

**Presidential Commission on the Supreme Court of the United States**

*Court Expansion and Other Changes to the Court's Composition*

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Co-Chair Rodriguez, Co-Chair Bauer, and members of the Commission, thank you for inviting me to testify on the topic of “Court Expansion and Other Changes to the Court’s Composition.”

I believe that there is both a long-term problem in the way we constitute our Supreme Court and an immediate existential threat to democracy, attributable largely to today’s Republican Party and exacerbated by the way in which the current Republican Justices have used their power to both to further their party’s assault on democracy and to advance its plutocratic economic agenda.

The long-term problem is both easy to identify and relatively simple to fix. The immediate crisis will resist a bipartisan diagnosis because it has a mostly partisan cause—which is the same reason that molding a bipartisan solution to it will be almost impossible to achieve.

Because you have already heard much testimony on the long-term problem, I shall only briefly address that topic, after which I will focus my remarks on the immediate crisis confronting American democracy, the Court’s contributions to it, and one possible remedy—Court expansion.

There are five principal problems with our current system of constituting the Supreme Court, which consists of the president’s nominating and the Senate’s confirming Justices to life-tenured positions, which frequently amount in practice to Justices’ serving thirty years or more in office. First and most problematically, Justices who have not died unexpectedly or suffered sudden debilitating illnesses that prevented their remaining on the bench have timed their retirements to enable presidents sharing a similar political ideology to nominate their replacements—a practice that seems more compatible with hereditary aristocracy than democracy. Second, without fixed terms, the sometimes unpredictable deaths or debilitating illnesses of Justices have produced random variation in how many appointments to the Court a particular president gets to make during his term in office. For example, in a single four-year term as president, William Howard Taft appointed five Associate Justices and one Chief Justice, while Jimmy Carter appointed none.

Third, because the length of a Justice’s tenure will generally depend on the age at which she was appointed, presidents have incentives to appoint younger Justices. While an appointee in his forties may eventually become an outstanding Justice, an appointee in her fifties or sixties—usually possessed of more than a decade of judging experience—will much more easily transition to the job. The combination of these first three factors can enable one political party to dominate the Court for decades without enjoying any similar control over the Senate or the presidency.

Fourth, over the course of American history, several Justices have resisted retirement even though, in their advanced ages, they had become physically and/or mentally incompetent to do their jobs well. Fifth and finally, the absence of a constitutional guarantee that the Senate will confirm *some* presidential nominee every two years has created a temptation for a political party that controls the Senate but not the presidency to take advantage of an unexpected Supreme Court vacancy in order to attempt to “pack” the Court, as Senate Majority Leader Mitch McConnell successfully did in 2016.

Each of these deficiencies in our current method of appointing Justices could be easily remedied by a constitutional amendment mandating 18-year, non-renewable terms for Supreme Court Justices, staggered to ensure that one slot is open to be filled every two years. Such an amendment would terminate the ability of Justices to influence the ideology of their replacements by timing their retirements. It would also eliminate the randomness inherent in the present system and greatly reduce the incentive for presidents to nominate younger Justices. In addition, an eighteen-year term limit would greatly ameliorate the problem of Justices remaining on the bench past the point of competency. Finally, this proposal should reduce the acrimony that has characterized recent Supreme Court confirmation hearings by limiting the power of political parties to pack the Court.

### **The Present Existential Threat to American Democracy**

Nations around the world—including Brazil, Hungary, India, the Philippines, Poland, and Turkey—have experienced substantial deteriorations in their democracies over the last fifteen years. Aspiring autocrats have manipulated existing political structures to their advantage; undermined the independence of supposedly neutral arbiters of the system such as judges, media, and civil servants; told brazen lies; encouraged political violence; and attacked the “other,” often Muslims or immigrants, to consolidate their support and distract attention from their failure to solve problems.

A similar degradation of democracy has begun in the United States, whose democratic rating has declined significantly in recent years, according to the scoring system used by Freedom House, an American non-profit organization that conducts research and advocacy on democracy. A recent *Morning Consult* survey uncovered the disturbing fact that “26% of the U.S. population qualifies as highly right-wing authoritarian, twice the share of the No. 2 countries, Canada and Australia.”

From 2017 to 2021, the president of the United States displayed an openly authoritarian bent. President Donald J. Trump attacked the press as the “enemy of the people”; assailed judicial independence; politicized the Justice Department and intelligence agencies; encouraged political violence; undermined fundamental norms of government transparency; attempted to delegitimize elections; called his political opponents “traitors”; and manifested a bizarre admiration for foreign autocrats. Just in the months preceding the 2020 election, President

Trump refused to commit to a peaceful transition of power; declined to condemn white supremacists; sowed groundless doubts about the reliability of mail-in voting; and insisted that the only way he could lose the election was through fraud. After his defeat, Trump repeatedly pushed the lie that the election had been stolen from him; solicited election fraud from the Georgia Secretary of State by demanding that he “find” enough votes to make Trump the victor; summoned Michigan Republican legislative leaders to the White House to drag them into allocating the state’s electoral votes to him; pressured the Justice Department to launch investigations of his evidence-free allegations of widespread voter fraud; and, on January 6, incited a violent coup attempt against the U.S. Capitol.

To the astonishment of at least half the nation, the Republican Party proved overwhelmingly complicit with Trump’s authoritarian bent. Congressional Republicans did not want the 2016 Trump campaign’s involvement with Russia investigated by Special Counsel Robert Mueller. They were untroubled by Trump’s systematic obstruction of that investigation. They voted against his impeachment and removal from office after Trump tried to shake down President Zelensky of Ukraine by threatening to withhold congressionally appropriated defense aid unless Zelensky agreed to dig up dirt on Trump political opponent Joe Biden. Nor did Republicans object to Trump’s systematic obstruction of congressional oversight after Democrats took control of the House in 2019. After Trump’s acquittal by an overwhelmingly party-line vote in his first impeachment trial in February 2020, congressional Republicans acquiesced to his takeover of the intelligence establishment, his war against whistleblowers and inspectors general, his politicization of the Justice Department, and his catastrophic response to the coronavirus pandemic.

