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THE SUPREME COURT 2019 TERM

FOREWORD: THE DEGRADATION OF AMERICAN DEMOCRACY — AND THE COURT[†]

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[†] This Foreword was written prior to the 2020 election but will be published after it.

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*Michael J. Klarman**

INTRODUCTION

On June 25, 2013, the Supreme Court invalidated the geographic coverage formula of the 1965 Voting Rights Act,¹ effectively abrogating the preclearance requirement in section 5 of the Act.² Under that provision, most states of the former Confederacy had been required to “preclear” changes to their voting laws and practices with a federal court in Washington, D.C., or with the Department of Justice to ensure those changes did not deny or abridge the right to vote on the basis of race.³ Announcing that “history did not end in 1965”⁴ and that “[o]ur country has changed,” Chief Justice Roberts, writing for the conservative

* Kirkland & Ellis Professor, Harvard Law School. Thanks to my assistant, Mindy Eakin, who makes all of my professional work possible. Mindy Kent provided invaluable reference assistance, as did Maya Bergamasco. I am immensely grateful to the many research assistants who helped me with this project: Cecil Abungu, Kelsey Fraser, Sam Fry, Kim Hill, Stephanie Horwitz, Jess Hui, Izzy Jensen, Will Meyer, Julia More, Jarrod Nelson, Ally O'Connor, Will Ossoff, Owen Senders, Andrew Skaras, Ross Svenson, Michael Torcello, and Ali Wolfson. Special thanks to Kevin Bendesky, Michael Mitchell, John Sullivan, and Cem Tecimer, who, at various points over the summer, were working virtually full time on this project. I received helpful comments from Martha Minow, Eli Nathans, Aziz Huq, Daryl Levinson, Matt Wansley, Chris Havasy, Neil Eggleston, Francesca Procaccini, and Oliver York. Mike Seidman and Susannah Barton Tobin made especially important contributions to improving the manuscript. My brother, Seth Klarman, also provided helpful comments as well as inspiration through his many contributions to preserving American democracy. I dedicate this Foreword to the memory of my father, Herbert Klarman. He was a Polish Jew who came to the United States in 1929. His life embodied the American Dream, and he loved his country in a way that may be distinctive to immigrants coming from places of true oppression. He would have been appalled, though I hope not dispirited, by the recent degradation of American democracy.

¹ Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 (1965) (codified as amended in scattered sections of 52 U.S.C.).

² See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

³ See *id.* at 537–38.

⁴ *Id.* at 552.

majority of the Court, ruled that the geographic coverage formula contained in section 4(b) and used to identify jurisdictions subject to section 5 was outdated and could no longer be constitutionally justified.⁵

Texas Republicans apparently did not receive Chief Justice Roberts's memo announcing how much "our country has changed." Just hours after the decision, Texas implemented a law, enacted two years earlier but blocked by preclearance, that required government-issued photo identification to vote.⁶ The list of approved forms of identification included those more commonly possessed by Republican-leaning voters, such as a concealed handgun permit, but not those more commonly possessed by Democratic-leaning voters, such as college identification cards.⁷ Hundreds of thousands of registered Texas voters did not possess valid forms of voter identification under the law, including disproportionate numbers of African Americans and Latino Americans.⁸ Moreover, nearly a third of the state's counties, including some with large populations of people of color, did not have motor vehicle offices, which provide driver's licenses, the most common form of voter identification.⁹

Further, the Texas law did not require identification to submit an absentee ballot, a voting option used more frequently by Republicans than by Democrats, even though the State Attorney General's investigation of voter fraud found that absentee-ballot fraud was much more prevalent than voter impersonation fraud.¹⁰ Indeed, the investigation had failed to reveal a single instance of voter impersonation fraud.¹¹ Of the 120 Republicans in that Texas legislature, all but six were white.¹² By contrast, the Democratic caucus in that legislature included eleven Caucasians, seventeen African Americans, thirty-two Latino Americans,

⁵ *Id.* at 557.

⁶ S.B. 14, 82d Leg., Reg. Sess., ch. 123, 2011 Tex. Gen. Laws 619 (codified in scattered sections of TEX. ELEC. CODE ANN.); *see also* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 68–69 (2018); Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), <https://nyti.ms/12rWFZb> [<https://perma.cc/95NQ-8D38>].

⁷ *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 257 (2015); *see also id.* at 266–68, 308–09 (discussing disparate impact of the law on different demographic groups).

⁸ *See id.* at 308–09.

⁹ *See id.* at 266; TOVA WANG, DEMOS, VOTER IDENTIFICATION TALKING POINTS AND FACT SHEET 1–2 (2010), https://www.demos.org/sites/default/files/publications/VoterID_National_Demos.pdf [<https://perma.cc/3JZY-NNMV>]; Renée Cross, Jim Granato & Mark P. Jones, *In Texas, Almost All Non-voters Have a Photo ID — But Few Understand the Voter Identification Rules*, WASH. POST (May 8, 2017, 8:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/08/in-texas-almost-everyone-has-a-photo-id-but-few-understand-the-voting-rules> [<https://perma.cc/2CKR-9FM5>].

¹⁰ BERMAN, *supra* note 7, at 258.

¹¹ *Id.*

¹² *See id.* at 257.

and two Asian Americans.¹³ Republican Governor Rick Perry signed the bill, declaring: “This is what democracy is really all about.”¹⁴

North Carolina Republicans apparently did not receive the Chief Justice’s memo either. Seven weeks after the Court’s 2013 ruling on the Voting Rights Act in *Shelby County v. Holder*,¹⁵ they enacted a law imposing a strict voter identification requirement that excluded public-university student identification cards and public-employee identification cards.¹⁶ The legislature had not previously considered a voter identification requirement necessary, but blacks had turned out to vote at higher rates than whites did in 2008 and 2012, with Barack Obama on the ballot, and Latino and college student turnout had also increased.¹⁷ The new law also shortened the early voting period, restricted same-day voter registration, eliminated provisional ballots for those turning 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 the completion of their criminal sentences.¹⁸

In framing the bill, Republican legislators, according to a subsequent court finding, “target[ed] African Americans with almost surgical precision.”¹⁹ For example, African Americans were more than twice as likely as whites to opt for same-day registration and significantly more likely to use early voting and provisional ballots.²⁰ During the litigation challenging the law, one federal judge asked the state’s lawyers: “Why doesn’t North Carolina want people to vote?”²¹ The Obama Administration’s Justice Department would never have precleared such changes.²² As a result of the new law, North Carolina voters encountered many problems at the polls in 2014. For example, eliminating the first week of early voting, which nearly 200,000 people had used in 2010, translated into longer lines on Election Day, especially in predominantly Democratic urban

¹³ *Id.*

¹⁴ *Id.* at 259.

¹⁵ 570 U.S. 529 (2013).

¹⁶ See Voter Information Verification Act, S.L. 2013-381, 2013 N.C. Sess. Laws 1505 (codified as amended in scattered sections of N.C. GEN. STAT.); see also BERMAN, *supra* note 7, at 288, 294, 297.

¹⁷ See BERMAN, *supra* note 7, at 291.

¹⁸ See *id.* at 286, 294–95.

¹⁹ N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

²⁰ J. MORGAN KOUSSER, WHEN AFRICAN-AMERICANS WERE REPUBLICANS IN NORTH CAROLINA, THE TARGET OF SUPPRESSIVE LAWS WAS BLACK REPUBLICANS. NOW THAT THEY ARE DEMOCRATS, THE TARGET IS BLACK DEMOCRATS. THE CONSTANT IS RACE. 18, 29, https://www.aclu.org/sites/default/files/assets/lwv_expert_report_-_m_kousser.pdf [https://perma.cc/5R7K-KUW6].

²¹ BERMAN, *supra* note 7, at 306.

²² See *id.* at 294; Sari Horwitz, *Justice Department Bars Texas Voter ID Law*, WASH. POST (Mar. 12, 2012), https://www.washingtonpost.com/politics/justice-department-bars-texas-voter-id-law/2012/03/12/gIQAUzgW7R_story.html [https://perma.cc/R2BR-EA8Q].

precincts, where waiting times reached as long as three hours.²³ Republican Thom Tillis, who had served as the Speaker of the state House of Representatives when the law was enacted, secured a seat in the U.S. Senate, defeating incumbent Democrat Kay Hagan by 48,000 votes.²⁴ Democracy North Carolina estimated that the law had prevented 30,000 to 50,000 people from voting.²⁵

Reverend William J. Barber II, one of the leaders of the Moral Monday movement spawned in protest against the law, declared that the law “shows the nation what these extreme right-wingers, especially in the South, are willing to do to suppress the vote without having to go through preclearance.”²⁶ Barber did not exaggerate. Although the North Carolina law was among the most extreme, Republican-controlled legislatures throughout the nation enacted similar measures to reduce voter registration and turnout in order to preserve Republican political power in the face of demographic changes unfavorable to the party.²⁷ Against this backdrop, Freedom House, which researches and advocates for democracy around the world, lowered the United States on the organization’s scale of zero to 100 measuring political rights and civil liberties from ninety-four in 2010 to eighty-six in 2017.²⁸ The decline in the United States’ rating exceeded that of other Western democracies.²⁹

Since 2017, the Republican assault on voting rights at the state level has been supplemented by President Donald J. Trump’s attack on the basic norms and institutions of democracy at the national level. President Trump attacks the press as “the enemy of the people”; assails federal judges who invalidate his Administration’s policies or incarcerate his former political associates; politicizes law enforcement, intelligence, and other sectors of the federal government; uses the presidency for personal gain; slyly encourages violence; makes racist statements and

²³ See BERMAN, *supra* note 7, at 312–13.

²⁴ See *North Carolina Election Results: Tillis Defeats Hagan*, N.Y. TIMES (Dec. 17, 2014, 12:28 PM), <https://www.nytimes.com/elections/2014/north-carolina-elections> [https://perma.cc/Q4QY-3S6E]; see also BERMAN, *supra* note 7, at 312.

²⁵ Press Release, Democracy North Carolina, Wake-Up Call: Up to 50,000 NC Voters Silenced by New Rules, Confusion, Poor Preparation at the Polls (Nov. 30, 2014), <https://democracync.org/wp-content/uploads/2017/06/RejectedVoters2014.pdf> [https://perma.cc/3D8V-68Y8].

²⁶ BERMAN, *supra* note 7, at 313; see also *id.* at 287.

²⁷ See *id.* at 260, 311.

²⁸ LARRY DIAMOND, *ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY* 103 (2019).

²⁹ *Id.*; see also MICHAEL J. ABRAMOWITZ, FREEDOM HOUSE, *FREEDOM IN THE WORLD 2018: DEMOCRACY IN CRISIS* 3 (2018), https://freedomhouse.org/sites/default/files/2020-02/FH_FIW_Report_2018_Final.pdf [https://perma.cc/Z9QC-LC44]; Ishaan Tharoor, *Democracy Is in Decline Around the World — And Trump Is Part of the Problem*, WASH. POST (Mar. 5, 2020, 12:00 AM), <https://www.washingtonpost.com/world/2020/03/05/democracy-is-decline-around-world-trump-is-part-problem> [https://perma.cc/4B2L-ALEY].

enacts racist policies; systematically lies; erodes government transparency; expresses admiration for foreign autocrats; and delegitimizes elections and political opposition.³⁰

More than thirty years ago, political scientist Francis Fukuyama, reflecting on a wave of democratization that had swept the world beginning in the 1970s, concluded that liberal democracy had become inevitable — the logical endpoint in the evolutionary trajectory of the modern state.³¹ However, over roughly the last fifteen years, Freedom House has recorded erosion in levels of freedom in once-strong democracies such as Hungary, India, the Philippines, Poland, and Turkey.³² Governments in these countries have shut down independent media, assailed and incarcerated independent journalists, packed courts and bureaucracies with their supporters, dismantled independent institutions of civil society, and vilified racial and religious minorities to distract attention from problems they cannot solve.³³

Many Americans cannot imagine the erosion of their own democracy.³⁴ The United States has the longest-standing constitution in the world, a strong middle class, high levels of wealth and education, and deeply entrenched democratic institutions and mores.³⁵ Yet the United States is not immune from world trends of declining democratization.³⁶ In addition to the developments already noted, research shows that younger Americans are much less committed to democracy than their elders are. Among Americans born in the 1980s, only twenty-nine percent believe that living in a democracy is “essential,” as compared with seventy-one percent of those born in the 1930s.³⁷

This Foreword examines the recent degradation of American democracy, seeks explanations for it, and canvasses the Supreme Court’s contribution to it. Section I.A examines the “authoritarian playbook” to

³⁰ See *infra* section I.B, pp. 19–45.

³¹ Francis Fukuyama, *The End of History?*, NAT’L INT., Summer 1989, at 3–4; see also DIAMOND, *supra* note 28, at 48; YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* 3–4 (2018); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 559–60 (2018).

³² SARAH REPUCCI, FREEDOM HOUSE, *FREEDOM IN THE WORLD 2020: A LEADERLESS STRUGGLE FOR DEMOCRACY* 1–2, 11, 14, 22 (2020), https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf [<https://perma.cc/D9DV-FZNV>]; see also Scheppele, *supra* note 31, at 547.

³³ See generally ARCH PUDDINGTON, FREEDOM HOUSE, *BREAKING DOWN DEMOCRACY: GOALS, STRATEGIES, AND METHODS OF MODERN AUTHORITARIANS* (2017), https://freedomhouse.org/sites/default/files/2020-02/June2017_FH_Report_Breaking_Down_Democracy.pdf [<https://perma.cc/P4U3-MEJQ>] (discussing behavior and tactics of modern authoritarian leaders).

³⁴ See MOUNK, *supra* note 31, at 24–25.

³⁵ See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 1 (2018).

³⁶ See, e.g., MOUNK, *supra* note 31, at 44; see also DIAMOND, *supra* note 28, at 289; Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 100, 120 (2018) (arguing that the United States is not immune to democratic decline but is unlikely to become authoritarian).

³⁷ MOUNK, *supra* note 31, at 105.

establish a baseline against which to evaluate recent American developments. Section I.B considers President Trump's authoritarian bent. Section I.C describes the state measures that Republicans have enacted to entrench themselves in power, including partisan gerrymandering, voter identification laws, purges of the voter rolls, measures to suppress the youth vote, circumvention of inconvenient voter initiatives, and even the delay and cancellation of elections. Section I.D explores Republicans' escalating complicity with President Trump to the point that they mostly do not criticize him for obstructing the investigation into Russian interference with the 2016 presidential election, pressuring the President of Ukraine to dig up dirt on Joe Biden, politicizing law enforcement and intelligence, or catastrophically mishandling the federal government's response to the coronavirus pandemic.

Part II offers explanations for the nation's current political predicament. Groups that fear becoming perpetual political losers may abandon their commitment to democracy, just as white southerners did in the antebellum period. Section II.A, "The Disappearing White Majority," examines the role of demographic change, immigration, and increasing racial resentment in seeding disaffection with democracy. Section II.B, "The Disappearing Christian Majority," describes how the gradual collapse of the idea of the American "Christian nation" has contributed to such disaffection. Section II.C, "The Rise of the Neo-Ayn Randians," considers how radical libertarians, never enthusiastic about democracy because of the threat it posed to property rights, gradually gained ideological and political influence since the 1960s and came to dominate the Republican Party. Section II.D, "Economic Inequality," explores how working-class Americans, whose economic situation stopped improving about forty years ago, have become disaffected with a democratic political system that no longer works for them. Section II.E explains how these other developments, refracted through American political and media ecosystems, have produced a politics of asymmetric polarization, hardball, and negative partisanship, which created a Republican Party no longer strongly committed to democracy and prepared to defend at all costs a President with a strong authoritarian bent.

Part III examines the Supreme Court's contributions to the degradation of American democracy. As already noted, in 2013, the Court's conservatives essentially abrogated the preclearance provision of the Voting Rights Act, enabling Republican governments in the South to enact voting restrictions that allowed the party to maintain political power in rapidly diversifying states such as Florida, Georgia, North Carolina, and Texas. The Court's Republican Justices have also upheld stringent voter identification laws and purges of the voter rolls, both of which purport to address the largely nonexistent problem of voter fraud while disfranchising Democratic-leaning constituencies, such as people of color, the poor, and the young. Most recently, the conservative Justices have declined to

intervene against partisan gerrymandering, which has mostly benefited Republicans in recent years.

The Court's campaign finance decisions, dating back to 1976 but becoming increasingly extreme over the last decade, have created a political system dominated by money, which advantages Republicans who disproportionately benefit from the political spending of the most affluent Americans. In *Bush v. Gore*,³⁸ the Court helped elect a Republican President, who appointed two conservative Justices who made possible the recent rulings undermining democracy.

In 2019, the conservative Justices fell one vote short of enabling Republicans to entrench themselves in power for another decade by ensuring that people of color would be undercounted in the 2020 census. Only a last-minute change of heart by the Chief Justice stymied that effort. The conservative Justices have also abjured the Court's traditional role in protecting vulnerable racial and religious minorities from discrimination by validating the Trump Administration's thinly veiled ban on Muslim travel to the United States. Part III concludes by discussing how constitutional interpretation works in general and why the Republican majority's rulings on issues of democratic governance nearly always benefit the Republican Party.

Part IV briefly considers how to bolster American democracy. The best way to stem the degradation of democracy is to entrench democracy. Yet this is an uphill battle, both because political actors who benefit from the status quo are incentivized to resist changes to it and because various structural features of the American political system advantage Republicans. To entrench democracy, Democrats would need to overcome simultaneously the disadvantages of partisan gerrymandering and geographic clustering in state legislatures and the House of Representatives, extreme malapportionment in the Senate, the vagaries and malapportionment of the Electoral College, and the flood of unregulated political spending that the Court has unleashed. Even then, Republican Justices might invalidate democracy-entrenching measures. Moreover, some such measures, such as campaign finance reform, may require a constitutional amendment, given the conservative Justices' strained interpretations of the First Amendment.

The Court has a Republican majority today only because Senate Majority Leader Mitch McConnell stole a Supreme Court seat from Democrats in 2016, when he refused to permit President Obama to fill the vacancy left by the death of Justice Scalia. To entrench democracy, Democrats will probably have to undo that theft.

A brief Conclusion examines competing reasons to be pessimistic or optimistic regarding prospects for stemming the degradation of American democracy and reflects on the deeply contingent nature of this story's outcome.

³⁸ 531 U.S. 98 (2000) (per curiam).

Autocrats around the world sow disinformation, undermine confidence in truth, and normalize chaos. They take advantage of the powerful psychological tendencies to normalize the world as it exists and to resist imagining worst-case scenarios and of the powerful impulses to believe that every story has two sides and that all political actors engage in roughly similar forms of behavior. Those who resist autocracy must insist on the difference between fact and opinion, counter the impulse to normalize lies and outrages, and reject the assumptions that all stories have two sides and all political actors are basically the same. This Foreword is written in the spirit of that resistance.

