, leading to potential miscarriages of justice.

Federal judges have overseen cases in which they, their friends, or their family members stand to personally benefit.¹²¹ Others are wined and dined by wealthy corporations and special interests who come before the courts.¹²² That judicial decisions may be unduly influenced by conflicts of interest or personal prejudice is deeply problematic for anyone who values an impartial justice system. Even the

mere appearance of impropriety is enough to raise significant concern. Instances of corruption or questions about a judge's objectivity damages public faith in the third branch. Ethics reform is needed to ensure that judicial decision-making is based on law, not financial interests or personal relationships.

Expanding judicial ethics requirements and extend them to Supreme Court justices

The Judicial Conference of the United States, comprised of federal judges and headed by the chief justice of the Supreme Court, creates and periodically updates a code of conduct for U.S. judges.¹²⁴ The code, which is not applicable to Supreme Court justices and is largely aspirational, includes general guidance on how federal judges should conduct themselves on and off the bench.¹²⁵ It includes five ethical canons with which federal judges are expected to comply:

- **Judges should uphold the integrity and independence of the judiciary**, including by conducting themselves honorably both personally and professionally.
- **Judges should avoid impropriety and the appearance of impropriety in all activities**, including by avoiding conflicts of interest and membership in any group or organization “that practices invidious discrimination on the basis of race, sex, religion, or national origin.”
- **Judges should perform the duties of the office fairly, impartially, and diligently**, requiring recusal when their impartiality “might reasonably be questioned.”
- **Judges may engage in extrajudicial activities that are consistent with the obligations of judicial office** but may not participate in extrajudicial activities that interfere with their judicial duties or “reflect adversely on [their] impartiality.”
- **Judges should refrain from political activity**, such as holding political office, publicly endorsing parties or candidates, or making speeches for political organizations or politicians.¹²⁶

Each of the five ethical canons has subcanons providing additional guidance on judicial conduct. The Judicial Conference has additional requirements for judges receiving gifts or outside income.¹²⁷ And the Ethics in Government Act of 1978 requires federal judges and Supreme Court justices to file annual financial disclosures.¹²⁸

“The fact that the Supreme Court is not held accountable to any official code of conduct or ethics standards directly jeopardizes the public trust.”¹²³

— Sarah Turberville,
director of the Constitution
Project at the Project on
Government Oversight

Enforcement mechanisms for ensuring compliance with these rules and obligations are limited. The Judicial Conduct and Disability Act allows individuals to file complaints against lower court judges for alleged unethical behavior.¹²⁹ These complaints may be reviewed by a special committee of judges, but like the code of conduct, the law does not apply to Supreme Court justices.¹³⁰

Congress also has the power to impeach federal judges for bad behavior.¹³¹ However, since 1800, only 15 federal judges have been removed by Congress through impeachment.¹³² The lack of standards and enforcement mechanisms for judicial ethics means that federal judges are largely responsible for policing themselves.

For instance, there is nothing stopping judges from accepting exorbitant speaking fees from corporations and interest groups with stakes in federal cases. In 2008, Supreme Court Justice Clarence Thomas accepted an all-expense-paid speaking engagement in Palm Springs, California, funded by the Federalist Society and Koch Industries.¹³³ Two years later, Thomas ruled in favor of corporate interests, along with the other conservative justices in *Citizens United v. FEC*, which benefited the Koch brothers.¹³⁴ Government watchdogs had urged Thomas to recuse himself from the case, but he refused.¹³⁵

Similarly, corporate-funded interest groups are permitted to pay federal judges to attend seminars where they hear the industry perspective on issues facing the courts. Often, these are all-expense-paid trips to lavish resorts—extended free vacations. Like speaking fees, all-expense-paid trips can cloud judges’ judgement, particularly if the trip’s financiers come before their chambers. From 2004 to 2014, Justice Scalia took more than 250 trips that were paid for by various groups and individuals, including trips to Hawaii, Ireland, and Switzerland.¹³⁶ Hefty speaking fees and all-expense-paid trips are an unsubtle attempt to make judges more amenable to the arguments that corporations and other moneyed interests make in court. As opined by law professor Stephen Gillers, “the greater the luxury, the greater the risk of public suspicion.”¹³⁷

In reforming judicial ethics, it is of paramount importance that ethics requirements apply equally to Supreme Court justices and other federal judges.¹³⁸ Chief Justice Roberts claims that ethics codes are not necessary for the Supreme Court because justices already voluntarily adhere to codes of conduct.¹³⁹ But the above examples negate that argument. In addition to ensuring they apply to the Supreme Court, ethics requirements should be clearly specified and expanded upon.¹⁴⁰

For instance, federal judges and justices could be banned from owning individual stocks or required to disclose private events they attend, as well as the name of the individual or entity responsible for financing their appearance and travel.¹⁴¹ Lavish all-expense-paid trips and speaking engagements could be banned, except for reasonable reimbursements for legitimate educational events. Alternatively, any judicial travel or speaking engagement funded by private entities could be subject to preapproval by a judicial ethics committee such as the one explored in the next section. Going further, Congress could ban judicial junkets and other gifts to sitting judges altogether. Imposing a binding code of ethics on the Supreme Court raises constitutional questions.¹⁴² However, some scholars have pointed to Congress' ability to make other institutional changes, such as altering the court's size, as evidence that codes of conduct are constitutional.¹⁴³