In the initial aftermath of the violent coup attempt against the Capitol by enraged Trump supporters, Republican congressional leaders condemned the president’s actions. House Minority Leader Kevin McCarthy insisted that Trump “bears responsibility” for the attack on Congress and “should have immediately denounced the mob when he saw what was unfolding.” Senate Minority Leader Mitch McConnell declared Trump “morally responsible” for the assault and called the president’s actions “a disgraceful dereliction of duty” (while nonetheless voting to acquit Trump on the impeachment charge of inciting the insurrection).

However, in the months since January 6, Republican leaders have reassessed their position, as opinion polls have consistently revealed that 60 to 70 percent of Republican voters agree with Trump’s claim that the 2020 presidential election was “stolen” from him. Indeed, nearly 30 percent of Republican voters today believe that it is “somewhat likely” or “very likely” that Trump will be “reinstated” as president this year. In Arizona, the Republican-controlled state senate hired a firm run by a Trump-supporting conspiracy theorist to “audit” the Maricopa County’s 2020 presidential vote. Although the audit is so transparently fraudulent that the Republican county commissioners have disassociated themselves from it, Republican state political leaders from around the nation have made a show of traveling to Arizona to observe and learn from the experiment, declaring their intention to mimic the audit in their home states, and soliciting Trump’s future endorsement by doing so.

Copious video footage from January 6 reveals thousands of enraged Trump supporters storming the Capitol, chanting “Hang Mike Pence,” threatening to shoot Speaker Nancy Pelosi, forcing the evacuation of terrified lawmakers, injuring nearly 150 police officers, and causing several deaths. Yet over the ensuing months, Republican leaders have fixed upon a strategy of minimizing the violence of the Capitol riot, insisting that many of the demonstrators were “Antifa,” rather than Trump supporters, and denying that Trump bears responsibility for the attack. A Republican congressional representative from Georgia compared the marauding Capitol intruders to “tourists”; Senator Ron Johnson of Wisconsin declared them patriots who “loved this country and truly respect law enforcement”; and Trump himself insisted that the mob was “hugging and kissing,” not beating, police officers.

The Republican congressional caucus purged Representative Liz Cheney from her party leadership position after she refused to cease denouncing Trump’s incitement of the January 6 riot as “the most dangerous thing” any American president has ever done. McCarthy and McConnell rallied their troops to oppose the formation of an independent commission to investigate the events of January 6—even though Democrats had acquiesced to all of the major Republican demands for the commission. After Senate Republicans killed the commission with a filibuster, McCarthy threatened to take away the committee assignments of any Republican who cooperated with Speaker Pelosi’s decision to establish a select House committee to investigate the insurrection. Nearly all of the ten Republican House members who voted to impeach Trump in January 2021 for inciting the coup attempt have since been censured by their state parties, denounced as “traitors,” and confronted with primary challenges—often from Trump-endorsed opponents.

While Trump’s presidency and the Republican Party’s ready acquiescence to its more authoritarian aspects have been stunning recent developments, the degradation of American democracy is rooted in forces that originated long ago and percolated over the last half a century—discussed below—and that began to manifest themselves in anti-democratic practices of the GOP at the state level over the last twenty years. Republican-controlled state governments have suppressed votes through restrictive voter identification laws, other limits on the suffrage, and purges of the voter rolls. They have grotesquely gerrymandered legislative districts, enabling Republicans to maintain control of state legislatures and the House of Representatives while failing to win majorities of the vote. Republican legislatures have also eviscerated the powers of governors’ offices after Democrats were elected to them, rejected the results of voter initiatives of which they disapproved, imposed obstacles to putting such initiatives on the ballot in the first place, and implemented restrictions on mass voter registration drives that have made them practically impossible to pursue. In the months prior to the 2020 election, Republican elected officials across the nation made it harder to vote during a once-in-a-lifetime pandemic: refusing in some states to expand excuse-based absentee balloting; restricting the availability of drop boxes to collect absentee ballots; refusing to relax witness-signature requirements for such ballots; and declining to allow the counting of absentee ballots postmarked but not received by Election Day.

Since Republicans lost the electoral votes of Georgia and Arizona for the first time in decades and were then defeated in two special elections for the U.S. Senate in Georgia, several GOP-controlled state legislatures have launched the most systematic attack on voting rights since the 1965 Voting Rights Act sought to end race discrimination in voting. To take just one salient example, Georgia's recently enacted voter-suppression law makes it harder to obtain and cast mail ballots; drastically limits the number of drop-boxes in the large-population counties around Atlanta; expands the ability of poll watchers to object to voters and makes it more difficult to remove those observers from the polling places even if they prove obstreperous; bans counties from establishing mobile polling places; virtually eliminates the use of provisional ballots for registered voters who show up at the wrong precinct; and criminalizes offering food or water to persons standing in line to vote.

The Republican strategy behind the Georgia law was to target voting practices that have recently proved favorable to Democrats. For example, nearly two thirds of the provisional ballots cast in Georgia in 2020 were from Democratic voters, and President Biden won a clear majority of the absentee ballots cast in the state. Similarly, more than 55 percent of the 272,000 Georgians who do not have on file with state election officials the kind of identification required by the new law to vote are African American. Blacks are only about one-third of Georgia's population, and more than 90 percent of them voted Democratic in the recent election. When some Georgia-based corporations criticized the new law, and Major League Baseball announced that it was relocating the All-Star game from Atlanta in response, leading Republican politicians denounced "woke" corporations for "capitulating to the leftist mobs" that had called out Georgia for its voter suppression.