I. THE DEGRADATION OF AMERICAN DEMOCRACY

In evaluating the Republican Party's assault on voting rights and President Trump's war on the institutions and norms of democracy, it is useful to begin with a baseline, which I shall call the "Authoritarian Playbook."

A. *The Authoritarian Playbook*

The first two decades of the twenty-first century have witnessed a significant degradation of democracy around the world.³⁹ Many countries emerging a few decades ago from communist domination or military dictatorships as budding democracies have recently regressed, as democratically elected leaders have attacked the norms and institutions of democracy.⁴⁰ Roughly two dozen nations are at issue, and while the experience of each necessarily differs in the details, it is possible to extract an "authoritarian playbook," which such leaders have indeed borrowed from one another.

Authoritarian leaders often initially acquire power as a result of a divided political opposition.⁴¹ They are sometimes aided by political parties that profess opposition to authoritarianism while nonetheless joining forces with authoritarians to advance their political objectives.⁴² For example, until recently, center-right parties in the European Parliament resisted imposing sanctions on Prime Minister Viktor Orbán's increasingly authoritarian regime in Hungary because delegates of his party, Fidesz, usually voted with them.⁴³

³⁹ See, e.g., LEVITSKY & ZIBLAT, *supra* note 35, at 5; Huq & Ginsburg, *supra* note 36, at 120–23.

⁴⁰ See Huq & Ginsburg, *supra* note 36, at 118–19.

⁴¹ See, e.g., LEVITSKY & ZIBLAT, *supra* note 35, at 24–29, 68–69; MOUNK, *supra* note 31, at 190.

⁴² See LEVITSKY & ZIBLAT, *supra* note 35, at 25.

⁴³ See DIAMOND, *supra* note 28, at 71.

Once in power, authoritarian leaders often manipulate electoral rules to entrench their position.⁴⁴ Fidesz came to power in 2010, when its fifty-three percent of the popular vote translated into sixty-eight percent of parliamentary seats.⁴⁵ A two-thirds legislative majority empowered the party to implement gerrymandering and other election law changes that enabled it to maintain its supermajority despite winning only forty-five percent of the popular vote in 2014.⁴⁶ Authoritarians often draw on the support of rural voters and malapportion the legislature to dilute the power of their urban opponents.⁴⁷ They also enfranchise voters whom they believe will support them and disfranchise those whom they suspect will not.⁴⁸ Subtle and complex changes in electoral mechanisms often escape the notice of ordinary citizens.⁴⁹ Even when autocrats lose elections, they try to manipulate the political system to avoid losing power.⁵⁰

Adopting entrenchment tactics similar to those used by other authoritarians, Prime Minister Orbán altered parliamentary procedures to prevent opposition members from speaking or offering amendments to government bills.⁵¹ Authoritarians often extend their power vertically by replacing local officeholders with party loyalists and exercise iron discipline over their party members.⁵² Authoritarians use legislative control to amend constitutions — for example, abolishing term limits on officeholding.⁵³ In Russia, President Vladimir Putin recently secured from a compliant legislature and electorate a reset of presidential term limits through a constitutional amendment that will enable him to remain in office through 2036.⁵⁴

Autocrats typically attack the independent institutions of the state and civil society — the “referees” of the system — that represent potential roadblocks to their accumulation of power.⁵⁵ The media is often

⁴⁴ See *id.* at 65; LEVITSKY & ZIBLATT, *supra* note 35, at 87.

⁴⁵ Scheppele, *supra* note 31, at 549.

⁴⁶ See DIAMOND, *supra* note 28, at 61; see also Kim Lane Scheppele, *Legal but Not Fair: Viktor Orbán's New Supermajority*, VERFASSUNGSBLOG: ON MATTERS CONST. (Apr. 14, 2014), <https://verfassungsblog.de/legal-but-not-fair-viktor-orbans-new-supermajority> [<https://perma.cc/2E4P-UV9Z>].

⁴⁷ Huq & Ginsburg, *supra* note 36, at 138.

⁴⁸ See, e.g., Scheppele, *supra* note 31, at 549–50 & 549 n.11.

⁴⁹ See *id.* at 579 & n.116.

⁵⁰ See, e.g., Huq & Ginsburg, *supra* note 36, at 137.

⁵¹ See, e.g., Scheppele, *supra* note 31, at 550–51.

⁵² See, e.g., *id.* at 551.

⁵³ On attempts to evade or overturn term limits and the consequences of such attempts, see Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1811–15, 1851, 1866–67 (2011).

⁵⁴ See Andrew Higgins, *The Theatrical Method in Putin's Vote Madness*, N.Y. TIMES (July 1, 2020), <https://nyti.ms/3eQeJZJ> [<https://perma.cc/7G95-E2UL>].

⁵⁵ See LEVITSKY & ZIBLATT, *supra* note 35, at 177; see also DIAMOND, *supra* note 28, at 60; Scheppele, *supra* note 31, at 549.

their first target because it has the capacity to expose lies, corruption, and incompetence as well as to coordinate and publicize protest.⁵⁶ As the late Senator John McCain warned: “When you look at history, the first thing that dictators do is shut down the press.”⁵⁷

Authoritarians often seek control over public media, sometimes through complex oversight mechanisms that defy transparency.⁵⁸ In Poland, the reigning Law and Justice Party pressured public media to stop featuring liberal commentators.⁵⁹ When the national broadcasting council reported in 2016 that Polish broadcasters were violating their duty to present a plurality of viewpoints, the Polish Parliament effectively replaced the council with a new oversight board composed of political appointees.⁶⁰

Authoritarians also may pressure private media to support the regime.⁶¹ In 2015, the Law and Justice Party mandated government control of the boards of all broadcasting organizations and weakened a constitutional body tasked with protecting media independence.⁶² Private media can also be seduced with government advertising contracts or intimidated by government threats, such as the selective enforcement of tax laws.⁶³

Control of the media enables authoritarians to lie about their accomplishments and suppress criticism.⁶⁴ As the Nazis’ chief propagandist Joseph Goebbels famously declared: “If you tell a great lie and repeat it often enough, the people will eventually come to believe it.”⁶⁵ Even if authoritarians cannot convince the public to believe them, they seek to undermine the credibility of traditional media and confuse the public about what to believe.⁶⁶ As Putin critic Garry Kasparov explains: “The point of modern propaganda isn’t only to misinform or push an

⁵⁶ See DIAMOND, *supra* note 28, at 212; MOUNK, *supra* note 31, at 44.

⁵⁷ A.G. Sulzberger, Opinion, *The Growing Threat to Journalism Around the World*, N.Y. TIMES (Sept. 23, 2019), <https://nyti.ms/2mEuVH7> [<https://perma.cc/4E7Z-HAFW>].

⁵⁸ See, e.g., DIAMOND, *supra* note 28, at 60, 64; MOUNK, *supra* note 31, at 126–27.

⁵⁹ See Jakub Dymek & Zsolt Kapelner, *It Doesn’t Take a Dictator to Smother a Free Press*, DISSENT MAG. (May 3, 2017), https://www.dissentmagazine.org/online_articles/hungary-poland-orban-pis-press-freedom [<https://perma.cc/GY46-Z6S9>].

⁶⁰ See *id.*

⁶¹ See MOUNK, *supra* note 31, at 44.

⁶² See Huq & Ginsburg, *supra* note 36, at 132.

⁶³ See Scheppele, *supra* note 31, at 578–79, 579 n.115; Huq & Ginsburg, *supra* note 36, at 133 & n.250.

⁶⁴ See, e.g., Huq & Ginsburg, *supra* note 36, at 132–34.

⁶⁵ NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT’S STEALTH PLAN FOR AMERICA* 211 (2017).

⁶⁶ See PUDDINGTON, *supra* note 33, at 17–20, 57; cf. Thomas B. Edsall, Opinion, *Trump Is Waiting and He Is Ready*, N.Y. TIMES (Feb. 12, 2020), <https://nyti.ms/2UK67MX> [<https://perma.cc/5WXU-CSF6>] (describing President Trump’s “success in marketing provable falsehoods and an alternate reality”).

agenda. It is to exhaust your critical thinking, to annihilate truth.”⁶⁷ Authoritarians even seek to obliterate historically inconvenient facts by rewriting the past.⁶⁸ For example, the Law and Justice Party attempted to rescind an award given by a previous Polish government to a Princeton historian who had documented the extent of Polish involvement in the Holocaust.⁶⁹

Authoritarians criminalize speech they consider dangerous, such as under a statute forbidding the publication of material that may “foment anxiety in the public or disturb public order.”⁷⁰ Occasionally, authoritarians simply murder troublesome journalists. In 2018, Saudi assassins murdered and dismembered the body of *Washington Post* columnist Jamal Khashoggi in the Saudi consulate in Istanbul as an object lesson to regime critics.⁷¹

Autocrats seek control over independent judges, who may threaten their efforts to consolidate power and protect the rights of unpopular minority groups. Independent judges can be removed or rendered irrelevant by court packing, which can be dressed up in the guise of judicial reform.⁷² Prime Minister Orbán increased the size of the Hungarian constitutional court and changed the rules for nominating justices to enable a new body singlehandedly to appoint new ones.⁷³ Fidesz also packed the lower courts by lowering the retirement age for judges, producing vacancies in nearly half of those courts’ leadership positions.⁷⁴

Authoritarians can often intimidate or corrupt formerly independent judges into doing their handiwork. The once-famously independent India Supreme Court now rules reliably in favor of the Hindu-nationalist regime of Prime Minister Narendra Modi.⁷⁵ That court has authorized the incarceration of the Prime Minister’s critics⁷⁶ and ruled

⁶⁷ Jay Rosen, *The Christmas Eve Confessions of Chuck Todd*, PRESS THINK (Dec. 26, 2019, 1:40 AM), <https://pressthink.org/2019/12/the-christmas-eve-confessions-of-chuck-todd> [<https://perma.cc/4KH5-3V5Q>].

⁶⁸ Cf. GEORGE ORWELL, 1984, at 33–35 (1977) (describing such obfuscation of history in a fictional totalitarian society).

⁶⁹ MOUNK, *supra* note 31, at 127.

⁷⁰ Huq & Ginsburg, *supra* note 36, at 132 (quoting Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37, 39 (2015) (describing a law enacted by the Venezuelan government)).

⁷¹ See David D. Kirkpatrick & Malachy Browne, *Naming Names, Turks Turn Up Heat on Saudis in Consulate Case*, N.Y. TIMES (Oct. 10, 2018), <https://nyti.ms/2A2748s> [<https://perma.cc/9HZR-K5EX>]; Sulzberger, *supra* note 57.

⁷² See, e.g., Huq & Ginsburg, *supra* note 36, at 126; Scheppele, *supra* note 31, at 552.

⁷³ See Scheppele, *supra* note 31, at 550–51, 573 & n.100.

⁷⁴ See *id.* at 553.

⁷⁵ See Rana Ayyub, Opinion, *The Destruction of India’s Judicial Independence Is Almost Complete*, WASH. POST (Mar. 24, 2020, 2:08 PM), <https://www.washingtonpost.com/opinions/2020/03/24/destruction-indias-judicial-independence-is-almost-complete> [<https://perma.cc/FDK5-95HD>].

⁷⁶ See *id.*

against Muslims in a high-profile dispute over land arising from the 1992 destruction of a mosque by Hindu nationalists.⁷⁷ In addition, the government immediately transferred to another court a Delhi high court justice who criticized the police for their performance in investigations of Hindu mobs that killed dozens of Muslims.⁷⁸

Autocrats also attack other independent agencies of government. They stack electoral commissions with loyalists and undermine the authority of government ethics watchdogs.⁷⁹ More generally, authoritarians curtail the power of nonpolitical civil servants, who represent potential obstacles to the rapid accumulation and misuse of state power.⁸⁰ The commitment of professional bureaucrats to science, expertise, and truth frequently sets them at odds with the political priorities of an autocratic regime.⁸¹ Bureaucrats also have significant power to resist an autocrat's agenda — building an administrative record that complicates execution of the regime's designs, strategically leaking damning information to the press, and seeking judicial recourse to avoid being compelled to violate the law.⁸²

Thus, autocrats usually seek to expand the executive's power to appoint and remove bureaucrats. For instance, Turkish President Recep Tayyip Erdogan has increased the government's control over the selection of judges and prosecutors, and since the alleged coup attempt against the government in 2016, the regime has detained or purged thousands of police officers, teachers, and other education officials.⁸³ One favored technique of undermining an independent civil service is cronyism — installing political allies and party loyalists in powerful government positions.⁸⁴ Authoritarians are particularly keen to seize control over law enforcement and intelligence gathering, which can provide

⁷⁷ See Maria Abi-Habib & Sameer Yasir, *Court Backs Hindus on Ayodhya, Handing Modi Victory in His Bid to Remake India*, N.Y. TIMES (Nov. 8, 2019), <https://nyti.ms/2p5rcEe> [<https://perma.cc/W5BQ-LAY4>].

⁷⁸ See Sameer Yasir & Suhasini Raj, *Indian Police Sweep Through Riot Zone, Making More Arrests*, N.Y. TIMES (Apr. 2, 2020), <https://nyti.ms/2Tlvdj2> [<https://perma.cc/QC5G-53CH>].

⁷⁹ See, e.g., MOUNK, *supra* note 31, at 9–10; Huq & Ginsburg, *supra* note 36, at 136–37; Scheppele, *supra* note 31, at 549–50.

⁸⁰ See Huq & Ginsburg, *supra* note 36, at 127–29, 148, 150; see also Timothy Garton Ash, *The Pillars of Poland's Democracy Are Being Destroyed*, THE GUARDIAN (Jan. 7, 2016, 1:32 PM), <https://www.theguardian.com/commentisfree/2016/jan/07/polish-democracy-destroyed-constitution-media-poland> [<https://perma.cc/8AQZ-8EN9>]; Patrick Kingsley, *How Viktor Orban Bends Hungarian Society to His Will*, N.Y. TIMES (Mar. 27, 2018), <https://nyti.ms/2pJWZYt> [<https://perma.cc/XAQ4-4V38>].

⁸¹ See, e.g., Huq & Ginsburg, *supra* note 36, at 128–29, 150.

⁸² See *id.* at 150.

⁸³ *Id.* at 130.

⁸⁴ See Scheppele, *supra* note 31, at 549–54.

both a shield to protect themselves and a sword with which to attack their opponents.⁸⁵

Authoritarians also attack civil society institutions that may limit their power — universities, think tanks, and labor unions.⁸⁶ Such entities are capable of independent thought and can publicize government abuse and incompetence.⁸⁷ In 2018, Prime Minister Orbán finally succeeded in forcing the Central European University out of Hungary.⁸⁸ Fidesz, Prime Minister Orbán's party, also put the finances of every Hungarian university department under the authority of a government-appointed chancellor.⁸⁹

Authoritarians do not generally acknowledge the legitimacy of their political opponents, instead demonizing them as subversives and traitors.⁹⁰ Autocrats also attack the media they do not control.⁹¹ The current generation of authoritarians harass and intimidate political opponents, and, when necessary, they tolerate or encourage violence against them, incarcerate them on trumped-up charges, or bankrupt them through defamation lawsuits.⁹²

Authoritarian populists often invoke a plebiscitary mandate to justify their assault upon independent institutions: the people elected them with a mandate for change, and the people's will ought not to be stymied by technical legal constraints.⁹³ In Poland, when Law and Justice ignored a court order invalidating its attempt at court packing, one of its leaders said: "[I]t is the will of the people, not the law that matters."⁹⁴ Furthermore, authoritarian populists often attack the ruling elite as corrupt and promise to restore power to the people.⁹⁵

To divert attention from difficult-to-solve problems, such as a failing economy, authoritarians deflect blame for their nation's ills onto — and unify their citizens against — external agents, internal "traitors," and

⁸⁵ See, e.g., LEVITSKY & ZIBLATT, *supra* note 35, at 78; see also DIAMOND, *supra* note 28, at 65; Scheppele, *supra* note 31, at 549–50 (noting that one of Prime Minister Orbán's first legal initiatives was to attack the independence of the prosecutor's office).

⁸⁶ DIAMOND, *supra* note 28, at 64–65; MOUNK, *supra* note 31, at 43–45; Huq & Ginsburg, *supra* note 36, at 133.

⁸⁷ See, e.g., MOUNK, *supra* note 31, at 45.

⁸⁸ DIAMOND, *supra* note 28, at 61; see also Huq & Ginsburg, *supra* note 36, at 133.

⁸⁹ Kingsley, *supra* note 80.

⁹⁰ See LEVITSKY & ZIBLATT, *supra* note 35, at 8, 75; MOUNK, *supra* note 31, at 40–43.

⁹¹ Cf. LEVITSKY & ZIBLATT, *supra* note 35, at 75, 81–84; Huq & Ginsburg, *supra* note 36, at 132–33.

⁹² See MOUNK, *supra* note 31, at 40–41; Huq & Ginsburg, *supra* note 36, at 133–37, 139–41.

⁹³ See DIAMOND, *supra* note 28, at 62–66; Scheppele, *supra* note 31, at 549, 557, 562, 568 n.82, 573 & n.99, 574.

⁹⁴ Huq & Ginsburg, *supra* note 36, at 127.

⁹⁵ See MOUNK, *supra* note 31, at 38–39.

“others” who differ from the majority in terms of race, ethnicity, or religion.⁹⁶ In European history, Jews were often the target.⁹⁷ Even today, Fidesz focuses its ire on American billionaire George Soros,⁹⁸ a World War II-era Hungarian Jewish refugee, falsely suggesting that he pressured Hungary to admit large populations of migrants during the mass migration of refugees to Europe in 2015.⁹⁹

However, Muslims are the minority group most frequently targeted by authoritarians today. As economic growth in India has slowed, Prime Minister Modi has pursued a Hindu nationalist agenda at the expense of the nation’s two hundred million Muslims.¹⁰⁰ Last year, the government negated the autonomy of India’s only Muslim-majority state, Kashmir, and incarcerated hundreds of politicians and activists without publicly announcing criminal charges.¹⁰¹ The Indian Parliament also passed a citizenship bill that provides a clear path to citizenship to members of every major religious group in South Asia except Muslims while threatening to expel Muslims who cannot adequately document Indian citizenship.¹⁰² Prime Minister Modi has accused opposition leaders of being backed by the nation’s archenemy Pakistan, a majority-Muslim country,¹⁰³ and the home minister has called immigrants from Bangladesh, another majority-Muslim country, “termites.”¹⁰⁴

Even though Hungary accepted very few refugees in 2015, Prime Minister Orbán has vowed to defend European Christianity against the “poison” of Muslim refugees from Syria and Afghanistan.¹⁰⁵ When neo-fascist groups marched in Warsaw in 2017 carrying signs saying “White Europe” and flags with white supremacist symbols, the Polish Foreign

⁹⁶ See, e.g., DIAMOND, *supra* note 28, at 62–63; MOUNK, *supra* note 31, at 7–9, 40–43.