Besides strengthening ethics standards for sitting judges, elected officials must pay more attention to the ethical and professional competency of judicial nominees. For instance, a number of federal judges nominated by President Trump have prior associations with the Alliance Defending Freedom, which the Southern Poverty Law Center has designated as an anti-LGBTQ hate group.¹⁴⁴ Judges with ties to hate groups cannot be relied upon to render fair and impartial judgements in cases affecting historically underrepresented communities. Even if judges can separate themselves from personal biases, their association with such groups bring into question their objectivity—and, in turn, the legitimacy of their rulings.

Potential judges receiving “not qualified” ratings from the ABA's standing committee on the federal judiciary should also have their nominations withdrawn or voted down.¹⁴⁵ The ABA rating system considers a nominee's integrity, professional competence, and judicial temperament and has been relied upon by presidents to varying degrees since the 1950s.¹⁴⁶ Within just his first two years in office, President Trump has nominated six judges who received “not qualified” ratings by at least a majority of the ABA.¹⁴⁷ Four of the judges were ultimately confirmed to the federal bench.¹⁴⁸ ABA ratings provide the most basic assessment of a nominee's ability to serve on the federal judiciary; a nominee who cannot meet the ABA's baseline requirements does not merit confirmation.

Finally, no judicial nominee should be confirmed if an investigative panel concludes that ethics complaints made against them merit further review.¹⁴⁹ In 2018, the Senate majority rushed to confirm Brett Kavanaugh while he was being reviewed by a judicial panel for 83 ethics complaints. Once Kavanaugh was appointed, the investigative panel was forced to dismiss all of the complaints because although they were deemed “serious,” the panel lacked statutory authority over Supreme Court justices.¹⁵⁰

Creating a panel responsible for enforcing recusals and other ethics requirements

Strong ethics requirements must be coupled with effective enforcement mechanisms. Enforcement is needed for recusals and to ensure compliance with other ethical requirements. Although judicial ethics urge judges to recuse themselves in certain cases, they currently cannot be forced to do so. The appeals process offers litigants one option for holding judges that refuse to recuse themselves accountable. In 2009, the U.S. Supreme Court reversed a decision by the Supreme Court of Appeals of West Virginia in *Caperton v. A.T. Massey Coal Co.* after one of the judges received a large campaign contribution from Massey's CEO, ruling that the potential conflict of interest violated plaintiff party's due process rights.¹⁵¹ Of course, this is not an option for the Supreme Court, whose decisions cannot be appealed. For the most part, recusals fall solely within judges' discretion.

Lack of enforcement on recusals leads to failures of justice. In 2008, Judge Linda R. Reade, chief judge of the U.S. District Court for the Northern District of Iowa, oversaw the imprisonment of hundreds of undocumented immigrants in government and private detention centers following the raid of an Iowa slaughterhouse.¹⁵² The event raised suspicions once it was revealed that Reade's husband owned stock in two of the country's largest prison companies.¹⁵³ Even worse was the fact that Reade's husband bought additional stock in the two companies—collectively worth between \$30,000 and \$100,000—days before the raid, after Reade had already been notified that the raid would occur.¹⁵⁴ By the time Reade's husband sold the stocks a few months later, they were collectively worth between \$65,000 and \$150,000.¹⁵⁵ It is hard to know whether Judge Reade's advance knowledge of the raid was the impetus for her husband's last-minute acquisition of additional stocks. Regardless, stories such as these damage the courts' legitimacy.

Supreme Court justices have also refused to recuse themselves in important cases. In 2004, the Sierra Club sued then-Vice President Dick Cheney in *Cheney v. United States District Court for the District of Columbia* to access the records of a White House energy task force comprised of corporate lobbyists.¹⁵⁶ Scalia, a close friend of Cheney, refused to recuse himself, suggesting that friendship was not grounds for recusal “where the personal fortune or the personal freedom of the friend” is not at issue.¹⁵⁷ Although Cheney was not at risk of imprisonment or heavy fines, he had an undeniable stake in the case's outcome. Scalia and the court ruled in Cheney's interest.¹⁵⁸

Beyond recusals, strong penalties must exist for violating ethics laws and codes of conduct. For example, Justice Clarence Thomas failed to disclose on his federal disclosure filings the six-figure salary his wife received from conservative groups such as the Heritage Foundation.¹⁵⁹ The conservative organizations had stakes in several important cases

before the Supreme Court, including those pertaining to the Affordable Care Act and *Citizens United v. FEC*.¹⁶⁰ It is important that judges' financial disclosures be complete and accurate so that litigants and the public are aware of potential conflicts. Other judges have gone against protocol by letting their political preferences be known or by making comments perceived as racist and sexist.¹⁶¹

One way to enforce recusals and other ethical requirements is to create a permanent independent panel tasked with investigating ethics complaints and taking disciplinary action. Complaints of judicial ethics violations would be automatically referred to the panel, which would have broad investigative power. The panel could be comprised of retired judges and those serving in senior status. Its members would be subject to strict recusal requirements if the subject of an investigation served as one of their clerks or if there were other social connections.