The recently enacted Republican voter-suppression laws are especially troubling because they also contain provisions that will facilitate Republican legislators and voting officials simply stealing the next election—a step that most of them refused to take in 2020. The Georgia law just described also authorizes the state legislature, currently controlled by Republicans, to replace county voting officials essentially at will, gives it greater control over the state election board, and removes the secretary of state from that board—apparently because, in 2020, that official, Brad Raffensperger, rejected Trump's demand that he overturn the results of the presidential election by "finding" enough additional votes for Trump. Across Georgia, Democrats—frequently African American—are already being purged from county election boards.

Across the country, Trump loyalists are running for political office at every level of government on platforms demanding "election integrity" and endorsing Trump's lie that the presidential election was stolen from him.

Of nearly 700 Republicans who have filed paperwork with the Federal Election Commission to run for Congress next year, at least one-third have endorsed Trump's false election claims. One recent poll found that 61 percent of conservatives—the people most likely to vote in Republican primaries—agree that “GOP officials who say there was no evidence of widespread fraud are part of a cover up.” Republican-controlled state legislatures are also enacting laws authorizing severe punishments for county election officials and poll workers who commit even small, technical violations in administering elections—laws that will chill efforts to make voting easier.

The idea that an American presidential election could be stolen seemed so absurd in 2020 that many Republican leaders asked, “What’s the downside of humoring him?,” as Trump pursued seemingly absurd efforts to overturn the election in court. Many of the election officials who resisted Trump’s efforts to overturn the 2020 election will have been removed from office by the next election cycles, and Republican political leaders—who are responding to the demands of majorities of their voters—will have committed themselves by then to the lie of a stolen presidential election.

Democracy depends not just on broad access to the franchise and free and fair election administration but also on peaceful transitions of political power and the repudiation of political violence by all parties. Yet, today, the threat of violence pervades American politics; the brutal assault on the Capitol by Trump loyalists is only the most salient example. Last year in Michigan, Trump-supporting militia members were charged with trying to kidnap and possibly execute Governor Gretchen Whitmer for imposing lockdown measures on the state at the zenith of the COVID-19 pandemic. Pennsylvania’s Republican senate leader admitted that he feared “I’d get my house bombed” if he defied Trump’s efforts to overturn the election results in his state. The family of Georgia Secretary of State Brad Raffensperger received death threats for months after the election, including one text message to his wife warning that “we plan for the death of you and your family every day.” Arizona’s Democratic Secretary of State Katie Hobbs now has bodyguard protection after receiving multiple death threats following her criticism of the fraudulent election audit in Maricopa County. Dozens of armed protestors assembled outside the home of Michigan Secretary of State Jocelyn Benson in early December 2020, shouting obscenities and threatening violence, in an effort to pressure her into capitulating to Trump’s demands not to certify the state’s Electoral College vote. Scores of election workers have resigned or retired in the face of such violent threats, which the Department of Justice has recently established a task force to investigate. Many of these election workers will be replaced by conspiracy-mongering Trump supporters who believe that the only fair elections are those that their side wins.

The threat of violence has now invaded the halls of Congress, as it did in the decade before the Civil War.

Some Republican congressional representatives, while refusing to wear masks on the House floor, have sought to carry guns onto it. In 2019, before her election to Congress, Marjorie Taylor Greene—who has compared mask mandates to the Holocaust, apologized for that statement, and then compared President Biden’s recent vaccination push to having Nazi-era “brown shirts showing up at [people’s] door”—repeatedly endorsed violence against Democratic officials and “liked” a statement on Facebook declaring that “a bullet to the head” would be a quick way to remove House Speaker Nancy Pelosi from office. Despite such comments, roughly 95 percent of the Republican House caucus refused to exclude Taylor Greene from committee assignments, and in the first quarter of 2021 she was one of the biggest fund-raisers among House Republicans.

### **The Causes of the Degradation of American Democracy**

Our current political predicament has multiple, complex causes, and this is not the appropriate forum in which to explore them in detail. I have sought to do so elsewhere, and here I shall simply summarize the five principal factors responsible for the recent degradation of American democracy.

Political scientists largely agree that racial resentment is the most important factor leading today’s Republican Party and its voters to lose enthusiasm for democracy. In the 1950s, the United States population was 90 percent white. In 1980, it was still 80 percent white, but today it is only about 60 percent white, and demographers project that within the next twenty-five years, the nation will no longer have a majority non-Latino white population. In the 1950s, 93 percent of Democratic Party voters were white (97 percent of Republican Party voters were), whereas today that number is around 60 percent.

The coloring of the nation—as exemplified by the election of its first African American president in 2008—has proved profoundly unsettling to many Americans, rendering them vulnerable to the appeals of a racist demagogue such as Trump. As late as the 1980s, the Democratic and Republican parties enjoyed the support of roughly equal percentages of white voters who registered high levels of racial resentment, but since then these voters have become overwhelmingly concentrated in the Republican Party. In the 2016 Republican presidential primaries, racial resentment was highly correlated with support for Donald Trump. These are the voters who believe that white Americans suffer more from race discrimination today than Black Americans; still do not believe that Barack Obama was born in the United States; favor building a wall on the Mexican border to keep out “rapists” and “criminals” (as Trump refers to them); want to bar non-citizen Muslims from entering the United States; and relish Trump’s urging of Black and brown Democratic congresswomen to return to the “shithole” nations from which they came (even though most of them came from the United States).