⁹⁷ Cf. LEVITSKY & ZIBLATT, *supra* note 35, at 43; MOUNK, *supra* note 31, at 240.

⁹⁸ Patrick Kingsley, *Hungary Criminalizes Aiding Illegal Immigrants*, N.Y. TIMES (June 20, 2018), <https://nyti.ms/2ME85b4> [<https://perma.cc/HRR9-WXUH>].

⁹⁹ ANNE APPLEBAUM, *TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM* 39 (2020).

¹⁰⁰ Maria Abi-Habib & Sameer Yasir, *As Modi Pushes Hindu Agenda, a Secular India Fights Back*, N.Y. TIMES (Feb. 25, 2020), <https://nyti.ms/2EFSy88> [<https://perma.cc/PH47-DXMZ>].

¹⁰¹ Jeffrey Gettleman, Kai Schultz, Sameer Yasir & Suhasini Raj, *India’s Move in Kashmir: More than 2,000 Rounded Up with No Recourse*, N.Y. TIMES (Aug. 23, 2019), <https://nyti.ms/2Nt7aNT> [<https://perma.cc/654F-P674>].

¹⁰² See Jeffrey Gettleman & Suhasini Raj, *Indian Parliament Passes Divisive Citizenship Bill, Moving It Closer to Law*, N.Y. TIMES (Feb. 26, 2020), <https://nyti.ms/2t8Z1G7> [<https://perma.cc/5H5F-PUVM>].

¹⁰³ Jeffrey Gettleman & Hari Kumar, *India’s Economic Woes Are Piercing Modi’s Aura of Invulnerability*, N.Y. TIMES (Jan. 6, 2018), <https://nyti.ms/2EdSURa> [<https://perma.cc/Z74F-GMNQ>].

¹⁰⁴ Jeffrey Gettleman & Hari Kumar, *India Plans Big Detention Camps for Migrants. Muslims Are Afraid.*, N.Y. TIMES (Aug. 17, 2019), <https://nyti.ms/3obSztn> [<https://perma.cc/5LT9-MET6>].

¹⁰⁵ DIAMOND, *supra* note 28, at 61 (citing Miklós Haraszti, *Behind Viktor Orbán’s War on Refugees in Hungary*, HUFFPOST (Dec. 6, 2017), https://www.huffingtonpost.com/miklos-haraszti/viktor-orban-hungary-refugees_b_8100906.html [<https://perma.cc/98EJ-MFQQ>]); see also MOUNK, *supra* note 31, at 176.

Ministry originally called the demonstration “a great celebration of Poles, differing in their views, but united around the common values of freedom and loyalty to an independent homeland.”¹⁰⁶ Across different countries, defenders of liberalism and pluralism who protest the vilification of minorities are often denounced by authoritarians as “politically correct.”¹⁰⁷

Authoritarian regimes are often, but not always, more corrupt than democracies.¹⁰⁸ Leaders who do not rule through genuine consent of the governed may need to purchase the support of powerful business elites by inviting them to enrich themselves through government largesse.¹⁰⁹ Those not converted into regime loyalists through the carrot of enrichment can often be convinced by the stick of intimidation.¹¹⁰ Just months into his first term, President Putin “summoned twenty-one of Russia’s wealthiest businessmen [who had the means to finance political opposition] to the Kremlin, where he told them that they would be free to make money under his watch — but only if they stayed out of politics.”¹¹¹ Most businessmen complied, but one who did not faced the threat of arrest and was investigated for fraud.¹¹² Such examples often have powerful incentive effects on everyone else.

Today’s autocrats are not your grandparents’ autocrats.¹¹³ With a few exceptions, such as in Thailand and Egypt, they assumed power not through military coups, but in democratic elections.¹¹⁴ Some of them, such as Turkish President Erdogan and Venezuelan President Hugo Chavez, initially governed as democrats.¹¹⁵ Even after turning authoritarian, they continued to hold elections to maintain the appearance of democratic legitimacy.¹¹⁶ The “new autocrats” generally refrain from massive human rights violations.¹¹⁷ They are more inclined to drive

¹⁰⁶ Vanessa Gera, *Polish President Sharply Condemns Weekend Nationalist March*, ASSOCIATED PRESS (Nov. 13, 2017), <https://apnews.com/article/651bdb77d51b4d1697d1dfca8606bdcd> [https://perma.cc/YSJ4-N4C6].

¹⁰⁷ See Scheppele, *supra* note 31, at 567–68, 567 nn.78–79.

¹⁰⁸ See DIAMOND, *supra* note 28, at 6. See generally Matthew C. Stephenson, *Corruption and Democratic Institutions: A Review and Synthesis*, in GREED, CORRUPTION, AND THE MODERN STATE: ESSAYS IN POLITICAL ECONOMY 92 (Susan Rose-Ackerman & Paul Lagunes eds., 2015) (exploring existence of corruption in democratic societies).

¹⁰⁹ See DIAMOND, *supra* note 28, at 61, 65; LEVITSKY & ZIBLATT, *supra* note 35, at 81.

¹¹⁰ See, e.g., DIAMOND, *supra* note 28, at 65; see also LEVITSKY & ZIBLATT, *supra* note 35, at 83.

¹¹¹ LEVITSKY & ZIBLATT, *supra* note 35, at 85.

¹¹² *Id.*

¹¹³ See Scheppele, *supra* note 31, at 547–48, 571, 578; see also Huq & Ginsburg, *supra* note 36, at 93–99.

¹¹⁴ DIAMOND, *supra* note 28, at 55; LEVITSKY & ZIBLATT, *supra* note 35, at 3; Huq & Ginsburg, *supra* note 36, at 100–02.

¹¹⁵ See LEVITSKY & ZIBLATT, *supra* note 35, at 4; MOUNK, *supra* note 31, at 188.

¹¹⁶ See, e.g., LEVITSKY & ZIBLATT, *supra* note 35, at 77; MOUNK, *supra* note 31, at 188; Huq & Ginsburg, *supra* note 36, at 136–37; Scheppele, *supra* note 31, at 547.

¹¹⁷ Scheppele, *supra* note 31, at 574–77.

political opponents and critical journalists into exile or bankruptcy than to incarcerate them.¹¹⁸

To avoid setting off alarm bells, the new autocrats undermine democracy only incrementally.¹¹⁹ Rather than abolishing traditional institutions of governance, they weaken their independence.¹²⁰ Because no single measure appears outrageous, citizens may not recognize the danger to democracy — the proverbial frog failing to notice it is slowly being boiled alive.¹²¹ Measuring today’s autocrats against Adolf Hitler and Joseph Stalin makes them appear to be models of democratic commitment.¹²² Indeed, the new authoritarians may invoke these very comparisons to ridicule their critics as absurd exaggerators.¹²³

Authoritarians often use economic crises, natural disasters, terrorist attacks, and wars as opportunities to consolidate power.¹²⁴ Citizens tend to rally in support of chief executives during such crises.¹²⁵ Indeed, many modern constitutions affirmatively license expanded executive power during emergencies.¹²⁶ President Erdogan used an apparent coup against him in 2016 to justify a massive crackdown on political opponents, leading to a constitutional amendment that augmented presidential power.¹²⁷ And, if crises do not conveniently appear, they can often be manufactured.¹²⁸

Of course, autocrats are not invariably successful in their efforts to accumulate power. Autocracy is no more inevitable than democracy.¹²⁹

B. *President Trump’s Authoritarian Bent*

The United States is not immune from the forces precipitating international democratic decline.¹³⁰ Although President Trump is not much

¹¹⁸ *Id.* at 575–77.

¹¹⁹ See LEVITSKY & ZIBLATT, *supra* note 35, at 92.

¹²⁰ See, e.g., Huq & Ginsburg, *supra* note 36, at 126, 129, 140; Scheppele, *supra* note 31, at 549–50, 573.

¹²¹ See Huq & Ginsburg, *supra* note 36, at 119; see also *id.* at 97–98, 117–18; LEVITSKY & ZIBLATT, *supra* note 35, at 77, 92; Scheppele, *supra* note 31, at 582.

¹²² See Scheppele, *supra* note 31, at 571–75.

¹²³ Cf. *id.* at 577–78 (describing how the “new autocrats” behave in ways that enable them to “claim that they are not authoritarians of the twentieth-century sort”).

¹²⁴ See, e.g., LEVITSKY & ZIBLATT, *supra* note 35, at 92–93; Scheppele, *supra* note 31, at 571–72, 571 n.90.

¹²⁵ LEVITSKY & ZIBLATT, *supra* note 35, at 93–94.

¹²⁶ *Id.* at 94; Huq & Ginsburg, *supra* note 36, at 110–11.

¹²⁷ LEVITSKY & ZIBLATT, *supra* note 35, at 96; see also Scheppele, *supra* note 31, at 575 n.104.

¹²⁸ See, e.g., LEVITSKY & ZIBLATT, *supra* note 35, at 93–96.

¹²⁹ Cf. Scheppele, *supra* note 31, at 555 (noting that “not all states that start down this path of autocratic legalism necessarily end in a democratic death spiral”).

¹³⁰ See sources cited *supra* note 36.

of a reader,¹³¹ he displays an astonishingly intuitive grasp of the authoritarian playbook. During and since the 2016 presidential campaign, Trump has made little effort to hide his authoritarian bent.¹³²

I. Attacks on Freedom of the Press and Freedom of Speech. — During the 2016 campaign, Trump called for “open[ing] up” libel laws,¹³³ and his reelection campaign recently filed several defamation lawsuits against media outlets that published articles regarding his stance toward Russian interference in the 2016 and 2020 presidential elections.¹³⁴ Since becoming President, Trump has dismissed hundreds of media stories as “fake news,”¹³⁵ such as *The New York Times*’s investigation of his family’s tax-avoidance schemes¹³⁶ and *The Wall Street Journal*’s revelations of his hush-money payments to an adult-film star.¹³⁷ He regularly calls the mainstream media the true “enemy of the people”¹³⁸ — a term invoked in the twentieth century to justify mass executions in Nazi Germany¹³⁹ and Soviet Russia.¹⁴⁰

President Trump has sought to intimidate critical reporters by tweeting about them, calling for them to be fired, and pointing them out at rallies.¹⁴¹ At one campaign event, the Secret Service had to escort NBC

¹³¹ See PHILIP RUCKER & CAROL LEONNIG, A VERY STABLE GENIUS: DONALD J. TRUMP’S TESTING OF AMERICA 166 (2020).

¹³² See DIAMOND, *supra* note 28, at 76; LEVITSKY & ZIBLATT, *supra* note 35, at 64–65.

¹³³ Hadas Gold, *Donald Trump: We’re Going to “Open Up” Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> [<https://perma.cc/FP5T-B6YT>].

¹³⁴ Joshua A. Geltzer & Neal K. Katyal, *The True Danger of the Trump Campaign’s Defamation Lawsuits*, THE ATLANTIC (Mar. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/true-danger-trump-campaigns-libel-lawsuits/607753> [<https://perma.cc/7Q4C-Q3FQ>].

¹³⁵ See Michael M. Grynbaum, *After Another Year of Trump Attacks, “Ominous Signs” for the American Press*, N.Y. TIMES (Jan. 2, 2020), <https://nyti.ms/2Q6bwet> [<https://perma.cc/55RK-ZFTS>].

¹³⁶ David Barstow, Susanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father*, N.Y. TIMES (Oct. 2, 2018), <https://nyti.ms/37TvkqZ> [<https://perma.cc/H46M-JCWM>]; see also Sulzberger, *supra* note 57.

¹³⁷ Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Arranged \$130,000 Payment for Adult-Film Star’s Silence*, WALL ST. J. (Jan. 12, 2018, 3:13 PM), <https://www.wsj.com/articles/trump-lawyer-arranged-130-000-payment-for-adult-film-stars-silence-1515787678> [<https://perma.cc/6XLJ-T5RF>]; see also Sulzberger, *supra* note 57.

¹³⁸ William P. Davis, *“Enemy of the People”: Trump Breaks Out this Phrase During Moments of Peak Criticism*, N.Y. TIMES (July 19, 2018), <https://nyti.ms/2JCNZv3> [<https://perma.cc/3LXF-7U7X>].

¹³⁹ Timothy Snyder, Opinion, *How Hitler Pioneered “Fake News,”* N.Y. TIMES (Oct. 16, 2019), <https://nyti.ms/2ptRcZS> [<https://perma.cc/4JYP-ZVFZ>].

¹⁴⁰ David Remnick, *Trump and the Enemies of the People*, NEW YORKER (Aug. 15, 2018), <https://www.newyorker.com/news/daily-comment/trump-and-the-enemies-of-the-people> [<https://perma.cc/RWR5-CQSN>].

¹⁴¹ See, e.g., Emily Yahr, *President Trump Calls for Washington Post Reporter Who Apologized for Inaccurate Tweet to Be Fired*, WASH. POST (Dec. 9, 2017), <https://www.washingtonpost.com/lifestyle/style/president-trump-calls-for-washington-post-reporter-who-apologized-for-inaccurate->

reporter Katy Tur to her car after he incited a crowd against her.¹⁴² There has been speculation that the President has been so angered at CNN's reporting on his presidency that he pressured his Department of Justice to sue to block the proposed acquisition of Time Warner by AT&T unless AT&T sold off CNN, even though the Department rarely objects to such vertical mergers.¹⁴³

Reflecting his displeasure with *The Washington Post's* reporting on his Administration, President Trump has repeatedly criticized Amazon and its CEO Jeff Bezos, who also owns the newspaper. The President has complained that Amazon pays too little to the Post Office for package deliveries,¹⁴⁴ and he is reported to have personally demanded that the Postmaster General double Amazon's postal service fees.¹⁴⁵ The company's market value fell by approximately \$60 billion after one of the President's attacks.¹⁴⁶ In 2019, the Pentagon awarded a cloud computing contract to Microsoft, although Amazon had been widely viewed as the frontrunner.¹⁴⁷ Amazon sued the Trump Administration, alleging political interference by the President, and a judge has ruled that the lawsuit is likely to prevail on the merits.¹⁴⁸

Private vigilantes may pose the greatest deterrent to public criticism of President Trump. After a Fox News host assailed the President's statement lauding the "very fine people" on both sides at a white supremacist rally in Charlottesville, Virginia, viewers called for her firing,

tweet-to-be-fired/2017/12/09/2fb467de-dd4b-11e7-b1a8-62589434a581_story.html [https://perma.cc/5KUR-KP34].

¹⁴² Luisita Lopez Torregrosa, "You Can't Rattle Her": Katy Tur on the Rise, N.Y. TIMES (June 10, 2017), <https://nyti.ms/2s7I9Np> [https://perma.cc/C3JS-PEEX].

¹⁴³ Brian Fung & Sari Horwitz, *AT&T and Antitrust Officials Have Discussed Shedding CNN in the Telecom's Mega-deal for Time Warner*, WASH. POST (Nov. 8, 2017, 9:52 PM), <https://www.washingtonpost.com/news/the-switch/wp/2017/11/08/att-and-antitrust-officials-have-discussed-shedding-cnn-in-the-telecoms-mega-deal-for-time-warner> [https://perma.cc/K6TB-LZDY].

¹⁴⁴ See Michael Gold & Katie Rogers, *The Facts Behind Trump's Tweets on Amazon, Taxes and the Postal Service*, N.Y. TIMES (Mar. 29, 2018), <https://nyti.ms/2uzbSBL> [https://perma.cc/46M5-3VML].

¹⁴⁵ Emily Stewart, *Trump's Trying to Fight Amazon and Jeff Bezos from the White House*, VOX (May 21, 2018, 11:06 AM), <https://www.vox.com/policy-and-politics/2018/5/19/17371780/donald-trump-amazon-jeff-bezos-postal-service> [https://perma.cc/6Z6W-YH4Z].

¹⁴⁶ Nathaniel Meyersohn, *Amazon Stock Sinks Following Trump's Attacks*, CNN (Apr. 2, 2018, 4:33 PM), <https://money.cnn.com/2018/04/02/news/companies/amazon-stock-trump/index.html?iid=EL> [https://perma.cc/74TT-EWSW].

¹⁴⁷ Kate Conger & David E. Sanger, *Pentagon Asks to Reconsider Awarding Huge Cloud Contract to Amazon*, N.Y. TIMES (Mar. 12, 2020), <https://nyti.ms/2TXGOVE> [https://perma.cc/W8BG-Q675].

¹⁴⁸ Aaron Gregg, *Judge Says Amazon Is "Likely to Succeed" on Key Argument in Pentagon Cloud Lawsuit*, WASH. POST (Mar. 6, 2020, 7:29 PM), <https://www.washingtonpost.com/business/2020/03/06/judge-says-amazon-likely-succeed-key-argument-pentagon-cloud-lawsuit> [https://perma.cc/RC6E-MH2E].

and she received threats that led to her receiving a security escort.¹⁴⁹ A labor union leader at the Carrier air conditioner plant in Indiana who exposed President Trump's false statements regarding how many jobs were saved when he pressured the company not to move its plant to Mexico received threats after the President denounced the union leader on Twitter.¹⁵⁰

2. *Attacks on an Independent Judiciary.* — Trump attacked judges during his presidential campaign and has not stopped since. In 2016, he accused Judge Curiel, a lifelong American citizen, of bias because of his Mexican heritage and called his actions a “disgrace” after Judge Curiel issued adverse procedural rulings in a lawsuit against Trump University.¹⁵¹ When another district court judge invalidated one iteration of the Trump Administration's Muslim travel ban in 2017, the President denounced him as a “so-called judge.”¹⁵²

President Trump also repeatedly assailed the criminal justice system as he attempted to obstruct the Special Counsel's investigation of Russian interference in the 2016 presidential election. Before and during the criminal trial of his former campaign manager, Paul Manafort, the President repeatedly tweeted about how unfairly Manafort was being treated.¹⁵³ President Trump later assailed Supreme Court Justices Ginsburg and Sotomayor for refusing to recuse themselves in “Trump-related” cases after Justice Sotomayor criticized her colleagues in 2020 for being overly accommodating of the federal government's repeated requests for emergency action from the Court and Justice Ginsburg called Trump a “faker” in an interview during the summer before the 2016 presidential election.¹⁵⁴

President Trump has evinced disdain for the rule of law in other ways as well. His pardon of the former sheriff of Maricopa County, Arizona, Joe Arpaio, was a direct assault on the rule of law because

¹⁴⁹ Michael M. Grynbaum, *A Fox News Host Attacks Trump, and Some Viewers Bristle*, N.Y. TIMES (Aug. 16, 2017), <https://nyti.ms/2vFmb5S> [<https://perma.cc/H85Z-JTGE>]; see also David Bauder, *Raw Feelings Close to the Surface at Fox News over Criticism of Trump Remarks*, CHI. TRIB. (Aug. 16, 2017, 6:13 PM), <https://www.chicagotribune.com/entertainment/tv/ct-fox-news-trump-critics-20170816-story.html> [<https://perma.cc/ZPC4-Q343>].