Some express concern that an independent panel of this kind would be unconstitutional under Article III, Section 1 of the Constitution.¹⁶² However, because the panel would not be able to overturn cases or order retrials, it would not endanger the Supreme Court's core responsibilities. Establishing a panel of this type could significantly improve accountability and transparency in the judicial system.

Restoring access to the courts

Conservative efforts to politicize the courts go beyond packing them with extreme conservative judges who will help advance conservative policies. Conservatives also seek to change the procedural rules that determine how people access the courts and the terms on which their claims are heard. These technical rule changes significantly affect who sees their rights vindicated in court.

Procedural rule changes have curtailed access to justice for society's least powerful, including workers and low-income people, making it harder for them to hold large corporations responsible for wrongdoing. In recent years, the Supreme Court has been particularly problematic, upholding forced arbitration requirements, restricting private rights of action, and making it harder for vulnerable plaintiffs to get an audience before a judge.¹⁶³

One especially pernicious effort has been to limit the use of class action lawsuits, which Judge William G. Young of the U.S. District Court for the District of Massachusetts has said “is among the most profound shifts in our legal history,” helping to ensure that “business has a good chance of opting out of the legal system altogether and misbehaving without reproach.”¹⁶⁴ Class actions have historically been relied upon to stop institutionalized discrimination and abuse, which is difficult to address through litigation brought by an individual plaintiff. As the Supreme Court recognized in *Amchem Products Inc. v. Windsor*, class actions provide “vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’”¹⁶⁵

Beyond the attack on class action lawsuits, the courts have supported the rise of forced arbitration agreements, which put consumers and workers in business-friendly arbitration, rather than in front of a judge.¹⁶⁶ Moreover, they create a range of other barriers for people seeking to bring suits that further reduce access to the courts—from requiring plaintiffs to meet burdensome pleading standards to limiting private rights of action.

This report does not address all the ways individuals and communities are denied access to justice. For instance, it does not examine the deterrent effect of exorbitant court and attorney fees; power dynamics and inadequate representation in landlord-tenant and immigration courts; or communication barriers for people with limited English proficiency.¹⁶⁷ Nor does the report address issues in the criminal justice system or with the limited resources and tools available to nonprofit legal service organizations. These systematic problems prevent countless people from realizing important rights and therefore require policy responses as well.

Nonetheless, the reforms explored here could go a long way in restoring access to the courts for everyday Americans and include the following:

- Restoring plaintiffs' ability to bring class action suits
- Prohibiting forced arbitration in all consumer and employment contracts
- Restricting secret settlements and record sealing in cases affecting public safety
- Restoring the power of private attorneys general to enforce federal law
- Restoring simpler pleading standards

Restoring plaintiffs' ability to bring class action suits

Class actions are a critical tool for people—particularly workers and consumers—to seek justice against systemic corporate abuse. A study by the Consumer Financial Protection Bureau found that class action lawsuits have resulted in billions of dollars being returned to victims of corporate misconduct.¹⁶⁸

Class actions promote cases that have widespread impact but result in very small individual rewards, such as corporate fraud, product safety, civil rights, or employment claims.¹⁶⁹ For example, in 2009, toy manufacturer Mattel and its subsidiary Fisher-Price settled a class action lawsuit involving families exposed to lead-contaminated toys—which can cause serious health problems—agreeing to pay class members in the form of refunds and for out-of-pocket expenses for lead testing.¹⁷⁰ Class action lawsuits also allow class members to share the financial burdens of legal and court fees, which can be substantial in cases involving wealthy corporations.¹⁷¹

In response to an increase in class action lawsuits during the second half of the 20th century, corporations and employers began prohibiting workers and consumers from bringing class actions as part of employment contracts and consumer agreements. These are what are termed “collective action waivers,” which differ from, but can be coupled with, forced arbitration clauses.

The Supreme Court has also shown a hostility toward class action suits, with a long line of cases upholding bans or restrictions against them. For example, in 2011, the Supreme Court decided *Wal-Mart v. Dukes*, the largest class action lawsuit in U.S. history.¹⁷² *Dukes* made it harder for class action plaintiffs to be certified under Rule 23 of the Federal Rules of Civil Procedure. The plaintiff class included more than 1 million current or former female Walmart employees who sued the company for allegedly engaging in systemic sex discrimination. The district and circuit courts found that the plaintiffs had satisfied traditional class certification requirements under Rule 23, including numerosity, commonality, typicality, and adequacy of representation.¹⁷³ However, the Supreme Court’s conservative majority disagreed, finding specifically that the women did not share enough commonalities—common facts or legal issues—to meet its standards.¹⁷⁴

According to the conservative justices, it was not enough that members of the class were all women who currently or previously worked at Walmart and were subjected to systematic sex discrimination.¹⁷⁵ Two years later, the conservative justices again rejected class certification for a group of plaintiff consumers in *Comcast v. Behrend*. In this case, the majority found that the plaintiffs failed to adequately measure damages.¹⁷⁶ Litigators and scholars have interpreted *Dukes* and *Behrend* as imposing arbitrarily onerous pleading and pretrial discovery requirements that make it exceptionally difficult for plaintiffs to bring class action suits.