Declines in the religiosity of Americans and a shift in the nation’s religious demographics have been a potent second factor in the recent degradation of American democracy. Over roughly the last half century, the idea of America as a white Christian nation has collapsed. In

the 1960s, Democratic and Republican voters hardly differed in their religiosity. The culture war issues of the 1960s and 1970s—such as prayer in public school, abortion, legal regulation of homosexuality, and the proliferation of pornography—gradually pushed religious conservatives into the Republican Party. In the late 1970s, Jerry Falwell’s Moral Majority mobilized millions of white evangelical Christians to increase their participation in politics in support of Ronald Reagan and his party.

Beginning around 1990 and accelerating since the dawn of the twenty-first century, religious conservatives have come to recognize that they are losing the battles over the normalization of homosexuality and gay marriage, the loosening of sexual mores, and changing gender norms that make genuine equality for women a real possibility for the first time in American history. In recent decades, religious conservatives have seen their children and grandchildren leaving their churches in record numbers, alienated especially by their religious elders’ homophobia and general resistance to racial reforms sought by Black Lives Matter.

Today, roughly 67 percent of Americans aged 65 and above are white Christians, but only about 29 percent of Americans aged 18 to 29 are. The number of Americans claiming no religious affiliation at all has more than tripled—from roughly 7 percent of the population in 1974 to more than 25 percent in 2018-19. When asked their religious affiliation, the largest bloc of Democratic voters today identifies as “none of the above.” By 2024, for the first time in American history, white Christians may not be a majority of the electorate. These are profoundly disorienting developments for those who conceive of the United States as a white Christian nation, which it has been, unofficially, for nearly the entirety of its history.

The rise of neo-Ayn Randism is the third factor accounting for the recent degradation of American democracy: Radical libertarians, who were politically marginalized after the Great Depression and World War II, began a cultural and political comeback in the 1960s and 1970s. Libertarian billionaires such as the Koch Brothers, Richard Scaife, and John Olin began investing in libertarian think tanks such as Heritage and Cato. They asserted their influence on college campuses through the Olin Fund and in law schools through the Federalist Society. They gained political ascendancy during the presidency of Ronald Reagan, who taught us that government is always the problem, never the solution. Extreme tax reformers like Grover Norquist, whose professed goal was to shrink government to the “size where we can drown it in the bathtub,” came to dominate the ideology of the Republican Party. This radical libertarian philosophy became so culturally and politically hegemonic that it even exerted considerable influence in the administrations of Democratic presidents Clinton and Obama.

The Ayn Randian renaissance has culminated in today’s Republican Party, which generally denies human-caused climate change, pursues tax cuts that overwhelmingly benefit corporations and the wealthy, undermines labor unions at every turn, and aims to eviscerate the social safety net. Good illustrations of this libertarian extremism are former Speaker of the House Paul Ryan’s declaration that free school lunches for poor children gave them “a full



stomach—and an empty soul,” and the statement by North Dakota Governor Doug Burgum last fall, when his state had the highest per capita COVID-19 rate of any jurisdiction *in the world*, that placing legal limits on reckless behavior “is not a job for government.” One wonders what is the point of government if it is not to orchestrate a scientifically informed and coordinated response to a once-in-a-century disaster such as the coronavirus pandemic.

The fourth factor contributing to the recent degradation of American democracy has been the enormous increase in economic inequality over the last forty years. The wages of the American working class roughly doubled between 1935 and 1960, and then doubled again over the following generation. During those years, blue-collar workers without college degrees—partly because of their strong labor unions—were able to buy homes and send their children to college on a single income, and their offspring were likely to fare even better economically.

Yet since 1980, two-thirds of the gains from economic growth have gone to the top 10 percent of earners, and roughly half of that to the top 1 percent. American workers now have lower life expectancies than workers in comparable western democracies; their babies have higher infant mortality rates; and they have worse access to health care, even though the United States spends nearly twice as much on it per capita. Life expectancies in some age ranges of the white working class are declining as a result of deaths of despair—suicides and deaths from drug overdoses and alcoholism.

Worsening economic inequality and the deteriorating social conditions it has produced created a golden opportunity for a racist, faux-populist demagogue such as Trump to appeal to white, economically dispossessed workers. While these voters ought to be blaming their ills on globalization, technological change, and neo-Ayn Randian government policies, Trump and the Republican Party have sought to convince them instead to blame Mexicans, Muslims, and alleged Satan-worshipping child molesters in the Democratic Party.

Fifth and finally, several features of our political system—such as partisan primaries, winner-take-all districted elections, and the virtually unlimited flow of money into politics—have fed political polarization and negative partisanship. Technological changes in media and the altered media consumption patterns they have produced—the so-called Fox News effect—have further exacerbated these phenomena. Such forces paved the way for an autocratic demagogue to take over one of our major political parties—something that would not have been possible for most of American history. In addition, various structural features of the American political system—geographic clustering, partisan gerrymandering, the vast malapportionment of the Senate, and the milder malapportionment of the Electoral College together with its other vagaries—have made a minority party’s control of government not only possible but actually quite probable. Such features of our politics—combined with extensive voter suppression by Republican-controlled state governments—have enabled the GOP, whose policy agenda (to the extent it still has one) is quite unpopular according to opinion polls, to retain a fighting chance to control the branches of the national government.

## **The Supreme Court's Contributions to the Degradation of American Democracy**

What does any of this have to do with the Supreme Court and the question of whether it is in need of reform? Rather than resisting the degradation of American democracy, the Court under Republican control has been largely complicit in the GOP's assault on democracy—in three distinct ways. In addition, a Republican-dominated Court poses an enormous potential obstacle to democracy-entrenching measures that the Democratic Party might pursue.