¹⁵⁰ Michael D. Shear, *Trump as Cyberbully in Chief? Twitter Attack on Union Boss Draws Fire*, N.Y. TIMES (Dec. 8, 2016), <https://nyti.ms/2h2KROw> [<https://perma.cc/876E-JD7G>].

¹⁵¹ Jose A. Del Real & Katie Zezima, *Trump's Personal, Racially Tinged Attacks on Federal Judge Alarm Legal Experts*, WASH. POST (June 1, 2016), <http://wapo.st/1ROCXzf> [<https://perma.cc/5K4P-H9JK>]; Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks “Obama Judge,”* N.Y. TIMES (Nov. 21, 2018), <https://nyti.ms/2DBposL> [<https://perma.cc/6JE8-SZXB>].

¹⁵² Liptak, *supra* note 151.

¹⁵³ 2 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 123–26 (2019).

¹⁵⁴ Meagan Flynn & Brittany Shammass, *Trump Slams Sotomayor and Ginsburg, Says They Should Recuse Themselves from “Trump-Related” Cases*, WASH. POST (Feb. 25, 2020, 1:40 PM), <https://www.washingtonpost.com/nation/2020/02/25/trump-targets-sotomayor-ginsburg-tweets-seeks-their-recusal-all-trump-related-cases/> [<https://perma.cc/SXZ3-WFYX>].

Arpaio had been convicted of criminal contempt of court for violating an injunction to cease arresting people on mere suspicion of their immigration status.¹⁵⁵ According to credible reporting, the President has repeatedly urged Cabinet members and other federal officials to disregard immigration laws, assuring one official of a pardon from the President if he was criminally prosecuted for following a presidential directive.¹⁵⁶

3. *Politicizing Law Enforcement.* — As we have seen, politicizing law enforcement is one of autocrats' most important weapons, serving as both a shield to defend them and their allies against prosecution and a sword to attack political adversaries.¹⁵⁷ Some of President Trump's most egregious violations of democratic norms have occurred in this sphere.

In a presidential debate with Hillary Clinton in 2016, Trump issued a threat: "If I win, I'm going to instruct my attorney general to get a special prosecutor to look into your [Hillary Clinton's] situation because there has [sic] never been so many lies, so much deception."¹⁵⁸ Throughout the campaign, Trump encouraged chants of "lock her up."¹⁵⁹

President Trump has made clear that he sees the role of the attorney general as protecting the President¹⁶⁰ and serving as his "Roy Cohn."¹⁶¹ When then-Attorney General Jeff Sessions was contemplating recusing himself from the Russia investigation in March 2017, as Justice Department guidelines plainly required him to do, President Trump pressed White House Counsel Don McGahn to persuade him not to do so.¹⁶² When the Attorney General nonetheless recused himself, President Trump was furious,¹⁶³ and he repeatedly attacked his Attorney General as "weak"¹⁶⁴ for allowing the Mueller "witch hunt" to continue.¹⁶⁵

The Mueller Report also plainly demonstrates that while the Russia investigation was proceeding, President Trump repeatedly sought to

¹⁵⁵ See Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://nyti.ms/2vwEQx7> [<https://perma.cc/UZ73-KHCG>].

¹⁵⁶ Maggie Haberman, Annie Karni & Eric Schmitt, *Trump Urged Homeland Security Official to Close Border Despite an Earlier Promise of a Delay*, N.Y. TIMES (Apr. 12, 2019), <https://nyti.ms/2ZhmVEC> [<https://perma.cc/SN8E-72YN>].

¹⁵⁷ See LEVITSKY & ZIBLATT, *supra* note 35, at 78.

¹⁵⁸ Charlie Savage, *Threat to Jail Clinton Smacks of "Tin-Pot Dictators," Experts Say*, N.Y. TIMES (Oct. 10, 2016), <https://nyti.ms/2dSQldP> [<https://perma.cc/2P59-DDQ9>].

¹⁵⁹ James Fallows, *Trump Time Capsule #140: "Lock Her Up,"* THE ATLANTIC (Oct. 11, 2016, 1:42 PM), <https://www.theatlantic.com/notes/2016/10/trump-time-capsule-140-lock-her-up/503684> [<https://perma.cc/K7ZA-GMTS>].

¹⁶⁰ 2 MUELLER, *supra* note 153, at 51.

¹⁶¹ *Id.* at 50.

¹⁶² *Id.* at 49–51, 50 n.286.

¹⁶³ *Id.* at 63–64.

¹⁶⁴ *Id.* at 51, 91.

¹⁶⁵ *Id.* at 111.

have Attorney General Sessions reopen the Justice Department's criminal investigation into Hillary Clinton's emails.¹⁶⁶ In addition, reports suggest that Department political appointees pursued criminal charges against former Acting Director of the Federal Bureau of Investigation (FBI) Andrew McCabe against the wishes of career prosecutors and at the behest of the President.¹⁶⁷ A grand jury did not indict McCabe for lying to investigators, but prosecutors strung him along for five months before announcing that the charges had been dropped.¹⁶⁸ Eventually, every FBI leader who had participated in the investigation of President Trump's 2016 campaign was forced out of the Bureau.¹⁶⁹

Since his impeachment acquittal, President Trump has continued to flagrantly violate the norm of Justice Department independence from the White House.¹⁷⁰ In February 2020, President Trump denounced as unfair the seven-to-nine year sentence prosecutors sought against his friend and advisor Roger Stone.¹⁷¹ Attorney General William Barr then intervened to reduce the prosecutors' recommendation, leading the prosecutors to resign from the case.¹⁷² When Judge Amy Berman Jackson sentenced Stone to just over three years in prison, President Trump criticized the decision, excoriated the "dirty cops" who prosecuted his political allies but not his enemies, and hinted that he would pardon Stone or commute his sentence,¹⁷³ which he has since done.¹⁷⁴ Many Department lawyers told *The New York Times* that the episode was devastating to Department morale and left U.S. Attorneys fearful of prosecuting cases that might displease the President.¹⁷⁵ In May, the

¹⁶⁶ *Id.* at 107, 109.

¹⁶⁷ See Katie Benner & Adam Goldman, *D.C. Prosecutors' Tensions with Justice Dept. Began Long Before Stone Sentencing*, N.Y. TIMES (Apr. 29, 2020), <https://nyti.ms/2VhGTWC> [<https://perma.cc/86AE-MBMZ>].

¹⁶⁸ George Packer, *The President Is Winning His War on American Institutions*, THE ATLANTIC (Apr. 2020), <https://www.theatlantic.com/magazine/archive/2020/04/how-to-destroy-a-government/606793> [<https://perma.cc/7AL8-QB3Y>].

¹⁶⁹ *Id.*

¹⁷⁰ See Nicholas Fandos & Catie Edmondson, *As a Post-Impeachment Trump Pushes the Limits, Republicans Say Little*, N.Y. TIMES (Feb. 12, 2020), <https://nyti.ms/2SE7CK2> [<https://perma.cc/UPG5-HRDB>].

¹⁷¹ Eileen Sullivan, *Trump Takes Up Call for Barr to "Clean House" at Justice Dept.*, N.Y. TIMES (Feb. 19, 2020), <https://nyti.ms/39YLjpx> [<https://perma.cc/UXQ8-9MBG>]; see also Sharon LaFraniere, *Prosecutors Recommend Roger Stone Receive Up to 9 Years in Prison*, N.Y. TIMES (Feb. 10, 2020), <https://nyti.ms/2UKxh6j> [<https://perma.cc/NUH5-8263>].

¹⁷² Sullivan, *supra* note 171.

¹⁷³ Peter Baker, *Trump Renews Attack on Justice System, Again Disregarding Barr's Pleas*, N.Y. TIMES (Feb. 20, 2020), <https://nyti.ms/39RLl2d> [<https://perma.cc/NC5Q-6PBT>].

¹⁷⁴ Katie Rogers, Derrick Bryson Taylor & Heather Murphy, *Trump Adds Roger Stone to His List of Pardons and Commutations*, N.Y. TIMES (July 11, 2020), <https://nyti.ms/38LC2kZ> [<https://perma.cc/6Q8G-N7L5>].

¹⁷⁵ See Katie Benner, Charlie Savage, Sharon LaFraniere & Ben Protess, *After Stone Case, Prosecutors Say They Fear Pressure from Trump*, N.Y. TIMES (Feb. 20, 2020), <https://nyti.ms/2SmAuYb> [<https://perma.cc/YYU6-DMDL>].

Department overrode recommendations of career prosecutors again and dropped all charges against former National Security Advisor Michael Flynn for lying to the FBI.¹⁷⁶

Barr, who replaced Sessions as Attorney General after the 2018 mid-term elections,¹⁷⁷ “appears to view his primary obligation as loyalty to the president individually rather than to the nation,” in the words of the New York City Bar Association.¹⁷⁸ Attorney General Barr has made foreign trips in pursuit of President Trump’s conspiracy theory regarding the origins of the FBI’s investigation into his campaign’s possible involvement in Russia’s interference in the 2016 election and prejudged the results of a special prosecutor’s investigation of the origins of the Russia probe.¹⁷⁹

4. *Politicizing the Rest of the Government.* — When the Constitution’s Framers bestowed upon the President the power and obligation to faithfully execute the law, their idea was that this power would be deployed in the public’s interest, not the personal or political interests of the chief executive.¹⁸⁰ Yet from President Trump’s perspective, as reflected by his behavior while in office, the entirety of the U.S. government owes loyalty to him.

Just one week into his presidency, the day after President Trump was told that National Security Advisor Flynn had lied to Vice President Mike Pence and the FBI about the contents of his phone calls with Russian Ambassador Sergey Kislyak, the President invited FBI Director James Comey to dine with him alone in the White House.¹⁸¹ After discussing the Director’s future, which Comey interpreted as President Trump’s reminder that he could be fired without cause, the President told him: “I need loyalty, I expect loyalty.”¹⁸² According to the Mueller Report, the morning after President Trump fired Director Comey, he summoned FBI Deputy Director Andrew McCabe to the White House

¹⁷⁶ Mark Mazzetti, Charlie Savage & Adam Goldman, *How Michael Flynn’s Defense Team Found Powerful Allies*, N.Y. TIMES (June 28, 2020), <https://nyti.ms/2Zjs6uD> [<https://perma.cc/7FUU-QEV8>].

¹⁷⁷ Emily Bazelon, Opinion, *Who Is Bill Barr?*, N.Y. TIMES (Oct. 26, 2019), <https://nyti.ms/2BQXW6F> [<https://perma.cc/MQZ5-XU6B>].

¹⁷⁸ Press Release, New York City Bar Ass’n, Attorney General Barr Should Recuse Himself from Department of Justice Review of Ukraine Matter (Oct. 23, 2019), <https://www.nycbar.org/media-listing/media/detail/attorney-general-barr-should-recuse-himself-from-department-of-justice-review-of-ukraine-matter> [<https://perma.cc/V6EA-8RCL>].

¹⁷⁹ See Bazelon, *supra* note 177; Nicholas Fandos & Adam Goldman, *Barr Asserts Intelligence Agencies Spied on the Trump Campaign*, N.Y. TIMES (Apr. 10, 2019), <https://nyti.ms/2VxtzZo> [<https://perma.cc/68HE-3WRS>].

¹⁸⁰ 2 MUELLER, *supra* note 153, at 177; Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2188–90 (2019).

¹⁸¹ 2 MUELLER, *supra* note 153, at 3.

¹⁸² *Id.* at 34. The Special Counsel highlighted several pieces of evidence corroborating Director Comey’s description of events. See *id.* at 35–36.

and asked him whom he had voted for in the presidential election, apparently concerned about his loyalty to the President.¹⁸³ President Trump also pressed Director of National Intelligence (DNI) Dan Coats and then–Central Intelligence Agency (CIA) Director Mike Pompeo to intervene in the FBI’s Russia investigation.¹⁸⁴

President Trump has repeatedly abused the power of his office to advance his political interests. For example, in February 2020, the Trump Administration halted New Yorkers’ enrollment in and membership renewal with Global Entry and associated trusted traveler programs, which afford Americans quicker border crossings and access to shorter airport lines.¹⁸⁵ The President implied he would not reverse the decision unless New York dropped all investigations and lawsuits related to the Trump Administration and his personal business and finances.¹⁸⁶

Most egregiously, according to the articles of impeachment passed by the House of Representatives, President Trump used the threat of withholding nearly \$400 million in military aid from Ukraine to pressure Ukrainian President Volodymyr Zelensky into announcing two investigations: first, of Vice President Joe Biden’s role in the firing of Ukraine’s top prosecutor; and second, of allegations of Ukrainian interference in the 2016 American presidential election.¹⁸⁷ This move was straight out of the authoritarian playbook — using the power of government office to pursue charges of criminal corruption, based on no evidence, against a leading political opponent.¹⁸⁸

Immediately after his Senate impeachment acquittal, President Trump commenced a thorough Administration housecleaning of “disloyal” employees.¹⁸⁹ President Trump also appointed Richard Grenell as his Acting DNI although Grenell had essentially no intelligence experience, which is statutorily required for the job.¹⁹⁰ In May, the Senate confirmed as permanent director Representative John Ratcliffe, one of President Trump’s fiercest defenders during the House impeachment

¹⁸³ See *id.* at 69; see also *id.* at 71–72; Packer, *supra* note 168.

¹⁸⁴ 2 MUELLER, *supra* note 153, at 55–57.

¹⁸⁵ Kyle Cheney, *Trump Accused of Another Quid Pro Quo, this Time with New York*, POLITICO (Feb. 13, 2020, 4:18 PM), <https://www.politico.com/news/2020/02/13/trump-new-york-investigations-114991> [<https://perma.cc/7GYB-D6QS>].

¹⁸⁶ *Id.*

¹⁸⁷ See Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019) (enacted).

¹⁸⁸ See *supra* note 85 and accompanying text.

¹⁸⁹ See Peter Baker, *Trump’s Efforts to Remove the Disloyal Heightens Unease Across His Administration*, N.Y. TIMES (Feb. 22, 2020), <https://nyti.ms/2SNfPg2> [<https://perma.cc/7APF-J6PG>]; Helene Cooper & Catie Edmondson, *Trump, Returning to Retribution, Withdraws Pentagon Nomination*, N.Y. TIMES (Mar. 2, 2020), <https://nyti.ms/2ThwtEU> [<https://perma.cc/C8WE-AZCU>].

¹⁹⁰ Zeke Miller & Matthew Lee, *Trump Taps Loyalist Grenell as Nation’s Top Intel Official*, ASSOCIATED PRESS (Feb. 19, 2020), <https://apnews.com/59fo6282bc4c2db256e75e73efe66e8f> [<https://perma.cc/MH3W-DZC2>].

proceedings.¹⁹¹ Ratcliffe's previous nomination to the same post had failed in 2019 in the face of bipartisan opposition owing to his lack of national security experience and his apparently false claims that he had put terrorists behind bars as a federal prosecutor.¹⁹²

The reason President Trump needed a new DNI was that in February 2020, he fired Acting Director Joseph Maguire, whose offense apparently was permitting a subordinate to brief the House Intelligence Committee on Russia's efforts to interfere with the 2020 presidential election.¹⁹³ Newspaper reports described President Trump as furious, not because the Russian government may interfere with the forthcoming presidential election but because such information was conveyed to the committee.¹⁹⁴ In January, leading intelligence officials informed Congress that they wished to cancel the public portion of their annual briefing on the world's greatest security threats, apparently because in the preceding year President Trump had lambasted the group's assessments that differed from his own views.¹⁹⁵ In response to these developments, former Acting DNI David Gompert said: "We have an enemy of the United States that is conducting information warfare against us and our executive leadership doesn't want to hear it, doesn't want the Congress to hear it, and doesn't want the people to hear it."¹⁹⁶

Demanding unquestioning loyalty from federal bureaucrats comes with a significant price: incompetence, compounded by warped decisionmaking.¹⁹⁷ One reason the federal government's response to the coronavirus pandemic has been so catastrophic is that the Trump

¹⁹¹ Julian E. Barnes & Nicholas Fandos, *Senate Approves John Ratcliffe for Top Intelligence Job in Sharply Split Vote*, N.Y. TIMES (May 21, 2020), <https://nyti.ms/3gdoRMV> [<https://perma.cc/MM7M-A7ZW>].

¹⁹² *Id.*; Charlie Savage, Julian E. Barnes & Annie Karni, *Trump Drops Plans to Nominate John Ratcliffe as Director of National Intelligence*, N.Y. TIMES (Aug. 2, 2019), <https://nyti.ms/2SZAGeN> [<https://perma.cc/G5PD-KHT5>].

¹⁹³ Ellen Nakashima, Shane Harris, Josh Dawsey & Anne Gearan, *Senior Intelligence Official Told Lawmakers that Russia Wants to See Trump Reelected*, WASH. POST (Feb. 21, 2020, 6:53 AM), https://www.washingtonpost.com/national-security/after-a-congressional-briefing-on-election-threats-trump-soured-on-acting-spy-chief/2020/02/20/1ed2b4ec-53f1-11ea-b119-4faabac6674f_story.html [<https://perma.cc/P9KQ-FDVE>]. Some officials denied that Acting Director Maguire was fired because of the briefing. See Adam Goldman, Julian E. Barnes, Maggie Haberman & Nicholas Fandos, *Lawmakers Are Warned that Russia Is Meddling to Re-elect Trump*, N.Y. TIMES (July 1, 2020), <https://nyti.ms/2uTOgJ7> [<https://perma.cc/ZD6W-EDGY>].

¹⁹⁴ See, e.g., Nakashima et al., *supra* note 193.

¹⁹⁵ Natasha Bertrand & Daniel Lippman, *Trump Tightens His Grip on Intelligence*, POLITICO (Feb. 26, 2020, 4:30 AM), <https://www.politico.com/news/2020/02/26/trump-tightens-his-grip-on-intelligence-117451> [<https://perma.cc/NYB3-EUF7>].

¹⁹⁶ *Id.*

¹⁹⁷ See Paul Waldman, Opinion, *Nine Reasons Trump Is Uniquely Incapable of Managing Crises — Including this One*, WASH. POST (Mar. 13, 2020, 1:20 PM), <https://www.washingtonpost.com/opinions/2020/03/13/nine-reasons-trump-is-uniquely-incapable-managing-crises-like-this-one> [<https://perma.cc/3PJC-UAJN>].