In another example of the Supreme Court’s anti-class action jurisprudence, the 2011 case *AT&T Mobility v. Concepcion* struck down a state ban against class action waivers in arbitration consumer agreements.¹⁷⁷ This hostility toward class action lawsuits was reiterated in 2018 in *Epic Systems Corp. v. Lewis*, which validated the inclusion of class action waivers in forced arbitration employment contracts.¹⁷⁸ An estimated 24.7 million American workers are subject to class action waivers in forced arbitration procedures; millions more are effectively prohibited from bringing class action suits because of the nature of their forced arbitration procedures.¹⁷⁹

Congress, too, has acted to restrict class actions. The Class Action Fairness Act (CAFA) of 2005 expands federal courts’ jurisdiction over class action cases.¹⁸⁰ This expansion has been problematic for plaintiffs, since state courts are considered more favorable to class action plaintiffs than their federal counterparts.¹⁸¹ For corporations, CAFA signified victory by making it harder for workers and consumers to successfully sue them for wrongdoing. In warning about CAFA’s detrimental impact, then-House Majority Leader Nancy Pelosi (D-CA) noted: “When Americans are injured or even killed by Vioxx or Celebrex or discriminated against by Wal-Mart, they may never get their day in court.”¹⁸²

Adding to this problem, legal aid organizations receiving funding through the federally appropriated Legal Services Corporation (LSC) are also banned from bringing class action lawsuits.¹⁸³ Prior to these changes, LSC-funded legal aid organizations were able to bring class actions on behalf of clients with identical claims against the same repeat offender. The consolidation of cases saves legal aid attorneys valuable time and resources while providing their clients with all the benefits of class action suits.

Before being prohibited from doing so, legal aid lawyers brought class actions protecting low-income pregnant women and children at risk of malnutrition from the denial of lifesaving health and nutritional benefits. They protected elderly people from being deprived of medical reimbursements and assisted individuals in receiving secured disability benefits.¹⁸⁴ Class actions also have been used to help workers of colors who have been cheated out of wages and benefits by discriminatory employers.¹⁸⁵ Without the ability to bring class action lawsuits, these legal aid organizations—and, most importantly, their clients—are deprived of a powerful weapon against forces of exploitation, as well as effective remedies for institutionalized misconduct.

The limitations of Legal Services Corporation grantees prevent people from accessing justice

The existing legal aid delivery system was created through the 1974 Legal Services Corporation (LSC) Act with the goal of increasing civil legal services and protections for low-income Americans and other underrepresented groups.¹⁸⁶ Federally funded legal aid organizations grew from former President Lyndon B. Johnson's "War on Poverty" during the 1960s and continue to play a vital role in providing vulnerable members of society access to justice.¹⁸⁷

Legal aid programs protect against unlawful eviction and foreclosure, discrimination by employers, improper denial of lifesaving medical care, and other legal problems that threaten the basic necessities of life.¹⁸⁸ For 45 years, these publicly funded civil legal aid organizations have provided one of the most effective mechanisms for protecting low-income people from systemic abuse and ensuring access to employment, education, housing, health care, safety, and stability.

But these organizations face significant limitations to the scope of their work. In addition to prohibitions against bringing class action lawsuits, LSC groups are barred from representing certain clients, including incarcerated people and people charged with drug offenses

facing eviction.¹⁸⁹ Restrictions apply to other sources of funding received by LSC grantees as well.¹⁹⁰

Resources are also an issue. In 1996, the LSC's budget was slashed by nearly one-third.¹⁹¹ By 2016, LSC groups were being funded at levels \$100 million less than what they were awarded in 1976, after adjusting for inflation.¹⁹² Meanwhile, President Trump has sought to eliminate funding for LSC groups altogether in every budget proposal he has put forward.¹⁹³

Without adequate funding, legal aid lawyers are forced to turn people away and operate with insufficient resources. According to the LSC's own estimates, in 2017, low-income Americans were expected to have approached LSC-funded legal aid offices with 1.7 million problems, but more than half would have received only limited or no legal help due to a lack of resources.¹⁹⁴ There has, however, been some recent improvement in funding: In 2019, Congress increased LSC funding to \$415 million, approximately \$30 million higher than the amount Congress allocated to the LSC in 2016.¹⁹⁵ The increase indicates growing bipartisan support for LSC legal aid organizations and a recognition of their value to people and society.

To address these issues, lawmakers should undo recent efforts to limit class action suits. Class action waivers in consumer and employment settings should be prohibited, and the pre-*Duke* standard for certifying a class should be reinstated. Furthermore, CAFA should be repealed or narrowed to prevent its enforcement in worker and consumer class actions, and LSC grantees should be allowed to bring class action suits again.

