

PEOPLE'S PARITY PROJECT

Judicial Supremacy: What Is It & What Can We Do About It?

The Problem

The Supreme Court has too much power. Beginning with the 1803 case *Marbury v. Madison*, in which the power of judicial review¹ was given to the Court by the Court, the justices of the Supreme Court have been on an unrelenting march to concentrate power in their own hands, to the detriment of working people.

This accumulation of power by the Court has resulted in nine unelected and unaccountable actors making fundamental political determinations for over 300 million Americans, with virtually no pushback by the other branches. This has been and remains a recipe for disaster. Our governmental system purports to have three co-equal branches that check and balance each other—yet the judiciary is the only branch continually usurping the power to make political decisions from the others.

The Supreme Court has long used its hoarded power to impede the work of building a more just, democratic nation. In the last 200 years, the Court has demonstrated that when it is allowed to have too much power, it will, far more often than not, use it to regressive ends. Examples of the Court's willingness to stand against progress include, but are far from limited to, the following cases:

- **Dred Scott v. Sandford** (1857) (prohibiting Congress from banning the spread of slavery).
- **The Civil Rights Cases** (1883) (prohibiting Congress from enacting an antidiscrimination law).
- **Pollock v. Farmers' Loan & Trust Co.** (1895) (prohibiting Congress from taxing income or wealth).
- **Shelby County v. Holder** (2013) (restricting Congress from protecting voting rights).
- **Chinese Exclusion Case** (1889) (allowing Congress to exclude immigrants on the basis of race or nationality).
- **Lone Wolf v. Hitchcock** (1903) (allowing Congress to ignore treaties and dispossess Native Americans).
- **Dennis v. United States** (1951) (allowing Congress to target Communists in the labor movement).
- **Trump v. Hawaii** (2018) (upholding the Muslim ban).
- **Dobbs v. Jackson Women's Health Organization** (2022) (overturning the constitutional right to abortion).

In short, when the federal government wants to cause harm to vulnerable people, the Supreme Court tends to be just fine with it. When the federal government wants to build a better world, however, the Supreme Court is quick to interfere. By accepting the Court's power-hoarding, Congress is failing in its responsibility to be a co-equal branch of government.

In its present composition, the Court is locked into a solid 6–3 far-right conservative stronghold as a result of [multiple instances](#) of Republicans playing political games to pack the Court. Scholars have studied this and predict that the Court is currently on pace to [remain](#) under conservative control until at least 2068. Under the current far-right control, it has become increasingly common for the Court to [take up cases](#) without the benefit of full briefings and arguments, [disregard](#) common-sense ethical practices, and [assume](#) the role of chief right-wing policymaker. In just the last few years alone, the current Court has reshaped our country's legal and political landscape by ripping away Americans' right to abortion and bodily autonomy—a decision

¹ The ability of the courts to deem laws passed by Congress and orders signed by the president unconstitutional.

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[met with disapproval](#) by 69 percent of people under 30. From education equity to the environment, LGBTQ+ rights, and democratic participation, the right-wing bloc of justices is handing down decisions that restrict our rights and freedoms—potentially for the rest of our lives—against our will. As our nation continues to struggle in the fight to preserve our democracy and build a better, more just world, it is paramount that we are explicit in identifying the Court as a root cause of the freefall we find ourselves in and respond with appropriate solutions.

Options for Reform

As the Court has proven itself to be increasingly hostile to civil and constitutional rights and far outside of the mainstream of public opinion, conversations around various court reform options have grown louder and louder—as they should. There have already been various pieces of legislation introduced supporting ideas like [court expansion](#), [term limits](#), and [ethics reforms](#). This resource will identify and explain four additional options for reform that must be on the table: jurisdiction stripping, jurisdiction channeling, supermajority requirements, and fast-track congressional review. While the legislation currently proposed largely addresses the composition and conduct of the current Court, these four reforms address the deeper question of the Court's proper role in our democracy.

The Supreme Court threatens any progress we stand to achieve in the foreseeable future. Progressive energy will be ill-spent if we focus only on achieving policy wins in Congress, and not on protecting these wins from the Supreme Court. They are intended to complement, not replace, the reform proposals that are already on the table; in our current moment of Supreme Court-created crisis, it is critical to be aware of all the levers at our disposal and to pull more than one lever simultaneously.