Administration has chosen government officials primarily for loyalty rather than expertise or competence.¹⁹⁸ Another reason is that those officials' decisionmaking has been distorted by the perceived imperative of appearing loyal to President Trump. Secretary of Health and Human Services Alex Azar may have not pushed for extensive early coronavirus testing because he did not wish to tell Trump what the President did not want to hear.¹⁹⁹ Defense Secretary Mark Esper apparently directed military commanders not to make decisions related to the pandemic that might run afoul of President Trump's messaging.²⁰⁰ Similarly, scientific experts on the coronavirus task force, such as Drs. Anthony Fauci and Deborah Birx, have praised President Trump's handling of the pandemic, no matter how much they privately disagree with his actions, perhaps in part because doing so is necessary to remain in President Trump's favor.²⁰¹

5. *Using Government Office for Private Gain.* — President Trump has also deployed the resources of the federal government for his personal financial gain,²⁰² despite his campaign promise to “drain the swamp.”²⁰³ Although President Trump says that President George Washington continued to run a family business while in office,²⁰⁴ no modern President has ever derived direct financial benefit from his position as President Trump has.²⁰⁵

The Mueller Report reveals that throughout most of Trump's presidential campaign, he and his lawyer Michael Cohen pursued a deal for

¹⁹⁸ See *id.*; see also Adam Serwer, *Donald Trump's Cult of Personality Did This*, THE ATLANTIC (Mar. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/donald-trump-menace-public-health/608449> [https://perma.cc/4RY5-RMJ8].

¹⁹⁹ See Dan Diamond & Adam Cancryn, *Azar in the Crosshairs for Delays in Virus Tests*, POLITICO (Mar. 2, 2020, 1:04 PM), <https://www.politico.com/news/2020/03/02/azar-crosshairs-delays-coronavirus-tests-118796> [https://perma.cc/MA2D-5UQE].

²⁰⁰ Eric Schmitt & Helene Cooper, *Defense Secretary Warns Commanders Not to Surprise Trump on Coronavirus*, N.Y. TIMES (Mar. 2, 2020), <https://nyti.ms/3co4zP2> [https://perma.cc/QTS2-AQK5].

²⁰¹ See Maggie Haberman, *Trump Has Given Unusual Leeway to Fauci, but Aides Say He's Losing His Patience*, N.Y. TIMES (May 13, 2020), <https://nyti.ms/2QENNSE> [https://perma.cc/T8SF-8UKL]; Noah Weiland & Maggie Haberman, *For Dr. Deborah Birx, Urging Calm Has Come with Heavy Criticism*, N.Y. TIMES (Mar. 27, 2020), <https://nyti.ms/3dBKnd2> [https://perma.cc/24AD-6ZSG].

²⁰² Anita Kumar, *How Trump Fused His Business Empire to the Presidency*, POLITICO (Jan. 20, 2020, 8:09 AM), <https://www.politico.com/news/2020/01/20/trump-businesses-empire-tied-presidency-100496> [https://perma.cc/RQ3B-ZE4M].

²⁰³ Theodor Meyer, *Has Trump Drained the Swamp in Washington?*, POLITICO (Oct. 19, 2017, 5:03 AM), <https://www.politico.com/story/2017/10/19/trump-drain-swamp-promises-243924> [https://perma.cc/R79D-GMRC].

²⁰⁴ See Annie Karni, *Trump Dismisses “Phony Emoluments Clause,” Defending Doral*, N.Y. TIMES (Oct. 21, 2019), <https://nyti.ms/33QtV36> [https://perma.cc/8U7Q-AVU8].

²⁰⁵ See *Trump's 2,000 Conflicts of Interest (and Counting)*, CITIZENS FOR RESP. & ETHICS IN WASH. (CREW) (Aug. 15, 2019), <https://www.citizensforethics.org/2000-trump-conflicts-of-interest-counting> [https://perma.cc/25RP-ZRJ2].

a Trump Tower in Moscow that potentially would have been worth hundreds of millions of dollars to him.²⁰⁶ Trump apparently stated privately that his campaign was an “infomercial” for Trump-branded properties.²⁰⁷ Publicly, by contrast, Trump insisted he had no business interests in Russia.²⁰⁸ Meanwhile, during the Republican primaries, Trump distinguished himself from the other candidates by promising closer ties to Moscow and a better relationship with President Putin, whom he praised as a strong leader, while musing about whether the North Atlantic Treaty Organization (NATO) was “obsolete” and refusing to commit to defending NATO’s Baltic members against possible future Russian aggression.²⁰⁹ Both of Trump’s adult sons reportedly have said that Trump businesses began receiving substantial amounts of cash from Russian oligarchs early in the 2000s.²¹⁰

Because Trump refused to divest his interest in the Trump Organization when he became President, he has arguably been violating the Constitution’s Foreign Emoluments Clause every day he has been in office.²¹¹ The embassies of foreign nations have booked events at the Trump International Hotel in Washington, D.C., which charges hundreds

²⁰⁶ 1 MUELLER, *supra* note 153, at 67–75.

²⁰⁷ *Id.* at 72.

²⁰⁸ 2 MUELLER, *supra* note 153, at 18.

²⁰⁹ *Id.* at 16 & n.13; see David E. Sanger & Maggie Haberman, *Donald Trump Sets Conditions for Defending NATO Allies Against Attack*, N.Y. TIMES (July 20, 2016), <https://nyti.ms/2ai4u3g> [<https://perma.cc/D8P7-PVLJ>].

²¹⁰ See Rosalind S. Helderman, *Here’s What We Know About Donald Trump and His Ties to Russia*, WASH. POST (July 29, 2016), <http://wapo.st/2aAxC6x> [<https://perma.cc/4333-7A4A>]; Bill Littlefield, *A Day (and a Cheeseburger) with President Trump*, WBUR (May 11, 2017), <https://www.wbur.org/onlyagame/2017/05/05/james-dodson-donald-trump-golf> [<https://perma.cc/NNN2-7Z69>]. Eric Trump later denied making such a statement. Benjamin Swasey & Martin Kessler, *Eric Trump Denies Telling a Sportswriter the Trumps Got Golf Course Funding from Russia*, WBUR (May 10, 2017), <https://www.wbur.org/onlyagame/2017/05/08/eric-trump-russia-golf-course-funding> [<https://perma.cc/P66K-443V>].

²¹¹ See generally John Mikhail, Lecture, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 VAL. U. L. REV. 631 (2019) (concluding that President Trump’s continued ownership interests in the Trump Organization allow him to earn profits and other advantages from foreign transactions in violation of the Foreign Emoluments Clause). The District of Columbia and the State of Maryland sued President Trump for allegedly violating the Foreign and Domestic Emoluments Clauses. See *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018), *rev’d and remanded sub nom. In re Trump*, 928 F.3d 360 (4th Cir. 2019), *rev’d*, 958 F.3d 274 (4th Cir. 2020) (en banc). The Fourth Circuit recently declined to award the government mandamus relief to force dismissal of the case. See *In re Trump*, 958 F.3d at 279–80. In a separate lawsuit, New York hotel and restaurant businesses, along with Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit group, also sued President Trump for allegedly violating the Emoluments Clauses. See *Citizens for Resp. & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *vacated*, 953 F.3d 178 (2d Cir. 2019). The Second Circuit has determined that the plaintiffs have standing to pursue the action, permitting the case to proceed. See *Citizens for Resp. & Ethics in Wash.*, 953 F.3d at 189.

of dollars more a night than the average price charged by similar luxury hotels in the city.²¹²

During his presidential campaign, Trump bragged about doing tens of millions of dollars in business with Saudi Arabians: “[The Saudis] buy apartments from me. They spend \$40 million, \$50 million. Am I supposed to dislike them? I like them very much.”²¹³ The Trump Administration remained largely silent while Saudi Arabia was accused of effectively kidnapping the Prime Minister of Lebanon and exacerbating one of the world’s worst humanitarian crises in Yemen.²¹⁴ In November 2018, in the face of confident conclusions from U.S. intelligence agencies that Saudi Prince Mohammed bin Salman had ordered the killing and dismemberment of dissident journalist Jamal Khashoggi, President Trump insisted that the agencies simply had “feelings” on the matter and that nobody could know for sure what had happened to Khashoggi.²¹⁵

President Trump himself has admitted that his Trump Tower development in Istanbul creates a conflict of interest for him with regard to American foreign policy.²¹⁶ In late 2018, after a phone conversation with President Erdogan of Turkey, who had long pressed for a withdrawal of American troops from northern Syria, President Trump announced the withdrawal, without consulting government experts or foreign allies.²¹⁷ Turkey soon attacked America’s Kurdish allies, who

²¹² Cristina Alesci & Curt Devine, *Exclusive: Data Show Trump’s DC Hotel Was Pricier andemptier than Peers in 2017*, CNN (Jan. 27, 2018, 11:54 AM), <https://www.cnn.com/2018/01/27/politics/trump-hotel-occupancy-rates-data/index.html> [<https://perma.cc/G2KL-6NYD>]; Brent Griffiths & Kenneth P. Vogel, *Embassy of Azerbaijan to Co-host Event at Trump’s D.C. Hotel*, POLITICO (Dec. 5, 2016, 8:20 PM), <https://www.politico.com/blogs/donald-trump-administration/2016/12/embassy-of-azerbaijan-to-co-host-event-at-trumps-dc-hotel-232214> [<https://perma.cc/4UYU-H3NJ>].

²¹³ See David A. Fahrenthold & Jonathan O’Connell, *“I Like Them Very Much:” Trump Has Long-Standing Business Ties with Saudis, Who Have Boosted His Hotels Since He Took Office*, WASH. POST (Oct. 11, 2018, 5:04 PM), https://www.washingtonpost.com/politics/i-like-them-very-much-trump-has-long-standing-business-ties-with-saudis-who-have-boosted-his-hotels-since-he-took-office/2018/10/11/087odf24-cd67-11e8-a360-85875bac0b1f_story.html [<https://perma.cc/AJ74-78B2>].

²¹⁴ See David D. Kirkpatrick, *Saudi Arabia Charges Iran with “Act of War,” Raising Threat of Military Clash*, N.Y. TIMES (Nov. 6, 2017), <https://nyti.ms/2j3oyeJ> [<https://perma.cc/8YGG-JUJW>].

²¹⁵ Emily Cochrane, *Rebuffing C.I.A., Trump Says It Only Has “Feelings” About Khashoggi Killing*, N.Y. TIMES (Nov. 22, 2018), <https://nyti.ms/2DDqhj8> [<https://perma.cc/APT9-GMLM>]; see also Press Release, White House, Statement from President Donald J. Trump on Standing with Saudi Arabia (Nov. 20, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia> [<https://perma.cc/3GNB-6G22>].

²¹⁶ David D. Kirkpatrick & Eric Lipton, *Behind Trump’s Dealings with Turkey: Sons-in-Law Married to Power*, N.Y. TIMES (Nov. 12, 2019), <https://nyti.ms/32DQzdR> [<https://perma.cc/7WWS-VVVR>].

²¹⁷ Karen DeYoung, Missy Ryan, Josh Dawsey & Greg Jaffe, *A Tumultuous Week Began with a Phone Call Between Trump and the Turkish President*, WASH. POST (Dec. 21, 2018, 8:03 PM), <https://wapo.st/2ELdgFN> [<https://perma.cc/AG2T-UU7W>].

had supported the United States' mission against the Islamic State (ISIS) in Syria.²¹⁸ Military leaders and even many congressional Republicans condemned President Trump's action as a betrayal of a faithful ally and a victory for Russian influence in the Middle East.²¹⁹

As of March 2020, President Trump had spent 355 days, almost one-third of his presidency, at properties owned by one of his family's businesses.²²⁰ These visits have generated hundreds of thousands of dollars in federal government payments to the Trump Organization to cover the lodging expenses of the Secret Service and other accompanying personnel, an apparent violation of the Domestic Emoluments Clause.²²¹

In October 2019, President Trump announced that he would host the 2020 G-7 summit at the Trump National Doral in Miami, Florida, only to cancel that plan in the face of withering criticism.²²² While Congress was debating a nearly \$2 trillion coronavirus-relief program in the spring of 2020, President Trump refused to promise that his hotels and golf courses would not receive bailout funds.²²³

President Trump is grotesquely profiting off of his presidency. The head of Public Citizen, a nonprofit ethics group, refers to this enrichment as "the normalization of corruption" and "a stunning degradation of ethical norms."²²⁴ Moreover, there is reason to suspect that the Administration's

²¹⁸ Patrick Kingsley, *Who Are the Kurds, and Why Is Turkey Attacking Them in Syria?*, N.Y. TIMES (Oct. 14, 2019), <https://nyti.ms/2INoLcY> [<https://perma.cc/45CF-JLGE>].

²¹⁹ DeYoung et al., *supra* note 217.

²²⁰ See David A. Fahrenthold, Joshua Partlow, Jonathan O'Connell & Carol D. Leonnig, *Newly Obtained Documents Show \$157,000 in Additional Payments by the Secret Service to Trump Properties*, WASH. POST (Mar. 5, 2020, 3:36 PM), <https://wapo.st/2VUg23f> [<https://perma.cc/X5HQ-VKX8>].

²²¹ *Id.*; David A. Fahrenthold & Joshua Partlow, *Trump's Company Has Received at Least \$970,000 from U.S. Taxpayers for Room Rentals*, WASH. POST (May 14, 2020, 5:05 PM), https://www.washingtonpost.com/politics/trumps-company-has-received-at-least-970000-from-us-taxpayers-for-room-rentals/2020/05/14/26d27862-916d-11ea-9e23-6914ee410a5f_story.html [<https://perma.cc/6RVW-JWLQ>]; see also Second Amended Complaint ¶ 7, Citizens for Resp. & Ethics in Wash. v. Trump, No. 17-cv-00458 (S.D.N.Y. May 10, 2017) (alleging violations of the Domestic Emoluments Clause stemming from hotel stays at properties owned and operated by the Trump Organization).

²²² Philip Rucker & David A. Fahrenthold, *Trump Says His Doral Golf Resort Will No Longer Host Next Year's G-7 Summit, Bowing to Criticism*, WASH. POST (Oct. 20, 2019, 10:15 AM), https://www.washingtonpost.com/politics/trump-announces-that-his-doral-golf-resort-in-miami-will-no-longer-host-next-years-g-7-summit-after-criticism/2019/10/19/857361d0-f2dd-11e9-8693-f487e46784aa_story.html [<https://perma.cc/3TPQ-YQV6>].

²²³ Jacqueline Alemany, *Trump Won't Rule Out Possibility His Private Business Could Benefit from Coronavirus Stimulus*, WASH. POST (Mar. 23, 2020, 6:29 AM), <https://www.washingtonpost.com/news/powerpost/paloma/powerup/2020/03/23/powerup-trump-won-t-rule-out-possibility-his-private-business-could-benefit-from-coronavirus-stimulus/5e77caca88e0fa101a74f374> [<https://perma.cc/2AUJ-LMKT>].

²²⁴ Eric Lipton & Annie Karni, *Checking In at Trump Hotels, for Kinship (and Maybe Some Sway)*, N.Y. TIMES (Oct. 25, 2019), <https://nyti.ms/2Ard400> [<https://perma.cc/A3GA-DSND>].

foreign policy, especially with regard to Russia, Turkey, and Saudi Arabia, has been influenced by the President's business interests.²²⁵

6. *Encouraging Violence.* — President Trump also follows the authoritarian playbook by encouraging political violence.²²⁶ At rallies during his 2016 campaign, he incited crowds to “knock the crap” out of protestors.²²⁷ He also offered to pay the legal expenses of anyone beating up the protestors.²²⁸

As President, Trump has encouraged the police to rough up criminal suspects.²²⁹ In addition, President Trump has suggested that migrants who were being blocked at the border and threw rocks at American soldiers could be shot.²³⁰ “They want to throw rocks at our military, our military fights back,” President Trump told reporters.²³¹

In March 2019, President Trump said: “You know, the left plays a tougher game, it’s very funny. I actually think that the people on the right are tougher, but they don’t play it tougher. Okay? I can tell you, I have the support of the police, the support of the military, the support of the Bikers for Trump — I have the tough people, but they don’t play it tough until they go to a certain point, and then it would be very bad, very bad.”²³² Historically, one classic ploy of demagogues has been to incite violence by predicting it, while maintaining plausible deniability should violence erupt.²³³

Such incitements to violence have come home to roost. Just before the 2018 midterm elections, as President Trump described the Central American refugees caravanning to the United States as “criminals” and “an invasion,” two individuals evidently sharing the President’s animus

²²⁵ See *supra* notes 206–219 and accompanying text.

²²⁶ See *supra* note 92 and accompanying text.

²²⁷ LEVITSKY & ZIBLATT, *supra* note 35, at 63.

²²⁸ *Id.*

²²⁹ See Mark Berman, *Trump Tells Police Not to Worry About Injuring Suspects During Arrests*, WASH. POST (July 28, 2017, 8:43 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests> [https://perma.cc/UKW4-BULT].

²³⁰ See David Nakamura & Nick Miroff, *Trump Announces Plan to Block Some Migrants from Seeking Asylum at the U.S.-Mexico Border, Offers Few Details*, WASH. POST (Nov. 1, 2018, 11:54 PM), https://www.washingtonpost.com/politics/trump-says-he-is-finalizing-plan-to-end-abuse-of-us-asylum-system-vowing-massive-tent-cities-to-hold-migrants/2018/11/01/gofb6252-ddec-11e8-b732-3c72cbf131f2_story.html [https://perma.cc/6DWD-KLPV].

²³¹ *Id.*

²³² See Aaron Blake, *Trump Again Nods Toward Violence by His Supporters — And Maybe Something Bigger*, WASH. POST (Mar. 14, 2019, 1:21 PM), <https://www.washingtonpost.com/politics/2019/03/14/trump-again-nods-toward-violence-by-his-supporters-maybe-something-bigger> [https://perma.cc/4KXD-D3DM].

²³³ See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 426–28 (2004) [hereinafter KLARMAN, JIM CROW].

toward immigrants took action.²³⁴ In late October, Cesar Sayoc, an ardent Trump supporter, mailed more than a dozen pipe bombs to prominent Trump critics.²³⁵ Just days later, Robert Bowers, a white supremacist and anti-Semite who had expressed alarm at the caravan bringing “invaders in that kill our people” and blamed it on the Hebrew Immigrant Aid Society, murdered eleven Jews in a Pittsburgh synagogue.²³⁶ In 2019, in El Paso, Texas, a man who posted an anti-immigrant manifesto filled with Trumpian warnings of a “Hispanic invasion” and the potential for the Democratic Party to benefit from the growing Latino population murdered more than twenty people, mostly Latino.²³⁷

Most recently, President Trump has legitimized police violence during demonstrations protesting the killing of George Floyd, an African American, by a white police officer in Minneapolis.²³⁸ President Trump invoked an old white supremacist adage from the 1960s: “When the looting starts, the shooting starts.”²³⁹ On a phone call with governors, President Trump told them they were “weak” and could be made to “look like a bunch of jerks” and exhorted them to “get much tougher” and “dominate” the streets.²⁴⁰ Cell phone videos have since documented hundreds of instances of police violence against peaceful protestors.²⁴¹

7. *Racism.* — As we have seen, autocrats frequently vilify minority racial and religious groups to unify supporters and divert attention from their own failures.²⁴² President Trump and his defenders deny that he

²³⁴ Jeremy W. Peters, *How Trump-Fed Conspiracy Theories About Migrant Caravan Intersect with Deadly Hatred*, N.Y. TIMES (Oct. 29, 2018), <https://nyti.ms/2yDBf4H> [<https://perma.cc/H58J-W43C>].