Prohibiting forced arbitration in consumer and employment contracts

Like collective action waivers, forced arbitration agreements—which show up in everything from employment contracts to credit card and cell phone agreements—are another way to skew the justice system in favor of corporations and disadvantage everyday Americans. As noted in the previous section, forced arbitration clauses in employment or consumer contracts can be standalone or combined with class action waivers.

Through forced arbitration agreements—often purposely designed to be confusing—workers and consumers harmed by employers or manufacturers lose the right to have their case heard by a judge.¹⁹⁶ Instead, they must have their grievances settled in a private setting by an outside party who is often selected and compensated by the company accused of wrongdoing. In forced arbitration proceedings, “the corporation owns the referees.”¹⁹⁷ In fact, many arbitration groups, such as the American Arbitration Association, have financial interests—including stock shares—in the corporations they serve.¹⁹⁸ Consumers bringing affirmative claims in arbitration win only about 20 percent of the time; corporations, meanwhile, win in arbitration proceedings more than 90 percent of the time when they bring claims or counterclaims against consumers.¹⁹⁹

FIGURE 4

The number of employees subjected to forced arbitration has skyrocketed since the early 1990s

Reliance on forced arbitration in private sector workplaces, 1995 and 2017



Source: Alexander J.S. Colvin, “The growing use of mandatory arbitration” (Washington: Economic Policy Institute, 2018), available at <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

When it comes to forced arbitration, as the name suggests, employees and consumers are not given a choice. In most cases, job applicants are required to sign forced arbitration agreements prior to being employed. If they refuse, they are unlikely to be hired. The same goes for consumers who want to purchase products; they either agree to resolve future disputes through forced arbitration or are unable to purchase a cell phone, computer, or other products on the market.

Through mandatory arbitration, workers and consumers are forced into a corner, which makes it easier for powerful corporations to tip the scales in their favor. Arbitration is so cost-prohibitive to the average worker and consumer that they are unlikely to bring complaints against corporations at all. For example, arbitration fees can be hefty, sometimes exceeding any award the worker or consumer bringing the complaint may receive.²⁰⁰ Even when workers and consumers do bring cases in arbitration and succeed, the payoff is often low. Consumers who win in arbitration receive 12 cents for every dollar they claim, whereas corporations that win receive 91 cents for every dollar they claim.²⁰¹

The secretive and nonprecedential nature of arbitration proceedings makes it difficult for employees or consumers to establish patterns of wrongdoing, which can be vital in succeeding on claims. Decisions made by the arbitrator, who may not have legal training, are binding and cannot be appealed, regardless of whether the decision was made in good faith.²⁰²

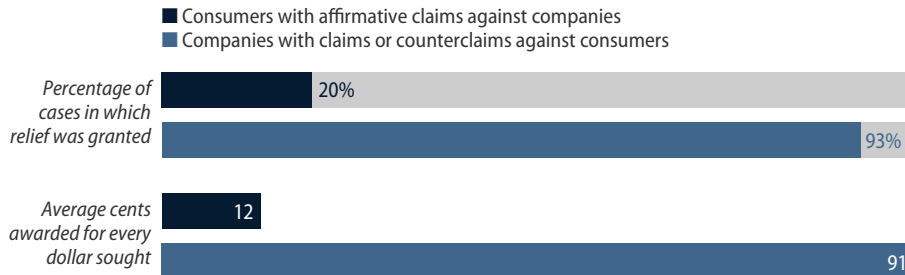
While forced arbitration agreements are bad for employees and consumers across the board, they disproportionately affect low-income Americans and other historically underrepresented groups. Forced arbitration requirements are most common in low-wage workplaces and in employment settings with disproportionate numbers of female and African American employees.²⁰³ Since 1995, the number of workplaces requiring forced arbitration for employee-employer disputes has increased seven-fold.²⁰⁴ Nationwide, an estimated 60.1 million American workers are required to undergo forced arbitration in resolving employment grievances.²⁰⁵

Forced arbitration agreements have been upheld by the Supreme Court even in the most extreme circumstances. For example, the U.S. Supreme Court vacated a 2012 decision by the Supreme Court of Appeals of West Virginia that found it was unconscionable to require parties to arbitrate matters of death or personal injury.²⁰⁶

FIGURE 5

In forced arbitration, consumers often get the short end of the stick

Consumers' success in forced arbitration compared with that of companies



Note: Data reflect cases filed with the American Arbitration Association across consumer financial product markets in 2010 and 2011.