First, the Republican Justices have largely acquiesced in GOP politicians' efforts to secure Republican political advantage through electoral machinations; sometimes, these Justices have gone even further and devised their own constitutional mechanisms for achieving Republican advantage. For starters, in 2013 the Republican Justices effectively nullified the preclearance provision of the 1965 Voting Rights Act, which required mostly southern states to submit proposed changes to their voting practices to the federal government for advance approval in order to ensure the absence of a discriminatory racial purpose or a disparate impact on minority voters. Within weeks of that ruling, to cite just one example, the Republican-controlled North Carolina government enacted a strict voter identification requirement that disadvantaged college students and public employees, shortened the early voting period, restricted same-day voter registration, eliminated provisional ballots for voters who turned up at the wrong precinct on Election Day, terminated preregistration for sixteen- and seventeen-year-olds, and rescinded the automatic restoration of voting rights for individuals convicted of felonies upon completion of their criminal sentences. The U.S. Court of Appeals for the Fourth Circuit ruled that the state legislature had sought to “target African-Americans with almost surgical precision.” The voter-suppression bill recently enacted by the Georgia legislature—described above—would never have been precleared by the Biden Justice Department.

On the proffered basis of the state's interest in reducing voter fraud, which numerous studies have demonstrated is a virtually nonexistent problem, the Republican Justices have upheld state purges of the voter rolls, as well as strict voter identification laws that disproportionately disfranchise college students, people of color, and the poor. The Republican Justices have made it difficult to prove intentional race discrimination in legislative districting, and just last month they made it harder to prove violations of Section 2 of the Voting Rights Act, which requires that all political processes be “equally open to participation” by racial minority groups—language defined to mean that such groups must have no “less opportunity” than other voters to “participate in the political process and to elect representatives of their choice.” This latter ruling provides a virtual green light to Republican state legislatures to continue with, and even accelerate, the most concerted partisan assault on the right to vote since the Jim Crow era.

In 2019, the Republican Justices declined to remedy the problem of partisan gerrymandering, which enables minorities of voters to elect majorities of legislators and, today, mostly benefits Republicans. Chief Justice Roberts's majority opinion denied the existence of any judicially manageable standard for evaluating partisan gerrymandering and insisted that other remedial paths were available to pursue limits on what even the majority conceded was an

insidious practice. However, Justice Kagan’s dissent demonstrated that judicially manageable standards for evaluating gerrymandering do exist, and the alternative avenues identified for constraining or eliminating partisan gerrymandering are either illusory (because they require Republican legislators to endorse the solutions) or possibly unconstitutional (because Republican Justices have already articulated concerns about replacing *legislatures* with bipartisan commissions to draw congressional districts).

Second, the Court’s campaign finance rulings since 1976—which initially did not feature partisan divisions, but have consistently done so in recent decades—have, on the basis of contrived constitutional rationales, unleashed a virtually unrestricted flow of money into politics, which disproportionately benefits wealthy donors, corporations, and well-funded interest groups. For example, the Court—which has generally meant the Republican Justices—has flatly ruled out the notion that the government has a legitimate interest in equalizing the political influence of its citizens; ruled that corporations have the same right to spend money on politics as persons; and invalidated legislative attempts to augment the public funding available to candidates competing against millionaires.

The Court’s campaign finance decisions have “transformed American politics”—and pretty clearly for the worse, except from a neo-Ayn Randian perspective. The American political system is awash in money, and the wealthiest Americans dominate political spending. Recent political-science literature reveals that working-class and middle-class Americans exercise almost no influence on political outcomes across a wide array of issues at the federal level. On average, the wealthiest Americans are far more conservative on economic policy issues than are average citizens, and the wealthier they are, the more conservative they tend to be.

Large majorities of Americans today favor paid sick leave and parental leave for workers, a higher minimum wage, higher taxes on millionaires, more robust efforts to combat human-caused climate change, and expansion of government-provided healthcare. Yet such policies are consistently blocked, mainly by congressional Republicans, who represent the interests of their wealthy donors far better than those of their primarily white, working-class voters—a situation that the Court’s campaign-finance decisions have contributed mightily to creating. A political system that responds to the policy preferences of wealthy individuals, corporations, and well-funded interest groups, rather than to those of most voters, is not a democracy.

Third, well beyond the sphere of campaign finance, today’s Republican Justices have consistently furthered the neo-Ayn Randian policies of the Republican Party, which—as we have seen—have contributed significantly to the recent degradation of American democracy. These Justices have undermined labor unions, protected corporations from class action litigation and punitive damage awards, upheld arbitration agreements that prevent employees and customers from airing their grievances against corporations in court, and curbed the reach of federal antitrust laws and antidiscrimination legislation. Today’s Republican Justices are as friendly to the Chamber of Commerce’s agenda as any Court in American history has been.

Twenty years ago, Republican Justices intervened in a presidential election on the basis of one of the least convincing rationales ever articulated in a Supreme Court decision. Had the 2020 presidential election come down to absentee ballots in Pennsylvania that had been postmarked by Election Day but not received until several days thereafter—ballots that the state supreme court, interpreting the state constitution, had deemed legitimate—the Republican Justices almost certainly would have intervened to provide a victory to Donald Trump. American democracy is under siege today from a large faction of the Republican Party, and the Court’s Republican Justices have proven themselves not only unwilling to protect democracy, but also likely in the future to create additional obstacles to the Democratic Party’s efforts to safeguard it themselves.

### **Expanding the Court to Enable a Democratic Majority to Defend Democracy.**

Because the current threat to American democracy is overwhelmingly partisan, any remedy will likely have to be partisan as well: Today’s Republican Party will not acquiesce to democratic reforms that will also benefit the Democratic Party. For example, Senator Lindsey Graham has referred to the Democrats’ electoral reform bill—which would expand access to the ballot, eliminate partisan gerrymandering, require disclosure of political donations, and provide public financing of congressional elections—as “the biggest power grab in the history of the country.”