²³⁵ See David Nakamura, *Critics Say Trump Has Fostered the Toxic Environment for the Political Violence He Denounces*, WASH. POST (Oct. 27, 2018, 11:55 PM), https://www.washingtonpost.com/politics/the-central-premise-of-his-presidency-critics-say-trump-has-fostered-the-toxic-environment-for-the-political-violence-he-denounces/2018/10/27/cd45e43e-da1e-11e8-a10f-b51546b10756_story.html [<https://perma.cc/6DUW-XK9Y>].

²³⁶ See *id.*; Peters, *supra* note 234.

²³⁷ See Erin Coulehan, Katie Benner & Manny Fernandez, *Federal Hate Crime Charges Filed in El Paso Shooting that Targeted Latinos*, N.Y. TIMES (Feb. 6, 2020), <https://nyti.ms/2H3okwM> [<https://perma.cc/QQY6-PYG3>]; see also Yasmeen Abutaleb, *What's Inside the Hate-Filled Manifesto Linked to the Alleged El Paso Shooter*, WASH. POST (Aug. 4, 2019, 2:48 PM), <https://www.washingtonpost.com/politics/2019/08/04/whats-inside-hate-filled-manifesto-linked-el-paso-shooter> [<https://perma.cc/783H-7R74>].

²³⁸ See Maggie Haberman & Alexander Burns, *Trump's Looting and "Shooting" Remarks Escalate Crisis in Minneapolis*, N.Y. TIMES (June 1, 2020), <https://nyti.ms/3deoaRX> [<https://perma.cc/77L4-PJ4N>].

²³⁹ See *id.*

²⁴⁰ Caitlin Oprysko, *Trump Threatens to End Protests with Military*, POLITICO (June 1, 2020, 9:25 PM), <https://www.politico.com/news/2020/06/01/trump-slams-governors-as-weak-crackdown-on-protests-294023> [<https://perma.cc/2UQQ-SXET>].

²⁴¹ See Shawn Hubler & Julie Bosman, *A Crisis that Began with an Image of Police Violence Keeps Providing More*, N.Y. TIMES (July 8, 2020), <https://nyti.ms/2MsEaDY> [<https://perma.cc/7DL9-Z99R>].

²⁴² See *supra* notes 96–107 and accompanying text.

is racist or Islamophobic.²⁴³ Whatever term one chooses to use, however, Trump's life and presidency are full of statements and actions consistent with the charge of racial and religious animus.

Trump came to public attention in 1973 when his father Fred's company, for which Donald Trump already served as president, was charged by the Department of Justice with discriminating against black and Puerto Rican applicants for apartment rentals.²⁴⁴ One book written about Trump refers to another early episode in which Trump was appalled to discover an African American man doing accounting work for his company: "Black guys counting my money! I hate it. . . . I think that the guy is lazy. And it's probably not his fault, because laziness is a trait in blacks."²⁴⁵ In 1989, Trump took out full-page advertisements in four New York City newspapers calling for the restoration of the death penalty in the case of the "Central Park Five" — five black and brown teenagers accused of beating and raping a white female jogger.²⁴⁶ After serving many years of their sentences, the defendants were exonerated by DNA evidence, but Trump continued to question their innocence.²⁴⁷

For five years beginning in 2011, Trump was a leading exponent of the racist "birther" conspiracy that denied President Obama was born in the United States.²⁴⁸ In June 2015, Trump launched his presidential campaign by denouncing Mexican immigrants, who he insisted were "bringing drugs . . . [and] crime" into the country.²⁴⁹ During the campaign, Trump repeated baseless allegations that thousands of Muslims had celebrated in New Jersey while watching the collapse of the Twin Towers on

²⁴³ See Peter Baker, *Trump Fans the Flames of a Racial Fire*, N.Y. TIMES (July 14, 2019), <https://nyti.ms/2XPRk18> [<https://perma.cc/PBK5-T7HW>]; German Lopez, *Donald Trump's Long History of Racism, from the 1970s to 2020*, VOX (Aug. 13, 2020, 7:00 PM), <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history> [<https://perma.cc/2DNW-EKLY>].

²⁴⁴ See Nicholas Kristof, Opinion, *Is Donald Trump a Racist?*, N.Y. TIMES (July 23, 2016), <https://nyti.ms/2aiqDo8> [<https://perma.cc/AV5D-X398>]; see also Josh Gerstein, *FBI Releases Files on Trump Apartments' Race Discrimination Probe in '70s*, POLITICO (Feb. 15, 2017, 5:47 PM), <https://www.politico.com/blogs/under-the-radar/2017/02/trump-fbi-files-discrimination-case-235067> [<https://perma.cc/3RRV-PZR5>].

²⁴⁵ Kristof, *supra* note 244.

²⁴⁶ See Jan Ransom, *Trump Will Not Apologize for Calling for Death Penalty over Central Park Five*, N.Y. TIMES (June 18, 2019), <https://nyti.ms/2FhyYzA> [<https://perma.cc/W2NY-KDP9>].

²⁴⁷ See Colby Itkowitz & Michael Brice-Saddler, *Trump Still Won't Apologize to the Central Park Five. Here's What He Said at the Time.*, WASH. POST (June 18, 2019, 9:30 PM), https://www.washingtonpost.com/politics/trump-still-wont-apologize-to-the-central-park-five-heres-what-he-said-at-the-time/2019/06/18/32ea4d7e-9208-11e9-b570-6416efdc0803_story.html [<https://perma.cc/NX24-KXBV>].

²⁴⁸ See Gregory Krieg, *14 of Trump's Most Outrageous "Birther" Claims — Half from After 2011*, CNN (Sept. 16, 2016, 12:33 PM), <https://www.cnn.com/2016/09/09/politics/donald-trump-birther/index.html> [<https://perma.cc/V5ML-9NSP>]; Kelefa Sanneh, *What Do People Mean When They Say Donald Trump Is Racist?*, NEW YORKER (Aug. 18, 2016), <https://www.newyorker.com/news/daily-comment/what-do-people-mean-when-they-say-donald-trump-is-racist> [<https://perma.cc/Q7N2-V35G>].

²⁴⁹ Sanneh, *supra* note 248.

September 11, 2001.²⁵⁰ After a Muslim couple killed fourteen people in a terrorist attack in San Bernardino, California, Trump called for a “total and complete” ban on Muslim immigration.²⁵¹ Only reluctantly and indirectly did Trump distance himself from the endorsement of white supremacist David Duke.²⁵²

As President, Trump remarked upon the “very fine people on both sides” at a white supremacist and neo-Nazi rally in Charlottesville,²⁵³ leading white nationalist Richard Spencer to praise the President for “defending the truth.”²⁵⁴ In a White House meeting, President Trump reportedly disparaged Haiti as well as all of Africa as “shithole countries” and declared his preference for immigrants from Norway.²⁵⁵ He has suggested that black football players protesting racial injustice during the national anthem should leave the United States and has repeatedly disparaged the intelligence of black reporters and congressional representatives.²⁵⁶ In 2019, he tweeted that four black and brown congresswomen, who he said dared to tell Americans “how our government is to be run,” should “go back and help fix the totally broken and crime infested places from which they came.”²⁵⁷ Three of the four were born in the United States, and all of them are U.S. citizens.²⁵⁸

²⁵⁰ See Jenna Johnson, *Inside Donald Trump's Strategic Decision to Target Muslims*, WASH. POST (June 21, 2016), https://www.washingtonpost.com/politics/inside-donald-trumps-strategic-decision-to-target-muslims/2016/06/20/d506411e-3241-11e6-8758-d58e76e11b12_story.html [https://perma.cc/7P34-CNZF].

²⁵¹ *Id.*

²⁵² See Sanneh, *supra* note 248.

²⁵³ RUCKER & LEONNIG, *supra* note 131, at 154.

²⁵⁴ See Steven Nelson, *White Nationalist Richard Spencer Thanks Trump for “Defending the Truth” on Charlottesville*, WASH. EXAM’R (Aug. 15, 2017, 5:30 PM), <https://www.washingtonexaminer.com/white-nationalist-richard-spencer-thanks-trump-for-defending-the-truth-on-charlottesville> [https://perma.cc/SUZ4-GQMR].

²⁵⁵ RUCKER & LEONNIG, *supra* note 131, at 187.

²⁵⁶ See Josh Levin, *Trump Also Told Colin Kaepernick that He Should Leave the Country*, SLATE (July 15, 2019, 7:12 PM), <https://slate.com/news-and-politics/2019/07/trump-kaepernick-find-another-country-megan-rapinoe.html> [https://perma.cc/M9K3-C5SB]; David Nakamura, *Trump's Insults Toward Black Reporters, Candidates Echo “Historic Playbooks” Used Against African Americans, Critics Say*, WASH. POST (Nov. 9, 2018, 7:12 PM), https://www.washingtonpost.com/politics/trumps-insults-toward-black-reporters-candidates-echo-historic-playbooks-used-against-african-americans/2018/11/09/74653438-e440-11e8-b759-3d88a5ce9e19_story.html [https://perma.cc/AAJ4-ZFRN]; John Wagner & Mark Maske, *Trump: NFL Players Unwilling to Stand for Anthem Maybe “Shouldn’t Be in the Country,”* WASH. POST (May 24, 2018, 7:20 AM), https://www.washingtonpost.com/politics/trump-nfl-owners-doing-the-right-thing-on-national-anthem-policy/2018/05/24/cdd66490-5f36-11e8-a4a4-c070ef53f315_story.html [https://perma.cc/3QGL-5WYQ].

²⁵⁷ See Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to “Go Back” to the Countries They Came From*, N.Y. TIMES (July 14, 2019), <https://nyti.ms/2LokWkq> [https://perma.cc/YT5H-BW29].

²⁵⁸ See Felicia Sonmez & Mike DeBonis, *Trump Tells Four Liberal Congresswomen to “Go Back” to Their Countries, Prompting Pelosi to Defend Them*, WASH. POST (July 14, 2019, 8:27 PM), <https://www.washingtonpost.com/politics/trump-says-four-liberal-congresswomen-should-go-back-to-their-countries-prompting-pelosi-to-defend-them/>

8. *Lies*. — According to a tally maintained by *The Washington Post*, as of early July 2020, President Trump had uttered over twenty thousand “false or misleading claims” during his presidency.²⁵⁹ Many of these statements were straight-out lies, but some journalists are reluctant to label them as such because “lie” connotes “an intent to deceive”²⁶⁰ and the President’s falsehoods could be instead a result of his being ignorant of the facts, confused about them, or indifferent as to whether they support his claims.²⁶¹

During the campaign, Trump lied about whether he had supported the Iraq War before he opposed it,²⁶² whether he had mocked a newspaper reporter with a physical disability,²⁶³ whether the murder rate in the United States was at a nearly fifty-year high,²⁶⁴ and whether he had any business interests in Russia.²⁶⁵ After losing the popular vote by nearly three million votes,²⁶⁶ President Trump has lied by insisting that three to five million undocumented immigrants voted in the election.²⁶⁷

Some of President Trump’s more notorious lies in office include that President Obama wiretapped Trump Tower during the campaign,²⁶⁸ that Trump did not authorize hush-money payments to adult-film actress Stormy Daniels,²⁶⁹ and that a whistleblower had misrepresented

back-to-the-crime-infested-places-from-which-they-came/2019/07/14/b8bf140e-a638-11e9-a3a6-ab670962db05_story.html [https://perma.cc/N8PV-H23X].

²⁵⁹ Glenn Kessler, Salvador Rizzo & Meg Kelly, *President Trump Has Made More than 20,000 False or Misleading Claims*, WASH. POST (July 13, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/07/13/president-trump-has-made-more-than-20000-false-or-misleading-claims/> [https://perma.cc/GK5J-QGP3].

²⁶⁰ Daniel Dale, “*Call Them Lies*”? *Why We Sometimes Don’t Use the L-Word When Trump Is Wrong*, THE STAR (May 28, 2018), <https://www.thestar.com/news/world/2018/05/28/call-them-lies-why-we-sometimes-dont-use-the-l-word-when-trump-is-wrong.html> [https://perma.cc/K8ET-ZSGU] (quoting the Merriam-Webster dictionary definition of “lie”).

²⁶¹ See *id.*; Pete Vernon, *Lie? Falsehood? What to Call the President’s Words*, COLUM. JOURNALISM REV. (May 29, 2018), https://www.cjr.org/the_media_today/trump-lie-falsehood.php [https://perma.cc/PCK7-Z2EW].

²⁶² David Leonhardt & Stuart A. Thompson, Opinion, *Trump’s Lies*, N.Y. TIMES (Dec. 14, 2017), <https://nyti.ms/2sZqacl> [https://perma.cc/82SP-3Z87].

²⁶³ Maggie Haberman, *Donald Trump Says His Mocking of New York Times Reporter Was Misread*, N.Y. TIMES (Nov. 26, 2015), <https://nyti.ms/1IloDYU> [https://perma.cc/5ZZW-ELW9].

²⁶⁴ Tom Jackman, *Trump Makes False Statement About U.S. Murder Rate to Sheriffs’ Group*, WASH. POST (Feb. 7, 2017, 1:26 PM), <https://www.washingtonpost.com/news/true-crime/wp/2017/02/07/trump-makes-false-statement-about-u-s-murder-rate-to-sheriffs-group/> [https://perma.cc/LX54-LBFC].

²⁶⁵ Linda Qiu, *Trump Denies Business Dealings with Russia. His Former Lawyer Contradicts Him*, N.Y. TIMES (Nov. 29, 2018), <https://nyti.ms/2DU3RdM> [https://perma.cc/A5FW-HXQP].

²⁶⁶ Nate Cohn, *Why Trump Had an Edge in the Electoral College*, N.Y. TIMES (Dec. 19, 2016), <https://nyti.ms/2i6AKWl> [https://perma.cc/T2LB-CLCY].

²⁶⁷ Nicholas Fandos, *Trump Won’t Back Down from His Voting Fraud Lie. Here Are the Facts*, N.Y. TIMES (Jan. 24, 2017), <https://nyti.ms/2kpnotp> [https://perma.cc/3YAL-5J5T].

²⁶⁸ Leonhardt & Thompson, *supra* note 262.

²⁶⁹ Alan Feuer, *What We Know About Trump’s \$130,000 Payment to Stormy Daniels*, N.Y. TIMES (Aug. 27, 2018), <https://nyti.ms/2P9B5YW> [https://perma.cc/WS35-DMS2].

President Trump's phone call with the President of Ukraine.²⁷⁰ President Trump is so prone to lying that his lawyers reportedly would not permit the Special Counsel to question him under oath in person because they assumed he would commit perjury, as it was "his nature" to just "ma[k]e something up" in response to questions.²⁷¹

With regard to the coronavirus pandemic alone, President Trump has told the following lies: that "anybody that needs a test gets a test,"²⁷² that the Obama Administration was responsible for the initial testing shortages,²⁷³ that President Trump identified COVID-19 as "a pandemic long before it was called a pandemic,"²⁷⁴ and that President Trump had never downplayed the coronavirus threat.²⁷⁵ Indeed, President Trump's lies during the pandemic have been so pervasive, and the potential consequences so grave, that some media scholars and journalists have urged television networks to cease carrying his news conferences live²⁷⁶ to avoid misinforming the American public through "propaganda."²⁷⁷

Never before in the modern era has the American public had to endure such an assault on truth by its chief executive.²⁷⁸ Moreover, because President Trump has not clearly suffered politically for his lies, other politicians are already beginning to mimic his dishonesty.²⁷⁹ Yet is democracy possible without an electorate able to distinguish truth from lies?²⁸⁰

²⁷⁰ Marshall Cohen, *Key Allegations from the Ukraine Whistleblower Are True, Despite What Trump Says*, CNN (Oct. 8, 2019), <https://www.cnn.com/interactive/2019/10/politics/whistleblower-complaint-corroboration> [<https://perma.cc/HCE5-RP6H>].

²⁷¹ Tina Nguyen, *Ex-Trump Lawyer Told Mueller that Trump Is Too Dumb to Testify*, VANITY FAIR (Sept. 4, 2018), <https://www.vanityfair.com/news/2018/09/ex-trump-lawyer-told-mueller-trump-is-too-dumb-to-testify> [<https://perma.cc/F298-PFBY>].

²⁷² Katie Rogers, *Trump Now Claims He Always Knew the Coronavirus Would Be a Pandemic*, N.Y. TIMES (Mar. 17, 2020), <https://nyti.ms/2UogjQO> [<https://perma.cc/S5XZ-8YA6>]; see also Noah Weiland & Katie Thomas, *Trump Administration Moves to Speed Coronavirus Testing*, N.Y. TIMES (Mar. 13, 2020), <https://nyti.ms/2IGPESs> [<https://perma.cc/496M-9AT6>].

²⁷³ Linda Qiu, *Trump's False Claims About His Response to the Coronavirus*, N.Y. TIMES (Mar. 15, 2020), <https://nyti.ms/3cVwVjT> [<https://perma.cc/F6NV-LRSW>].

²⁷⁴ Rogers, *supra* note 272.

²⁷⁵ *Id.*

²⁷⁶ Matthew Yglesias, *Cable News Should Cancel the Trump Show*, VOX (Mar. 23, 2020, 4:30 PM), <https://www.vox.com/2020/3/23/21190362/trump-daily-coronavirus-briefing-fox-cnn-msnbc> [<https://perma.cc/KY2T-2KHG>].

²⁷⁷ Jennifer Senior, Opinion, *Call Trump's News Conferences What They Are: Propaganda*, N.Y. TIMES (Mar. 20, 2020), <https://nyti.ms/33DFHPb> [<https://perma.cc/66YS-48M6>].

²⁷⁸ See Susan B. Glasser, *The Most Mendacious President in U.S. History*, NEW YORKER (May 29, 2020), <https://www.newyorker.com/news/letter-from-trumps-washington/the-most-mendacious-president-in-us-history> [<https://perma.cc/CZU3-HF7P>].

²⁷⁹ See Edsall, *supra* note 66; Paul Waldman, Opinion, *Why the Republican Commitment to Lying Will Outlast Trump*, WASH. POST (Dec. 10, 2019, 12:48 PM), <https://www.washingtonpost.com/opinions/2019/12/10/why-republican-commitment-lying-will-outlast-trump> [<https://perma.cc/SG2R-T5FQ>].

²⁸⁰ Cf. Jay Rosen, *Asymmetry Between the Major Parties Fries the Circuits of the Mainstream Press*, PRESSTHINK (Sept. 25, 2016, 7:59 PM), <https://pressthink.org/2016/09/>

As discussed further below, President Trump also has a dependable right-wing media ecosystem to back up his lies and to denigrate the “mainstream media” when it exposes them.²⁸¹ In fact, eighty-two percent of Republicans said they believe President Trump more than they believe mainstream media, which have forced reporters to resign instantly for making mistakes that fall far short of President Trump’s lies.²⁸²

g. *Eroding Transparency.* — Democracy requires that citizens be able to hold their government accountable, which is possible only if the government is sufficiently transparent.²⁸³ The Trump Administration has eroded more transparency norms than any government in recent American history.