Source: Consumer Financial Protection Bureau, "Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)" (Washington: 2015), available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

Furthermore, as noted in the previous section, the Supreme Court has relied upon the Federal Arbitration Act (FAA) to restrict class actions. Just last year, in *Epic Systems Corp. v. Lewis*, it ruled that the FAA supersedes even important workers' rights laws such as the National Labor Relations Act.²⁰⁷ The Supreme Court's expansive interpretation of the FAA puzzles legal experts who maintain that Congress intended the law to apply only to corporate-to-corporate dealings, and not dealings with individuals.²⁰⁸ As a result of the court's corporate protectionism, "Corporations are allowed to strip people of their constitutional right to go to court."²⁰⁹

Fair processes should exist for workers and consumers to obtain justice for corporate wrongs. In tipping the scales for powerful corporations, forced arbitration is fundamentally unfair and is an insufficient remedy for holding bad actors accountable. Forced arbitration agreements should be banned in employment and consumer contracts.

While forced arbitration must be eliminated, there may be instances where arbitration is preferred by both parties. In that case, parties can voluntarily elect to use arbitration after a dispute arises.

Restricting secret settlements and record sealing in cases affecting public safety

One way that the wealthy and corporations seek to limit future liability is by limiting access to information about their wrongdoing through secret settlements and record sealing.

Proponents of secret settlements say that they are beneficial to both parties involved in a dispute, as they avoid expensive, drawn-out trials and facilitate honest conversation.²¹⁰ Moreover, the nondisclosure agreements (NDAs) at the core of secret settlements protect parties from potential embarrassment or economic consequences resulting from public hearings.²¹¹ Settlements with NDAs are sometimes voluntarily entered into by victims of sexual assault who may want to keep the assault private due to lingering stigma over sexual assault and the difficulty of obtaining relief through the justice system.²¹²

In addition to NDAs, a party may seek a protective order by a court requiring that records pertaining to the settlement be sealed from the public.²¹³ Common law, along with the Federal Rules of Civil Procedure, has emphasized the public's right to examine court documents.²¹⁴ And in 2011, the U.S. Judicial Conference announced a policy restricting record sealing in federal courts: "[A]n entire civil case file should only be sealed when ... sealing ... is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives such as sealing discrete documents or redacting information, so that sealing an entire case file is a last resort."²¹⁵ Despite this, judges and lawyers are not always compliant.²¹⁶ Overworked judges may be inclined to grant record-sealing requests to settle cases out of court.

The corporations and wealthy people who argue for secret settlements largely insist they want to protect personal privacy or trade secrets.²¹⁷ The real purpose, however, seems to be to protect their financial interests. In the past, secret settlements have been used by corporations as a more cost-effective way to deal with dangerous products than fixing the problem.²¹⁸ Companies such as General Motors (GM) and Firestone used secret settlements so that they could continue manufacturing fire-prone vehicles and explosive tires, respectively, for years.²¹⁹ GM secretly settled 200 cases with victims harmed by vehicles manufactured with defective side-mounted gas tanks before the deadly defect was made public in the 1980s.²²⁰ It is impossible to know how many victims could have been spared had the public known about these dangers.

As described by Arthur Bryant, chairman of the nonprofit Public Justice, for corporations, "it's cheaper to hide the truth from the public" through secret settlements than to disclose wrongdoing in the interest of public safety.²²¹ For their part, victims may feel pressured to enter into such arrangements due to power imbalances and promises of higher settlement amounts for keeping quiet.²²²

Secret settlements and court sealing are also used to protect the rich and powerful from accountability. For example, they helped hide widespread sexual abuse by Catholic priests for decades. The Roman Catholic Diocese of Albany, New York, paid a victim who had been repeatedly assaulted by a priest nearly \$1 million as part of a secret settlement in 1997.²²³ Disgraced Hollywood producer Harvey Weinstein entered into at least eight secret settlements with women he harassed or assaulted, which allowed him to continue preying on victims.²²⁴

As noted by retired Judge H. Lee Sarokin, who previously served on the U.S. Court of Appeals for the 3rd Circuit, “Secret settlements may protect the innocent, but I suspect they serve much more often to protect the guilty.”²²⁵

Action is required by lawmakers to do away with abusive secret settlements and aggressive record sealing once and for all. Through secret settlements and record sealing, victims of abuse and wrongdoing are silenced, while the public is left none the wiser about the existence of dangerous products and predators that threaten public safety. The lack of public records regarding prior settlements can also prevent future victims from bringing successful lawsuits against repeat offenders. Corporations should be prohibited from entering into secret settlements with employees and consumers, while federal courts should be barred from sealing records in cases affecting public safety, which should be read broadly.²²⁶ Such prohibitions should be extended to cases between private individuals implicating public safety.

Variations of these laws—called “open records” or “sunshine-in-litigation laws”—have already been passed in states. For example, Florida’s sunshine-in-litigation law, adopted in 1990, prohibits secret settlements and record sealing in cases “concerning a public hazard,” which is afforded generous interpretation to include anything posing a “tangible danger to public health and safety.”²²⁷

As an alternative, some commentators recommend relying on semi-confidential settlements, where either the settlement amount or the defendant’s wrongdoing is disclosed, but not both.²²⁸ Although this arrangement may be preferable to the status quo, it does not fully address the problem. For instance, if only settlement amounts are revealed, the public remains in the dark about the harms caused or dangers posed by the defendant. On the other hand, keeping the settlement amount secret poses its own issues, since settlement disclosures provide the public with clues about the egregiousness of the defendants’ actions. Both pieces of information are therefore vital for protecting the public interest.