When Republicans enfranchised African Americans during Reconstruction and Progressives enfranchised women around World War I, both groups acted with dual motivations: doing the right thing and benefitting themselves politically. Today’s Democrats are similarly motivated: Protecting democracy is the right thing to do, and it will—in the short term at least—benefit Democrats. To effectively counter today’s existential threat to democracy, the Democratic Party must take unilateral action, much as Reconstruction Republicans did when white-supremacist Democrats lined up in solid opposition to both the enactment of postwar constitutional amendments to secure the civil and political rights of Black Americans and the passage of legislation to enforce those rights.

Despite the best efforts of Republicans, the 2020 election results have afforded Democrats a second opportunity to control the Supreme Court—for the first time since 1969. The first chance came in February 2016, when Justice Scalia died suddenly during Obama’s presidency. Senate Majority Leader Mitch McConnell blocked that Democratic opportunity by stealing a Supreme Court seat for the first time in American history. McConnell insisted historical precedent supported leaving Supreme Court vacancies unfulfilled during presidential election years, but this statement was rated “false” by Politifact, which is a nice way of calling it a lie. Never before in American history had a Senate controlled by one party blocked a Supreme Court nomination made by the president of another party simply because the vacancy occurred during a presidential election year. (If McConnell’s obstructionism was not enough, three Republican senators declared before the 2016 election that they would probably not confirm a Hillary Clinton nominee to the Supreme Court during her entire term in office, were she to win the presidential election while Republicans retained control of the Senate.)

In 2020, McConnell confirmed the hypocrisy of his position by ensuring that the Senate confirmed the nomination of Amy Coney Barrett—just eight days before the presidential election. Recently, he has made it clear that if Republicans win control of the Senate in 2022, he will probably not permit the confirmation of a Biden nominee to the Court if a vacancy arises in 2024, and he would not even commit himself to doing so if one arises in 2023.

In addition to the present urgency of safeguarding democracy, which has already been discussed, there are two principal arguments for Democrats' expanding the Court by four seats to ensure a temporary Democratic majority. The first is an affirmative argument for why Democrats have a strong claim to being entitled to control of today's Court. The second is a series of responses to the principal argument *against* Court expansion—namely, that Democrats' expanding the Court would incite a never-ending retaliatory spiral of Court expansions.

First, the affirmative argument: Democrats suffer today from several structural features of the American political system that permit minority rule. At the state legislative and congressional levels, Democrats are disadvantaged by a combination of partisan gerrymandering and geographic clustering that together often disable them from converting a majority of votes into a majority of legislative seats. For example, although Democrats in Pennsylvania and Ohio frequently win state-wide elections, they have been unable to control either state's senate for nearly four decades, largely because Democratic voters are inefficiently concentrated in and around large cities. For the same reasons, after recent decennial redistrictings, Republicans have won thirteen of eighteen Pennsylvania congressional seats despite winning only about half of the state's congressional vote. On average, these two factors have cost Democrats between fifteen and twenty congressional seats in recent elections.

Democrats are even more disadvantaged in the competition for control of the U.S. Senate. Because of a provision in the Constitution that cannot be amended without the consent of every state, Wyoming, with just over 600,000 residents, and California, with nearly 40 million, are each allocated two senators. Equal state representation in the Senate, which was difficult to justify in 1787, is impossible to reconcile today with the principle of one person, one vote.

Because of today's partisan geography, which features a stark divide between the political preferences of urban and rural voters, the Republican Party benefits greatly from the Senate's malapportionment. For example, in 2012, although President Obama defeated former governor Romney by about four percentage points in the national popular vote, Romney ran six points ahead of Obama in the nation's twenty-five smallest states, which together contain less than one-sixth of the population. This suggests that the voter population of the median Senate seat is significantly to the right of the ideological preferences of the median American voter. Similarly, in today's evenly divided Senate, the fifty Democratic senators represent over 40 million more people than the fifty Republican senators—an egregious violation of the principle of one person, one vote. Not once in the twenty-first century have Republican candidates won a majority of the popular vote in a Senate election cycle, nor have Republican senators represented a majority of

the nation's population. Senate malapportionment also has a significant disparate racial impact because people of color tend to live in more populous, urbanized states.

In addition, Senate races have recently become nationalized to an historically unprecedented degree. *Every* Senate race in the 2016 election was won by the candidate of the same party that carried the state in that year's presidential election—the first time for such an occurrence since senators began to be directly elected in 1914. In 2020, this phenomenon repeated itself, with the sole exception of the Senate race in Maine.

Given a combination of Senate malapportionment, current partisan geography, and the nationalization of Senate contests, Republicans enjoy a large advantage in the battle for future party control of the Senate. Barring a significant shift in one of these factors, after another election cycle or two the Democratic Party may never again control the Senate, regardless of how large a majority of the Senate popular vote it wins. Demographers project that by 2040, 70 percent of Americans will live in the fifteen most populous states, which will entitle the voters of those states to choose only 30 percent of U.S. senators. Such a development would create a legitimacy crisis of enormous proportions. For example, such a Senate might never again confirm a Democratic president's nominees to the Supreme Court—a scenario that Senate Minority Leader Mitch McConnell has already suggested might meet with his approval.