Trump was the first major party presidential candidate in more than forty years to refuse to release his tax returns.²⁸⁴ His justification was that the IRS was auditing the returns — though this would not preclude Trump’s releasing them — and he promised to make them public once the audit was completed, but he has walked back that promise since the election.²⁸⁵ Treasury Secretary Steven Mnuchin has blocked the IRS from turning over President Trump’s tax returns in response to a demand from a House committee, which by statute is clearly entitled to the returns.²⁸⁶ President Trump has also filed lawsuits to bar his principal lender, Deutsche Bank, and his accountant, Mazars, from complying with subpoenas by multiple House committees and the Manhattan District Attorney seeking those tax returns and other financial information from President Trump and his businesses.²⁸⁷

asymmetry-between-the-major-parties-fries-the-circuits-of-the-mainstream-press [https://perma.cc/CX3P-WMA9] (arguing that Trump’s campaign ran against the “basic notion[]” that “lying cannot become a universal principle . . . without major damage to our democracy”).

²⁸¹ See Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 4, 2019), <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house> [https://perma.cc/YYG2-ZPKG].

²⁸² Sulzberger, *supra* note 57; see also Michael M. Grynbaum, 3 *CNN Journalists Resign After Retracted Story on Trump Ally*, N.Y. TIMES (June 26, 2017), <https://nyti.ms/2tdyHbZ> [https://perma.cc/E3RL-7SBE].

²⁸³ See Huq & Ginsburg, *supra* note 36, at 130–32.

²⁸⁴ Julie Hirschfeld Davis, *Trump Won’t Release His Tax Returns, a Top Aide Says*, N.Y. TIMES (Jan. 22, 2017), <https://nyti.ms/2jOLLjg> [https://perma.cc/5DE8-N7FS].

²⁸⁵ See *id.*; Alan Rappeport, *I.R.S. Memo Undercuts Mnuchin on Withholding Trump’s Tax Returns*, N.Y. TIMES (May 21, 2019), <https://nyti.ms/2HtxX8Z> [https://perma.cc/EC6J-2DDB].

²⁸⁶ See Rappeport, *supra* note 285; see also Philip Hackney, *Why the IRS Is Legally Required to Give Congress Trump’s Tax Returns, but Probably Won’t*, PBS NEWS HOUR (May 7, 2019, 4:21 PM), <https://www.pbs.org/newshour/politics/why-the-irs-is-legally-required-to-give-congress-trumps-tax-returns-but-probably-wont> [https://perma.cc/KU88-MU59]; see also 26 U.S.C. § 6103(f)(1).

²⁸⁷ See Adam Liptak, *Momentous Choices for Supreme Court as It Hears Trump Financial Records Cases*, N.Y. TIMES (May 12, 2020), <https://nyti.ms/3bo8edW> [https://perma.cc/AP53-PGSS]; see also *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

After Democrats won control of the House in 2018, President Trump threatened a “warlike posture” if they investigated him.²⁸⁸ During the House impeachment proceedings, the White House defied House committee subpoenas to provide documents and witnesses and invoked an absolute testimonial privilege for close presidential advisors that no court has ever recognized.²⁸⁹

The White House has placed transcripts of the President’s phone calls and meetings with foreign leaders, such as his conversation with President Zelensky of Ukraine, on a “highly classified” computer system, not because all of the contents are classified but because they might prove embarrassing to the President.²⁹⁰ After President Trump met privately for the first time with President Putin at the G-20 summit in Hamburg, Germany, President Trump took possession of the American translator’s notes and instructed her not to discuss their contents even with other Administration officials.²⁹¹

Government whistleblowers and inspectors general promote transparency and accountability by facilitating the exposure of government waste, fraud, and misconduct.²⁹² Yet President Trump repeatedly demanded the unmasking of the Ukraine whistleblower, without whose report the nation might never have learned of President Trump’s impeachable conduct.²⁹³ President Trump’s repeated attacks on the whistleblower, which likely played a role in death threats made against his lawyers,²⁹⁴ will surely discourage future whistleblowers from coming forward, which is probably

²⁸⁸ RUCKER & LEONNIG, *supra* note 131, at 312.

²⁸⁹ See Peter Baker, *The Impeachment Witnesses Not Heard*, N.Y. TIMES (Jan. 6, 2020), <https://nyti.ms/2OaBOv1> [<https://perma.cc/973K-PKBP>]; see also RICHARD LEMPERT, BROOKINGS INST., ALL THE PRESIDENT’S PRIVILEGES (2019), <https://www.brookings.edu/research/all-the-presidents-privileges> [<https://perma.cc/Y6FH-W5WD>].

²⁹⁰ See Julian E. Barnes, Michael Crowley, Matthew Rosenberg & Mark Mazzetti, *White House Classified Computer System Is Used to Hold Transcripts of Sensitive Calls*, N.Y. TIMES (Sept. 29, 2019), <https://nyti.ms/2ncZUKJ> [<https://perma.cc/B57T-29PH>].

²⁹¹ RUCKER & LEONNIG, *supra* note 131, at 110.

²⁹² See Susan Nevelow Mart, *Documents, Leaks and the Boundaries of Expression: Government Whistleblowing in an Over-Classified Age*, LAW & TECH. RES. FOR LEGAL PROS. (July 27, 2007), <https://www.llrx.com/2007/07/documents-leaks-and-the-boundaries-of-expression-government-whistleblowing-in-an-over-classified-age> [<https://perma.cc/G4HM-LDUW>]; see also Quint Forney, *Government Watchdogs Slam DOJ’s Opinion on Whistleblower Report*, POLITICO (Oct. 25, 2019, 3:42 PM), <https://www.politico.com/news/2019/10/25/doj-opinion-whistleblower-report-057612> [<https://perma.cc/2PDG-2CQ8>].

²⁹³ See Colby Itkowitz, *Trump Retweets a Post Naming the Alleged Whistleblower*, WASH. POST (Dec. 28, 2019, 9:18 PM), https://www.washingtonpost.com/politics/trump-retweets--then-deletes--a-post-naming-the-alleged-whistleblower/2019/12/28/aa518350-2989-11ea-9c21-2c2a4d2c2166_story.html [<https://perma.cc/D2T6-YDNX>].

²⁹⁴ See Natasha Bertrand, “All Traitors Must Die”: *Feds Charge Man for Threatening Whistleblower Attorney*, POLITICO (Feb. 20, 2020, 12:37 PM), <https://www.politico.com/news/2020/02/20/man-charged-threatened-whistleblower-attorney-116379> [<https://perma.cc/JL84-X3BX>]; Maggie Haberman & Katie Rogers, *Trump Attacks Whistle-Blower’s Sources and Alludes*

one of the reasons President Trump acted as he did. Since the Senate's acquittal of President Trump on impeachment charges, he has fired or replaced no fewer than five agency inspectors general.²⁹⁵

10. *Admiration of Foreign Autocrats.* — President Trump regularly professes a bizarre admiration for foreign autocrats. During the campaign, he called President Putin a “strong leader”²⁹⁶ — better than President Obama — and admiringly noted President Putin's eighty-two percent approval ratings.²⁹⁷ When an interviewer pointed out to President Trump that President Putin has had political adversaries murdered, President Trump responded: “You got a lot of killers. What, you think our country's so innocent?”²⁹⁸ He later ignored the advice of his national security aides and congratulated President Putin upon his election to a fourth term as President in a transparently unfair election, in which President Putin's principal political opponent was not permitted to run, and soon after the Russian government allegedly had ordered the murder of a former Russian spy living in Great Britain.²⁹⁹

President Trump describes how he “fell in love” with North Korean leader Kim Jong-un,³⁰⁰ who runs possibly the most repressive regime in the world.³⁰¹ President Trump has commented that the North Korean leader is “very smart” and has a “great personality” and describes him

to *Punishment for Spies*, N.Y. TIMES (Sept. 26, 2019), <https://nyti.ms/2mTgyyR> [<https://perma.cc/UU5C-RK7T>].

²⁹⁵ See Jen Kirby, *Trump's Purge of Inspectors General, Explained*, VOX (May 28, 2020, 5:20 PM), <https://www.vox.com/2020/5/28/21265799/inspectors-general-trump-linick-atkinson> [<https://perma.cc/XZ68-HYJP>]; Melissa Quinn, *The Internal Watchdogs Trump Has Fired or Replaced*, CBS NEWS (May 19, 2020, 11:43 AM), <https://www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list> [<https://perma.cc/E4AV-R6JL>].

²⁹⁶ Andrew Kaczynski, Chris Massie & Nathan McDermott, *80 Times Trump Talked About Putin*, CNN (Mar. 2017), <https://www.cnn.com/interactive/2017/03/politics/trump-putin-russia-timeline> [<https://perma.cc/64BX-3ZBD>].

²⁹⁷ Philip Bump, *The Lesson of Vladimir Putin's Popularity Isn't the One Donald Trump Seems to Be Taking*, WASH. POST (Sept. 8, 2016, 10:33 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/08/the-lesson-of-vladimir-putins-popularity-isnt-the-one-donald-trump-seems-to-be-taking> [<https://perma.cc/K37T-FQ8P>].

²⁹⁸ Christopher Mele, *Trump, Asked Again About Putin, Suggests U.S. Isn't "So Innocent,"* N.Y. TIMES (Feb. 4, 2017), <https://nyti.ms/2kB9Jza> [<https://perma.cc/SNQ9-T6XE>].

²⁹⁹ Carol D. Leonnig, David Nakamura & Josh Dawsey, *Trump's National Security Advisers Warned Him Not to Congratulate Putin. He Did It Anyway.*, WASH. POST (Mar. 20, 2018, 7:15 PM), https://www.washingtonpost.com/politics/trumps-national-security-advisers-warned-him-not-to-congratulate-putin-he-did-it-anyway/2018/03/20/22738ebc-2c68-11e8-8ad6-fbc50284fce8_story.html [<https://perma.cc/P5RQ-KAPV>].

³⁰⁰ Philip Rucker & Josh Dawsey, *"We Fell in Love": Trump and Kim Shower Praise, Stroke Egos on Path to Nuclear Negotiations*, WASH. POST (Feb. 25, 2019, 4:30 AM), https://www.washingtonpost.com/politics/we-fell-in-love-trump-and-kim-shower-praise-stroke-egos-on-path-to-nuclear-negotiations/2019/02/24/46875188-3777-11e9-854a-7a14d7fec96a_story.html [<https://perma.cc/D262-RP2F>].

³⁰¹ See Eleanor Albert, *North Korea's Power Structure*, COUNCIL ON FOREIGN RELS. (June 17, 2020), <https://on.cfr.org/2zzkb30> [<https://perma.cc/ND6R-PVBW>].

as “funny.”³⁰² While President Trump was lauding Prime Minister Modi as a “terrific man” and a great supporter of “religious freedom” after a visit to Delhi,³⁰³ violence erupted as Prime Minister Modi’s supporters attacked opponents of India’s discriminatory citizenship law, resulting in at least forty deaths.³⁰⁴

The Trump Administration has also generally abandoned the tradition of American governments’ supporting democratic principles through foreign policy.³⁰⁵ Previous American Presidents understood that foreign authoritarian regimes posed a threat to American democracy through the spread of disinformation, the corrupt flow of money, and the threat of military conflict.³⁰⁶ Previous administrations intervened to protect even foreign journalists, political dissidents, and democratic protestors from incarceration or torture.³⁰⁷

By contrast, at a time when China is leveraging its growing economic clout to export its model of authoritarian state-run capitalism, the Trump Administration has made no significant countervailing effort to bolster international democracy.³⁰⁸ President Trump’s former ambassador to Germany, Richard Grenell, has openly supported right-wing political parties in Europe.³⁰⁹ In July 2017, speaking in Warsaw, President Trump expressed support for an increasingly authoritarian Polish government, which suppresses independent media and packs courts, on the grounds that it defended “the bonds of culture, faith and tradition that make us who we are” — a not very subtle reference to the governing

³⁰² Graham Russell, *Brothers in Nuclear Arms? Trump Defends Vladimir Putin and “Funny” Kim Jong-un*, THE GUARDIAN (July 15, 2018, 12:04 AM), <https://www.theguardian.com/us-news/2018/jul/15/donald-trump-defends-vladimir-putin-funny-kim-jong-un-russia-north-korea> [<https://perma.cc/PXD7-98G5>].

³⁰³ Anne Gearan, Joanna Slater, Seung Min Kim & Niha Masih, *Trump Praises Modi’s Record on Religious Tolerance as Violence Erupts over India’s Treatment of Muslims*, WASH. POST (Feb. 25, 2020, 10:48 PM), https://www.washingtonpost.com/politics/trump-india-modi-citizenship-law-muslims/2020/02/25/9358aef8-57b5-11ea-ab68-101ecfec2532_story.html [<https://perma.cc/9Z98-EK6M>].

³⁰⁴ See *id.*; Mira Kamdar, *What Happened in Delhi Was a Pogrom*, THE ATLANTIC (Feb. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/what-happened-delhi-was-pogrom/607198> [<https://perma.cc/U7W3-GEM2>].

³⁰⁵ See LEVITSKY & ZIBLATT, *supra* note 35, at 205.

³⁰⁶ Cf. DIAMOND, *supra* note 28, at 151 (arguing that the commitment of past Presidents to democracy was not “profoundly in doubt”); LEVITSKY & ZIBLATT, *supra* note 35, at 205 (noting that the United States played the role of “democracy promoter” following the Cold War).

³⁰⁷ See DIAMOND, *supra* note 28, at 209–14, 218–19.

³⁰⁸ See *id.* at 127–44; Paul Mozur, Jonah M. Kessel & Melissa Chan, *Made in China, Exported to the World: The Surveillance State*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/technology/ecuador-surveillance-cameras-police-government.html> [<https://perma.cc/SH2W-6WGT>]; Tharoor, *supra* note 29.

³⁰⁹ Melissa Eddy, *Promoting Europe’s Conservatives, U.S. Envoy Upsets Germans*, N.Y. TIMES (June 4, 2018), <https://nyti.ms/2LYF3m9> [<https://perma.cc/6X5J-GX8N>].

party's hostility to nonwhite, non-Christian immigrants.³¹⁰ In 2019, President Trump reportedly privately assured Chinese leader Xi Jinping that the United States would not publicly support pro-democracy protestors in Hong Kong and encouraged the Chinese leader's construction of internment camps for more than a million Uighurs, Kazakhs, and other members of mostly Muslim minority groups.³¹¹

As journalists around the world become increasingly endangered because of the challenge they pose to authoritarian governments, the Trump Administration has declined to intervene to protect them overseas.³¹² A.G. Sulzberger, publisher of *The New York Times*, recently explained how his newspaper had to seek help from a foreign government because the Trump Administration appeared to have declined to intervene when one of the *Times*'s journalists faced imminent arrest in Egypt.³¹³

Perhaps in part because they are unconcerned about criticism or sanctions from the United States, foreign autocrats feel liberated to suppress independent journalism.³¹⁴ Foreign autocrats attacking journalists have adopted President Trump's vocabulary.³¹⁵ Sulzberger notes that more than fifty government leaders across five continents have recently used the term "fake news" to justify clamping down on a free press.³¹⁶ In Myanmar, where the government has perpetrated genocide against the Rohingya minority, one government official characterized the existence of the minority group as "fake news."³¹⁷

II. Delegitimizing Elections and the Political Opposition. — Autocrats typically attack their political opponents as "traitors," and so does President Trump.³¹⁸ According to the President, congressional

³¹⁰ Yascha Mounk, *Democracy in Poland Is in Mortal Danger*, THE ATLANTIC (Oct. 9, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/poland-could-lose-its-democracy/599590> [<https://perma.cc/H6G3-QJ7X>]; see also Marc Santora, *Poland Bashes Immigrants, but Quietly Takes Christian Ones*, N.Y. TIMES (Mar. 26, 2019), <https://nyti.ms/2TzB4z9> [<https://perma.cc/B8RF-A8KF>].

³¹¹ JOHN BOLTON, THE ROOM WHERE IT HAPPENED: A WHITE HOUSE MEMOIR 279–84 (2020); see also Editorial, *How China Corralled 1 Million People into Concentration Camps*, WASH. POST (Feb. 29, 2020, 7:30 AM), https://www.washingtonpost.com/opinions/global-opinions/a-spreadsheet-of-those-in-hell-how-china-corralled-uighurs-into-concentration-camps/2020/02/28/4daeca4a-58c8-11ea-ab68-101ecfec2532_story.html [<https://perma.cc/2Q88-9SM3>].

³¹² See Sulzberger, *supra* note 57.

³¹³ *Id.*

³¹⁴ See *id.*

³¹⁵ See *id.*; Tharoor, *supra* note 29.

³¹⁶ Sulzberger, *supra* note 57.

³¹⁷ *Id.*

³¹⁸ LEVITSKY & ZIBLATT, *supra* note 35, at 75; see also Zachary Basu, *The 24 Times Trump Has Accused Somebody of "Treason"*, AXIOS (June 16, 2019), <https://www.axios.com/trump-treason-russia-investigation-new-york-times-e1660029-c73c-4809-8bd5-8988f1ed4fda.html> [<https://perma.cc/H4UJ-F9GF>].

Democrats who declined to stand up and applaud him during his State of the Union address committed “treason,” as did President Obama.³¹⁹

President Trump has also delegitimized American elections in an unprecedented fashion. In 2016, he questioned the legitimacy of the election before it happened and refused to acknowledge during a debate with Hillary Clinton whether he would accept the results if he lost: “We’re going to have to see. We’re going to see what happens.”³²⁰

Partly as a result of such statements, seventy-three percent of Republicans believed that the election could be “stolen” from Trump.³²¹ Approximately fifty percent of Republicans said they would not regard Hillary Clinton as a legitimate President if elected.³²² One presidential historian stated: “I haven’t seen it since 1860, this threat of delegitimizing the federal government, and Trump is trying to say our entire government is corrupt and the whole system is rigged And that’s a secessionist, revolutionary motif. That’s someone trying to topple the apple cart entirely.”³²³

What might happen in 2020 were President Trump to narrowly lose the election? President Obama controlled the military in 2016, but President Trump is now the commander in chief. Michael Cohen, the President’s former lawyer, warned during congressional testimony in 2019: “I fear that if he loses the election in 2020, there will never be a peaceful transition of power.”³²⁴

American intelligence officials have reported that Russia is already interfering in the 2020 election to help President Trump, just as it did in 2016.³²⁵ Even before President Trump pressured Ukraine’s leader to dig up dirt on the Bidens, he had said he would accept foreign assistance

³¹⁹ Haberman & Rogers, *supra* note 294; Mark Landler, *Trump Accuses Democrats of “Treason” amid Market Rout*, N.Y. TIMES (Feb. 5, 2018), <https://nyti.ms/2GQcSTT> [<https://perma.cc/866M-TSJW>]; Felicia Sonmez, *Trump, Without Evidence, Accuses Obama of “Treason,”* WASH. POST (June 22, 2020, 10:29 PM), https://www.washingtonpost.com/politics/trump-without-evidence-accuses-obama-of-treason/2020/06/22/14bc42c6-b4f3-11ea-aca5-ebb63d27e1ff_story.html [<https://perma.cc/ZNM5-FJUR>].