Restoring and expanding private attorneys general authorities to enforce federal law

An important way to empower people to bring legal action against exploitative entities is to restore and strengthen private attorneys general (PAGs) at the federal level. PAGs allow private citizens to bring causes of action on behalf of the public for violations of federal law and are particularly useful in instances where government enforcement is inadequate or where government officials are the ones violating the law.²²⁹

The Supreme Court articulated the importance of private rights of actions in 1969 in the context of Section 5 of the Voting Rights Act, which allowed private citizens to sue for voting rights violations:

*“The achievement of the Act’s laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General ... The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government.”*²³⁰

PAGs have been codified in several federal statutes, including the 1964 Civil Rights Act, the Clean Water Act, the Racketeer Influenced and Corrupt Organizations Act, and the Fair Labor Standards Act, among others.²³¹ Under these laws, private citizens may bring lawsuits in the public interest for noncompliance of federal laws and regulations affecting civil rights, public health, corruption, and wage theft, respectively.

PAGs differ from class action lawsuits in three ways. First, PAG cases are brought by individual private citizens rather than classes of people, which means that they are not subject to class certification requirements. Second, the types of cases PAGs can bring are more limited than class action suits since their authority derives from specific legislative provisions. Finally, the purpose of PAGs is to bring cases that benefit society as a whole. While class actions often have positive societal impacts, their purpose is to provide damages or injunctive relief for a specific group.

That said, PAGs and class actions both aim to obtain remedies for large numbers of people and to offer powerful incentives for corporations and governments to make institutional changes. PAGs that succeed on their claims have generally been allowed to collect attorney’s fees from the opposing party, as required by the Civil Rights Attorney’s Fees Award Act of 1976.²³² The purpose of the 1976 act was to incentivize private citizens to bring cases without taking on significant financial risk.

Traditionally, PAGs had support from both conservatives and progressives because they shrink the federal government's enforcement arm and provide plaintiffs with an effective avenue for pursuing civil rights claims. Over the past two decades, however, PAGs' ability to bring cases on the public's behalf has been severely curtailed by the Supreme Court.

For instance, in *Alexander v. Sandoval* in 2001, the Supreme Court barred lawsuits from being brought by private citizens to enforce disparate impact regulations under Title VI of the 1964 Civil Rights Act, which prohibits racial discrimination by federally funded programs.²³³ Also in 2001, in *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Resources*, the Supreme Court restricted PAGs from collecting legal fees in certain circumstances.²³⁴ The court went against long-standing precedent that entitled private actors to collect legal fees if the entity charged with wrongdoing voluntarily altered its behavior because of the lawsuit. Under *Buckhannon Board*, if the offending party remedies its behavior after being sued, but before a court order is entered, the prevailing plaintiff collects nothing in attorney's fees. Not only does this violate the Civil Rights Attorney's Fees Award Act's intent, it leaves private citizens with little incentive to bring suits to enforce important federal law. Research shows that nonprofits, particularly those focused on systemic social change, have been negatively impacted by *Buckhannon*; some even report that they are less likely to take on cases because of the inability to collect fees.²³⁵ The Supreme Court has also limited PAGs' ability to seek civil damages as opposed to injunctive relief.²³⁶

Private attorneys general have historically provided citizens with a powerful and effective means of protecting public welfare. By curtailing the power of PAGs, the Supreme Court has cut off access to justice in a vital way. Congress can remedy this through legislation clarifying the authority of PAGs and the kinds of relief they are entitled to seek, while restoring financial incentives for bringing private actions in the public interest.

More broadly, private rights of action should be expanded to include more federal statutes implicating important civil and economic rights. One area in which PAGs can be particularly effective is consumer and employment cases. In 2004, California adopted a Private Attorneys General Act (PAGA) that provides employees throughout the state with private rights of action against employers violating state labor laws.²³⁷ Under California's law, financial penalties are split 75-25, respectively, between the state's Labor and Workforce Development Agency and the affected employees.²³⁸ Private citizens who succeed in their case are entitled to attorney and other court fees.²³⁹ Importantly, the California Supreme Court ruled in 2014 that the right to bring PAGA representative claims cannot be waived by forced arbitration agreements as a condition of employment.²⁴⁰ The issue continues to be litigated in courts, but this development in California law is significant as it provides aggrieved employees otherwise subject to forced arbitration a fail-safe for holding employers accountable.²⁴¹

Restoring simpler pleading standards

In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*—sometimes collectively referred to as “*Twiqbal*”—the Supreme Court established stricter pleading standards, increasing the likelihood that plaintiffs’ claims against corporate bad actors will be dismissed.²⁴² In 2007, in *Twombly*, the Supreme Court upheld the dismissal of a claim for antitrust violations, holding that the plaintiff failed to plead enough facts to demonstrate that the defendants plausibly violated the Sherman Antitrust Act.²⁴³ Before *Twombly*, the Federal Rules of Civil Procedure and federal precedent only required plaintiffs to put forth enough information in initial pleadings to show it was possible that the defendant violated the law.²⁴⁴ Rather than showing it is possible that they will succeed—assuming all the alleged facts are true—plaintiffs must now show that they are likely to win on the merits.²⁴⁵ Two years later, in *Ashcroft v. Iqbal*, the Supreme Court articulated the applicability of *Twombly*’s heightened pleading standard to all civil cases.²⁴⁶