Lastly, the Electoral College system, in combination with another feature of today's partisan geography—the relatively high concentration of white working class voters in several narrowly divided states, such as Michigan, Pennsylvania, and Wisconsin—significantly advantage Republican presidential candidates. Although Democrats have now won the popular vote in seven of the last eight presidential elections, they have won in the Electoral College only five times. On the eve of the 2020 election, while President Trump had only about a 2 percent chance of winning the popular vote, according to election modelers, he still had a 10 percent chance of winning an Electoral College majority. Although Joe Biden won roughly 7 million more votes than Trump, if fewer than 43,000 voters in three key states—Arizona, Georgia, and Nevada—had switched sides, the result would have been an Electoral College tie and a virtually certain Trump victory in the House of Representatives.

These democratic deficits in the Senate and the Electoral College have enabled Republicans to dominate the Supreme Court despite winning the support of a diminishing minority of voters. Presidents George W. Bush and Donald Trump, neither of whom initially entered the White House with even a plurality of the popular vote, have appointed five of today's six Republican Justices. Four of those Justices were confirmed by narrow majorities of Republican senators who did not represent a majority of the American people. If the Senate and the Electoral College were more reflective of majority will, today's Supreme Court could not possibly have become the most conservative in the last hundred years, as academic studies have demonstrated it to be.

Directly remedying the democratic deficits of the Electoral College and the Senate is

virtually impossible (though they can be ameliorated by creating new states). Constitutional amendments would be required to alter these institutions, and amendments are practically unobtainable when one of the two major political parties benefits from the status quo. However, the size of the Supreme Court can be changed by statute. Congress altered the Court's size seven times in the nineteenth century (though not since 1869)—and for reasons that included raw partisanship.

Democrats today should expand the Court to provide a center-left country with a center-left Court that will defend democracy, resist voter suppression, permit reasonable regulation of campaign finance, and cease furthering a neo-Ayn Randian policy agenda that exacerbates economic inequality and fosters democratic degradation.

The principal argument against Democrats' expanding the Court is that Republicans will simply respond in kind the next time they have the opportunity to do so, inciting a never-ending retaliatory spiral. However, there are three powerful responses to this argument.

First, Republicans initiated this arms race by stealing the Court vacancy that was rightfully President Obama's to fill in 2016. For Democrats to refrain from responding in kind to Senator McConnell's shrinking of the Court for one year would be to unilaterally disarm. As game theorists have taught us, the quickest way to restore a stable equilibrium after one party in a reiterative game has repudiated a norm of cooperation is to reciprocate in kind. Failing to do so only incentivizes more of the norm-breaking behavior.

Second, Republicans themselves will almost surely enlarge the size of the Court the first time they have the opportunity and see the need to do so, regardless of how Democrats behave today. Suppose that Democrats refrain from expanding the Court in 2021. Next, imagine that two Republican Justices are tragically killed in an automobile accident, and President Biden and the Democratic Senate replace them with two Democratic Justices, restoring Democrats to the five-to-four majority they ought to have enjoyed after Justice Scalia's death. Now suppose that in 2024 a Republican is elected president and Republicans win control of Congress.

Can anyone doubt that at that point Senate Majority Leader McConnell would pursue Court expansion? His argument for doing so would be precisely the same as his argument in October 2020, for confirming Amy Coney Barrett to the Supreme Court just eight days before the presidential election: Republicans had the power to do it, and nothing in the Constitution prohibited them from doing so. He might even add a line similar to the one he used in 2016 when blocking the confirmation of Judge Merrick Garland: Democrats would have done the same thing if they were in his position (after all, they had *talked* about expanding the size of the Court in 2021), so he would have to be a fool not to do so.

Expanding the Court is a form of "political hardball"—defined as defying norms and traditions without violating the letter of the law—which Republicans have excelled at playing over the last decade or so. In addition to blocking the Garland nomination, McConnell prevented

President Obama from filling dozens of court of appeals vacancies during his last two years in office, used the filibuster nearly as much in his years as Minority Leader as it had been deployed in the previous hundred years, disabled some federal agencies from functioning by refusing to confirm Obama's nominees to head them, and ensured that the 2009 stimulus package in response to the Great Recession secured almost no Republican support in the Senate (which is equivalent to Democrats' hypothetically blocking a coronavirus relief package in the spring of 2020 to hinder Trump's reelection prospects—a step that not a single Democrat publicly advocated taking). In addition, at the state level, Republicans have recently packed the supreme courts of Arizona and Georgia, attempted to do so in North Carolina, and threatened to do so in Florida.

To reiterate: It cannot be a persuasive argument against Democrats' expanding the Court that Republicans will simply retaliate in kind one day. Republicans have amply demonstrated that they will break the norm against Court expansion when it suits them to do so, regardless of how Democrats behave.

The third response to the “retaliatory cycle” concern is that Democratic expansion of the Court to ensure that Republican Justices do not invalidate democracy-entrenching legislation could, in fact, facilitate a new and better political epoch. In this altered political environment, the unpopularity of the Republican Party's agenda—racism, misogyny, homophobia, xenophobia, Islamophobia, combined with neo-Ayn Randian economic policies such as tax cuts for the wealthy, economic deregulation, and environmental degradation—will cause the party to consistently lose elections. This has not happened to date because of the democratic deficits inherent in American political institutions and widespread Republican voter suppression and other electoral machinations. A series of electoral defeats might lead the Republican Party to adopt a platform more appealing to today's median voter, abandon practices of voter suppression, and perhaps even acknowledge its malfeasance in stealing a Court seat in 2016. Such a scenario may seem Panglossian, but the United States has historically experienced tectonic shifts in politics—most notably, in 1896, 1932, and 1968—that led to one party's political dominance for decades and the other party's eventual reform to expand its voter appeal.

However, creating a new political epoch requires entrenching democracy. After the Civil War—in which southern white traitors had endeavored to destroy “the last, best hope of earth,” in Lincoln's words—Republicans sought to defend and advance democracy by enfranchising African Americans and then criminalizing southern white efforts to disfranchise them. Democrats today must similarly protect democracy by expanding access to the ballot, reducing the influence of money on politics, ending partisan gerrymandering, and blocking the neo-Ayn Randian policy agenda that advances plutocracy.