Jurisdiction Stripping

Adding jurisdiction-stripping provisions to democratically enacted legislation allows Congress to remove key questions from the purview of federal courts—something that's [been done before](#). As the current Court continues to use the power of judicial review to attack democratically enacted policies, the need to strengthen critical legislation against bad-faith arguments of unconstitutionality grows. In light of devastating SCOTUS rulings on issues like [labor](#), [abortion](#), [climate change regulations](#), and [gun control](#), we have to prepare for attacks against important legislation like the Women's Health Protection Act, the For the People Act, the Protecting the Right to Organize Act, and any statutes that aim to promote the advancement of racial and economic justice. Preventing unelected, unaccountable, far-right judges from striking down these statutes is critical.

[To learn more about jurisdiction stripping, we recommend this report from the Congressional Research Service.](#)

Jurisdiction Channeling

Congress possesses the authority to channel jurisdiction over particular statutes or issue areas to particular courts. Jurisdiction channeling would allow Congress to decide which courts—either existing federal courts or newly created specialized courts—are the appropriate site for litigation over specific matters. This might look like mandating that any challenges against the For the People Act be brought to the D.C. District Court, a court generally understood to be favorably inclined toward protecting voting rights. That approach was taken in the Voting Rights Act of 1965, where Congress included a provision stating that challenges could only be filed with a three-judge district court panel in D.C. It could also take the form of requiring that any challenges against specific legislation be heard by a specialized court, similar to the Federal Circuit's

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[exclusive jurisdiction](#) over certain patent actions or the [Foreign Intelligence Surveillance Court's](#) unique jurisdiction. Channeling jurisdiction to a specialty court was also famously [used](#) by Franklin Roosevelt's administration, under which the "temporary Emergency Court of Appeals was given exclusive jurisdiction to determine the validity of price control regulations during the New Deal era."

[*To learn more about jurisdiction channeling, we recommend this statement to the Presidential Commission on the Supreme Court of the United States.*](#)

Supermajority Requirement

This reform measure would require a supermajority of justices on the Court or votes to overturn federal legislation. In other words, it would require more than 5 unelected actors to be able to thwart the will of Congress—the more democratically accountable and representative branch of government. Congress has the ability and authority to pass legislation requiring the Court to have a 7–2 (or 8–1, or 11–2) majority to strike down the constitutionality of federal legislation. For example, if the House and Senate were to pass the Green New Deal, a supermajority requirement could protect that legislation from being struck down unless a significant majority of justices agreed that it was unconstitutional. A supermajority requirement would allow the Court to act where Congress clearly gets the constitutionality of a piece of legislation wrong—but when the constitutionality of a law is contested, the people (by proxy of their elected representatives) would have the final say.

[*To learn more about a supermajority requirement, we recommend this article in Slate.*](#)

Fast-Track Congressional Review

Fast-track congressional review would create a mechanism similar to the Congressional Review Act to allow Congress to correct Supreme Court decisions. The existing Congressional Review Act allows Congress to overturn executive branch regulations through an expedited process, with simple majority votes and no amendments. Similar legislation for the Supreme Court could allow Congress to overturn decisions that interpret statutes or invalidate regulations. In one recent example, this mechanism would have been helpful in the case of *Sackett v. EPA*, which dramatically narrowed the scope of the Clean Water Act. If fast-track congressional review for Supreme Court decisions existed, Congress would have had an easy mechanism to correct the Court's incorrect reading of the statute, and wetlands would not be as open to pollution and harmful development and it would be less expensive to treat our water. In other anticipated high-impact statutory interpretation cases, like *Consumer Financial Protection Bureau v. Community Financial Services Association*, fast-track congressional review would allow Congress, not the Courts, to say what democratically enacted laws mean.

[*To learn more about fast-track congressional review, we recommend this article in The Atlantic.*](#)

Get in Touch

We know that we can't take a one-size-fits-all approach to court reform. There are many distinct problems with our judiciary as it is currently constructed and functions, and it will take comprehensive reform in order to ensure that the judiciary is no longer an impediment to our fight for a better world.

If you're interested in learning more about any of these reforms or discussing any of them further, please contact Tristin Brown, PPP Policy & Program Director, at tristin@peoplesparity.org.