The burden has always been on plaintiffs to demonstrate that their claims are not frivolous, but *Twiqbal* heightened that burden to a detrimental degree. Plaintiffs suing for discrimination or violations of civil rights are disproportionately affected by *Twiqbal*’s plausibility standard because clear evidence is difficult to establish during the initial pleading phase and defendants are unlikely to openly admit to wrongdoing. Plaintiffs suing for discrimination often rely on the discovery process, through which they gain access to documentary evidence such as internal emails and memos proving discriminatory intent or patterns of discrimination. In 2011, a judge on the U.S. Court of Appeals for the 7th Circuit articulated *Twiqbal*’s impact on civil rights litigation in a dissent, using *Brown v. Board of Education* as an example. He looked to the *Brown* plaintiff’s very simple complaint, writing:

*“Under the standards of Iqbal, however, it would be easy to argue that the plaintiffs in Brown failed to state a plausible claim for relief that could survive dismissal. The Court’s shift to ‘plausibility’ pleading, and the assignment of interpretation of that standard to the subjective common-sense of individual judges, has markedly increased the danger of throwing out the proverbial baby with the bathwater.”*²⁴⁷

Plaintiffs with legitimate claims must have a fair shot to make their case before a court. Practically speaking, *Twiqbal* requires plaintiffs to litigate their claims before their case even begins. It is perhaps unsurprising then that dismissal rates for lawsuits filed by individuals increased by more than 15 percent in the aftermath of *Twiqbal*.²⁴⁸

The uptick in case dismissal rates is not the result of more frivolous cases being filed. Instead, it is the obvious consequence of pleadings standards that are too high. Employment discrimination and civil rights cases have been particularly burdened by heightened *Twiqbal* standards.²⁴⁹

According to law professor Alexander A. Reinert, who has studied *Twiqbal*'s impact on case dismissal rates, “For civil rights cases, no other independent variable correlates more strongly than plausibility pleading with an increase in the likelihood of a grant of a motion to dismiss.”²⁵⁰ Whereas individual lawsuits have been dismissed more regularly after *Twiqbal*, lawsuits brought by corporations—which have access to extensive legal resources—have been left largely unaffected.²⁵¹

Although there is no guarantee plaintiffs’ claims will succeed, complaints should not be summarily dismissed for failing to meet arbitrary pleading standards. The simple pleading standards stipulated in the Federal Rules of Civil Procedure, requiring a “short and plain statement of the claim” should be reinstated.²⁵²

Conclusion

There are significant structural problems with the federal judiciary that necessitate robust structural reform. As it currently stands, the federal judiciary is out of touch with the broader populace, serving special interests and powerful corporations at the expense of everyday Americans. This is by design, due in large part to concerted efforts by conservatives to manipulate the courts for conservative ends. This report lays out several options for addressing the judiciary's many problems. It is critical to begin having conversations now about how to effectively address structural issues with the judiciary.

An independent judiciary is vital to a functioning democracy. The courts provide an important means for individuals to fully realize their rights, particularly in the face of opposition from powerful and well-connected actors. While the current judiciary has too often failed to meet this standard, the independence of the judiciary can be restored if lawmakers are willing to make necessary and significant structural changes, including those discussed in this report. Through careful attention to the structures of the U.S. legal system, policymakers can ensure that future generations are bound by legal determinations made by a just and fair-minded judiciary whose decisions are based in law rather than ideological preferences.

About the authors

Sam Berger is the vice president of Democracy and Government Reform at the Center for American Progress. Previously, he was the senior adviser at the Center. From 2015 to 2017, Berger served as a senior policy adviser at the White House Domestic Policy Council. Prior to that, he served as senior counselor and policy adviser at the U.S. Office of Management and Budget. Berger is a graduate of Swarthmore College and received his J.D. from Yale Law School.

Danielle Root is the associate director of Voting Rights for Democracy and Government at the Center. She has completed internships with the Obama administration in the Office of National Drug Control Policy and has interned at the U.S. Commission on Civil Rights, the U.S. Senate, and various nonprofits concerned with voting rights and election law, including campaign finance reform. Root holds a J.D. from the George Washington University Law School, where she received the Presidential Volunteer Service Award for her commitment to public service.

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- 243 *Bell Atlantic Corp. v. Twombly*.
- 244 A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." See Legal Information Institute, "Federal Rules of Civil Procedure: Rule 8(a)(2)," available at https://www.law.cornell.edu/rules/frcp/rule_8; *Conley v. Gibson*, 355 U.S. 41 (November 18, 1957), available at <https://supreme.justia.com/cases/federal/us/355/41/>.
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