To improve our democracy, voter registration should be automatic when citizens turn eighteen and easy for older citizens. Same-day registration enhances turnout without increasing fraud, as Republicans baselessly charge. Felon disfranchisement, which has enormous racially disparate effects and often was instituted long ago with a racially discriminatory purpose, should be ended. Election Day should be made a national holiday. The number of early-voting days,



polling places, and voting machines should be increased, to end the national disgrace of working-class African Americans in Atlanta having to wait in line for as long as five or ten hours to vote. Absentee ballots should be available without excuse. Onerous identification requirements for voting should be eliminated because they hinder turnout on the pretext of reducing fraud. Partisan gerrymandering has no plausible justification and should be ended.

Yet a Republican-controlled Court could easily invalidate federal legislation containing such democracy-entrenching measures, at least insofar as it applied to state and presidential elections, on the basis of contrived federalism rationales already advanced by Republican Justices. Those same Justices could easily invalidate measures designed to reduce the influence of money in politics, increase the transparency of political spending, restore the preclearance provision of the Voting Rights Act, and ameliorate economic inequality.

The real question confronting Democrats should not be *whether* to expand the Court but *when* to do so. Some commentators have suggested that Court reform be held in abeyance as a sword of Damocles hanging over the Court, to be implemented only if Republican Justices overplay their hand. Two compelling arguments counsel against Democrats waiting.

First, Democrats may lose control of either or both houses of Congress in 2022. Only twice since 1930 has the president's party gained seats in both the House and the Senate in midterm elections, and since 1862 the president's party has averaged losses of about thirty-two seats in the House and more than two in the Senate in such elections. Voter turnout can decline as much as 50 percent in midterm contests, when the electorate is far less demographically representative of the country as a whole. After Democrats won landslide victories across the board in 2008, Republicans seized control of the House in 2010. That result was less attributable to unpopular policy choices made by President Obama than to the different composition of the off-year electorate and to the decision of Republican congressional leaders to sabotage economic recovery and hope voters blamed the president for federal government paralysis.

Senator McConnell has already made it clear that he is hoping the 2022 midterms will reprise the Democratic debacle of 2010, declaring that he is "100 percent focused . . . on stopping" President Biden's agenda. Senator John Barasso of Wyoming has one-upped McConnell's famous 2010 pledge to make Obama a one-term president by declaring his intention to make Biden "a one-half-term president."

The other reason Democrats should not wait to expand the Court until Republican Justices have overplayed their hand is that these Justices can and will act strategically to avoid the appearance of excessive partisanship. Chief Justice Roberts has demonstrated on numerous occasions an inclination and capacity to cast strategic votes against ideological and partisan interest in order to enable liberal victories in highly salient cases and thus protect the Court from political retaliation. Such instances include Roberts's last-minute vote switch to uphold the individual health-insurance mandate in the Affordable Care Act in 2012,

his vote to exclude the immigration question from the 2019 census form, and his votes in 2020 to invalidate the administration's rescission of DACA and to strike down a restrictive Louisiana abortion statute. Roberts needs only one ally among the other five Republican Justices to ensure that the Court refrains from rendering decisions likely to incite Democrats to expand the Court—until Democrats no longer fully control the national government. In the Court's recently concluded Term, Roberts found that one ally—often more than one—on several occasions upon which the Court either awarded a victory to the liberal side or substantially narrowed the victory it handed to conservatives.

In 2016, as he orchestrated the theft of a Supreme Court seat for the first time in American history, Senator McConnell insisted that he violated no constitutional rule (and that Democrats would have done the same thing had they been in his shoes, a claim for which he offered no evidence and that would strike many close observers of our politics as absurd). In 2020, while hypocritically violating the “principle” he had articulated in 2016 that Supreme Court vacancies should not be filled in presidential election years, McConnell again insisted that he violated no constitutional rule (and, again, that Democrats would have done the same thing in his shoes). McConnell is correct that nothing in the Constitution requires a Senate controlled by one party to confirm a Supreme Court nominee of a president of the other party, no more than it requires the Senate to abstain from confirming Supreme Court nominees close to the date of a presidential election. McConnell violated no statutes or constitutional provisions on either occasion, only norms and traditions that have developed and persisted over hundreds of years and that are essential to the proper functioning of democratic government.

If Democrats expand the Court in 2021, they also would violate no constitutional rule, and Senator McConnell almost certainly would do the same thing were he in their shoes. One of the most difficult tactical questions in contemporary politics is how to respond when members of the other party play hardball. In general, Democrats should not play that game simply because Republicans played it first. It is morally reprehensible that Republicans suppress the votes of Democratic-leaning constituencies, defy the results of popular referenda they disfavor, eviscerate the powers of governors' offices that they no longer control, and seek to overturn the results of presidential elections on the basis of evidence-free allegations of fraud and wild conspiracy theories. Democrats should do none of these things.

Yet if Democrats do not expand the Court while they have the political power to do so, they—and the nation as a whole—will likely rue the day they squandered that opportunity. In contrast to the Republicans' antidemocratic norm violations, Democratic reform of the Court is critical to the preservation of American democracy. Today's Republican Justices can easily contrive constitutional rationales to invalidate most Democratic reform legislation, including measures that entrench democracy. Moreover, should Democrats choose to refrain from expanding the Court now, after Republicans contracted it in 2016-17, it will have no effect on whether Republicans later expand the Court when they have the power and perceive the need to do so. For Democrats to fail to undertake Court reform now may be tantamount to committing political suicide and guaranteeing the further degradation of American democracy.