³²⁰ Patrick Healy & Maggie Haberman, *Donald Trump Opens New Line of Attack on Hillary Clinton: Her Marriage*, N.Y. TIMES (Sept. 30, 2016), <https://nyti.ms/2diniha> [<https://perma.cc/D5V2-YDUV>].

³²¹ See LEVITSKY & ZIBLATT, *supra* note 35, at 61.

³²² Maurice Tamman, *Half of Republicans Would Reject Election Result if Clinton Wins*, REUTERS (Oct. 21, 2016, 4:36 PM), <https://www.reuters.com/article/us-usa-election-poll-rigging/half-of-republicans-would-reject-election-result-if-clinton-wins-reuters-ipsos-idUSKCN12L2O2> [<https://perma.cc/W8XW-MJY7>].

³²³ Ashley Parker, *Donald Trump, Slipping in Polls, Warns of “Stolen Election,”* N.Y. TIMES (Oct. 13, 2016), <https://nyti.ms/2eo7imx> [<https://perma.cc/TJ4T-7FZJ>].

³²⁴ Ginger Gibson, Doina Chiacu & Sarah N. Lynch, *Cohen: Fears No “Peaceful Transition” if Trump Loses in 2020*, REUTERS (Feb. 27, 2019, 5:27 PM), <https://www.reuters.com/article/us-usa-trump-russia-2020/ex-trump-lawyer-cohen-says-he-fears-trump-may-not-allow-peaceful-transition-if-he-loses-in-2020-idUSKCN1QG2ZR> [<https://perma.cc/RU5F-B8BN>].

³²⁵ Goldman et al., *supra* note 193.

in an election and not tell the FBI about it.³²⁶ When Senators Mark Warner and Susan Collins proposed a requirement that all presidential candidates report to the FBI offers of foreign assistance, Senate Republicans blocked the proposal.³²⁷

President Trump is endeavoring to delegitimize the 2020 presidential election by claiming that Democrats are seeking to expand excuse-free absentee balloting, in the midst of a pandemic that has killed roughly 200,000 Americans as of the end of September,³²⁸ so they can steal the election through fraud.³²⁹ “This will be,” President Trump warned in June, “the most corrupt election in the history of our country, and we cannot let this happen.”³³⁰ Surveys found that nearly half of all Republicans believe Trump won the popular vote in 2016, and about eighty percent of them believe that a “meaningful amount” of voter fraud occurs when in fact it almost never does.³³¹ What happens if President Trump narrowly loses the election and claims it was stolen from him?

* * * * *

During the 2016 campaign, some Trump supporters rationalized his rhetoric and falsehoods by taking him “seriously, but not literally.”³³² Even well over three years into his Administration, Trump apologists insist that Democrats who criticize the President suffer from “Trump Derangement Syndrome.”³³³ However, President Trump’s actions in office demonstrate that he usually means what he says. The frog boils to

³²⁶ Peter Baker & Nicholas Fandos, *Trump Is Assailed for Saying He Would Take Campaign Help from Russia*, N.Y. TIMES (June 13, 2019), <https://nyti.ms/2IcoMKA> [<https://perma.cc/797W-C8SF>].

³²⁷ Jeremy Herb, *Senate Strips Provision from Intelligence Bill Requiring Campaigns to Report Foreign Election Help*, CNN (June 30, 2020, 1:24 PM), <https://www.cnn.com/2020/06/30/politics/senate-removes-ban-foreign-election-help/index.html> [<https://perma.cc/8P5X-94AZ>].

³²⁸ See *Daily Updates of Totals by Week and State*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 30, 2020), <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> [<https://perma.cc/65VX-PA2K>].

³²⁹ See Maggie Haberman, Nick Corasaniti & Linda Qiu, *Trump’s False Attacks on Voting by Mail Stir Broad Concern*, N.Y. TIMES (Aug. 3, 2020), <https://nyti.ms/2VhOqUn> [<https://perma.cc/86WP-XGTG>].

³³⁰ Maegan Vazquez & Donald Judd, *Trump Predicts “Most Corrupt Election” in US History While Making False Claims About Mail-In Voting*, CNN (June 23, 2020, 9:32 PM), <https://www.cnn.com/2020/06/23/politics/donald-trump-mail-voter-fraud-most-corrupt-election/index.html> [<https://perma.cc/GBC3-HFVP>].

³³¹ LEVITSKY & ZIBLATT, *supra* note 35, at 196; see also ANDERSON, *supra* note 6, at 64–65.

³³² Salena Zito, *Taking Trump Seriously, Not Literally*, THE ATLANTIC (Sept. 23, 2016), <https://www.theatlantic.com/politics/archive/2016/09/trump-makes-his-case-in-pittsburgh/501335> [<https://perma.cc/9WRE-KZHP>].

³³³ Conor Friedersdorf, *The Implications of Trump Derangement Syndrome*, THE ATLANTIC (Apr. 27, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/the-implications-of-trump-derangement-syndrome/610705> [<https://perma.cc/AMH4-NQ99>] (defining Trump Derangement Syndrome as a condition that “renders many Trump critics incapable of rational thoughts and prudent judgments”).

death one second at a time,³³⁴ and President Trump’s assault on democracy takes place one step at a time. Many Americans may be too busy to notice. Others, including most Republican officeholders, may be too enthusiastic about lower taxes, business deregulation, and conservative judges to care.³³⁵

C. *The Republican Party’s Assault on Democracy*

Democracies do not succumb to autocrats without the complicity of political insiders.³³⁶ A dysfunctional political party can be captured by an aspiring autocrat.³³⁷ To a large degree, President Trump is a symptom of a diseased political party that has largely abandoned its commitment to democracy.³³⁸

The American political system’s commitment to democracy has historically been uneven.³³⁹ While American states extended broader suffrage rights than did any other political community in the world in the late 1700s, the Constitution’s Framers sought to curtail what they saw as excessive democratic practices in the states.³⁴⁰ The Jacksonians extended suffrage to nearly all white male citizens while often curtailing it for black men.³⁴¹ After the Civil War, Republicans expanded the franchise to black men, but not to women as suffragists were demanding.³⁴² During and after Reconstruction, southern whites effectively nullified the voting rights of blacks.³⁴³ Throughout American history, political parties have manipulated electoral rules to entrench themselves

³³⁴ See LEVITSKY & ZIBLATT, *supra* note 35, at 5–6; Huq & Ginsburg, *supra* note 36, at 119.

³³⁵ See Janet Hook, *Donald Trump’s Iron Grip on the GOP: Why Republicans Stick with Him*, L.A. TIMES (June 12, 2020, 9:50 AM), <https://www.latimes.com/politics/story/2020-06-12/republican-officials-fear-trump> [<https://perma.cc/QQE3-8JBC>]; Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://nyti.ms/3aOHDXA> [<https://perma.cc/K38S-79ZW>].

³³⁶ See LEVITSKY & ZIBLATT, *supra* note 35, at 7.

³³⁷ Cf. Scheppele, *supra* note 31, at 580 (arguing that “dysfunction in the party system allows a mainstream political party to be captured” by an autocrat).

³³⁸ See *id.* at 569–70, 579–80 (discussing the structural weaknesses that are generally necessary for a prospective autocrat to succeed).

³³⁹ See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, at xvi, xx (2000).

³⁴⁰ See *id.* at 19–21, 24–25; MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 171, 178* (2016) [hereinafter KLARMAN, *FRAMERS’ COUP*].

³⁴¹ See KEYSSAR, *supra* note 339, at 2, 50; see also *id.* at 39–40, 52, 54–59.

³⁴² See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 111–15* (2019).

³⁴³ See KEYSSAR, *supra* note 339, at 105–16.

in power, a pathology to which the American political system is especially vulnerable because it eschews nonpartisan, professionalized election administration.³⁴⁴

The 1965 Voting Rights Act dramatically expanded black political participation in the South,³⁴⁵ and one might have assumed that American voter suppression was a thing of the past. Yet in the last twenty years, the Republican Party has revived the practice of voter suppression to preserve its weakening grip on political power.

Two factors account for this development. First, the national electorate is more closely divided between the two major political parties today than it has generally been over the past century.³⁴⁶ Control of the presidency and both chambers of Congress is usually at stake in every election, which was not generally the case from 1896 to 1932 or from 1950 to 1990.³⁴⁷ The 537 votes in Florida that determined the outcome of the 2000 presidential election drove this point home.³⁴⁸ Suppressing a few thousand votes here and there can make the difference in elections that have enormous political consequences.³⁴⁹ Second, a combination of dramatic demographic changes, secularization, and growing social liberalism has led Republicans to conclude that their political agenda may no longer be able to command majority support.³⁵⁰ Recognizing that they perform better in elections “as the voting populace goes down,”³⁵¹ Republicans have chosen to shrink the electorate and engage in other electoral machinations rather than alter their agenda to make it more popular.³⁵²

I. Partisan Gerrymandering. — Political gerrymandering has existed throughout American history. In 1788, the Virginia legislature, at the behest of Patrick Henry, who had been a leading opponent of ratification of the Constitution, gerrymandered the House district in which James Madison, one of the Constitution’s foremost proponents, was competing for a seat in the first Federal Congress.³⁵³ Historically, parties in

³⁴⁴ See Huq & Ginsburg, *supra* note 36, at 158–59; Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 121–22 (2016).

³⁴⁵ See, e.g., ANDERSON, *supra* note 6, at 27.

³⁴⁶ See ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* 91, 118 (2018).

³⁴⁷ See *id.* at 91–93; EZRA KLEIN, *WHY WE’RE POLARIZED* 214–15 (2020); Walter Dean Burnham, *The System of 1896: An Analysis, in THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* 147, 173–74 (1981).

³⁴⁸ See BERMAN, *supra* note 7, at 210.

³⁴⁹ See *id.* at 218.

³⁵⁰ See ABRAMOWITZ, *supra* note 346, at 120.

³⁵¹ ANDERSON, *supra* note 6, at 48 (quoting conservative activist Paul Weyrich).

³⁵² See JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* 256–59 (2016).

³⁵³ KLARMAN, *FRAMERS’ COUP*, *supra* note 340, at 556, 559.

power have gerrymandered legislative districts to their advantage.³⁵⁴ However, a mix of more sophisticated voter data collection and more powerful computers has turned gerrymandering into a fine art. In recent elections, Republicans have been the principal beneficiaries of gerrymandering, especially after conservative billionaires invested heavily in state legislative elections in 2010, enabling Republicans to win hundreds of seats, seize control of many state governments, and aggressively gerrymander districts after the 2010 census.³⁵⁵

A combination of partisan gerrymandering and geographic sorting — the tendency of Democrats to live in and around cities and the more balanced geographic distribution of Republicans — has produced some remarkably antidemocratic results to the Republicans' advantage.³⁵⁶ In the 2018 elections for the Wisconsin State Assembly, Democrats won fifty-three percent of the popular vote but only thirty-six percent of the seats.³⁵⁷ In the 2016 congressional elections in North Carolina, Democrats won roughly half of the votes cast but only three of the thirteen House seats.³⁵⁸ In 2012 in Pennsylvania, Democrats won fifty-one percent of the statewide vote for the U.S. House of Representatives, but only five out of eighteen House seats.³⁵⁹ A Brennan Center for Justice study estimated that Republican gerrymandering probably netted the party between thirteen and nineteen extra congressional seats in 2016.³⁶⁰ “Is this how American democracy is supposed to work?” asked Justice Kagan in her dissent to the Court’s recent ruling that partisan gerrymandering is a non-justiciable political question.³⁶¹

The answer is: Of course not. In general, democracy means that a majority of voters enjoys at least a majority of the political power. As further described below, when voters have approved initiatives to create independent districting commissions to end gerrymandering, Republican-controlled legislatures have tried to sabotage the results.³⁶²

³⁵⁴ See, e.g., ANDERSON, *supra* note 6, at 102; JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 412–14 (2017).

³⁵⁵ DIAMOND, *supra* note 28, at 96; MAYER, *supra* note 354, at 298–300, 327–28.

³⁵⁶ DIAMOND, *supra* note 28, at 94–98, 266–67.

³⁵⁷ Philip Bump, *The Several Layers of Republican Power-Grabbing in Wisconsin*, WASH. POST (Dec. 4, 2018, 12:44 PM), <https://www.washingtonpost.com/politics/2018/12/04/several-layers-republican-power-grabbing-wisconsin> [<https://perma.cc/NJK2-HS3D>].

³⁵⁸ DIAMOND, *supra* note 28, at 96.

³⁵⁹ Christopher Ingraham, *How Pennsylvania Republicans Pulled Off Their Aggressive Gerrymander*, WASH. POST (Feb. 6, 2018, 2:19 PM), <https://www.washingtonpost.com/news/work/wp/2018/02/06/how-pennsylvania-republicans-pulled-off-their-aggressive-gerrymander> [<https://perma.cc/Z6EE-YX8S>].

³⁶⁰ See LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUST., *EXTREME MAPS* 9, 14 (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_o.pdf [<https://perma.cc/2DMC-SDTU>].

³⁶¹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting); see also *id.* at 2506–07 (majority opinion).

³⁶² See *infra* section I.C.7(b), pp. 62–64.

2. *Voter Identification Laws.* — Beginning in 2005, Republican legislatures have enacted increasingly stringent requirements that voters present photo identification at the polls to prevent voter impersonation fraud.³⁶³ However, numerous studies confirm that such fraud essentially does not exist, while voter identification requirements have an adverse impact on Democratic-leaning voter populations — people of color, young people, and the poor.³⁶⁴

The Republican Party's obsession with voter impersonation fraud began in 2000 after a very close U.S. Senate contest in Missouri.³⁶⁵ Over the preceding four years, the St. Louis Board of Election Commissioners had purged from the rolls without notification more than fifty thousand voters, most of them African American, after voter registration cards mailed to them had been returned as nondeliverable.³⁶⁶ On Election Day, thousands of people showed up to vote only to discover they were no longer registered and could not vote until a local election judge received authorization from the Board.³⁶⁷ The campaign of Democratic presidential candidate Al Gore filed an emergency lawsuit late on Election Day, asking a court to keep the polls open late so that everyone wishing to vote could do so, and the judge acquiesced.³⁶⁸ However, the court of appeals quickly overturned that order and closed the polls.³⁶⁹

Republican Senator John Ashcroft lost his race for reelection by only 49,000 votes and alleged fraud and corruption in St. Louis.³⁷⁰ Missouri's other Republican Senator Kit Bond charged that "Democrats in the city of St. Louis are trying to steal the election."³⁷¹ In a 250-page report sent to the FBI and the local U.S. Attorney's office, Bond alleged a vast criminal voter fraud scheme.³⁷² Newly elected President George W. Bush appointed Ashcroft to the post of Attorney General, and the Justice Department quickly established the Voting Access and Integrity Initiative, focused on uncovering evidence of voter fraud.³⁷³ In the words of one voting rights expert, "a new right-wing voter fraud movement was born."³⁷⁴ Fox News broadcast fraudulent stories of pervasive

³⁶³ ANDERSON, *supra* note 6, at 52–71.

³⁶⁴ See *infra* notes 391–401 and accompanying text.

³⁶⁵ See BERMAN, *supra* note 7, at 214–17.

³⁶⁶ *Id.* at 215; *Federal Election Practices and Procedures: Hearings Before the S. Comm. on Governmental Affs.*, 107th Cong. 20 (2001) (statement of Rep. William Lacy Clay).

³⁶⁷ BERMAN, *supra* note 7, at 215.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 216.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

voter fraud, and, over time, Republican voters came to believe there was a real problem.³⁷⁵

In 2005, Georgia and Indiana became the first states to enact voter photo identification laws.³⁷⁶ Previously, Georgians could vote using any of seventeen different forms of identification, including a student identification card or a Social Security card.³⁷⁷ Claiming a need to protect the security of elections, Republicans proposed a new law that would accept only six forms of government-issued photo identification, such as a driver's license or a passport.³⁷⁸ Hundreds of thousands of voting-age Georgians lacked the requisite identification, and African Americans were five times more likely than whites not to own cars and thus not to possess driver's licenses.³⁷⁹ Republicans identified no actual cases of voter fraud to justify the bill, but one Republican legislator claimed that African Americans voted only when someone paid them to do so.³⁸⁰ Nor did the bill require photo identification to cast absentee ballots, which carried higher potential for fraud; such ballots were used frequently by the elderly and military personnel, both of whom voted disproportionately Republican.³⁸¹ The bill passed on a party-line vote, as one black legislator protested: "What's happening today is just an updated form of Jim Crow."³⁸² The Bush Justice Department precleared the law over the objection of career lawyers in the Civil Rights Division.³⁸³

Despite Republicans' best efforts to find it, almost no evidence of voter impersonation fraud has emerged.³⁸⁴ Common sense indicates that such fraud would be a foolish way to seek electoral advantage: the potential criminal penalties are severe, and the payoff in terms of votes gained is trivial. One comprehensive investigation into voter impersonation fraud found only thirty-one possible incidents over a fifteen-year period in which more than one billion votes had been cast.³⁸⁵ Attorney General Ashcroft's probe, conducted between 2002 and 2007, uncovered only eighty-six convictions for voter fraud in a dataset of 300 million votes, and

³⁷⁵ See ANDERSON, *supra* note 6, at 53–54.

³⁷⁶ BERMAN, *supra* note 7, at 222–29, 253–54.

³⁷⁷ M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. RSCH. 555, 559 & n.5 (2008).

³⁷⁸ *Id.* at 560; see BERMAN, *supra* note 7, at 223.

³⁷⁹ BERMAN, *supra* note 7, at 223.

³⁸⁰ ANDERSON, *supra* note 6, at 60; see BERMAN, *supra* note 7, at 223.

³⁸¹ BERMAN, *supra* note 7, at 224.

³⁸² *Id.*

³⁸³ ANDERSON, *supra* note 6, at 61–62; BERMAN, *supra* note 7, at 229.

³⁸⁴ See ANDERSON, *supra* note 6, at 65; BERMAN, *supra* note 7, at 232–33.

³⁸⁵ Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014, 6:00 AM), <http://wapo.st/X13upo> [<https://perma.cc/U9MP-FBJB>].

not a single one was for voter impersonation fraud, which is the only type that a photo identification requirement could possibly prevent.³⁸⁶

Yet the nearly total absence of proof of voter impersonation fraud has not stopped Republicans from perpetuating the fraudulent myth of voter fraud — which the vast majority of Republicans believe.³⁸⁷ Most states under Republican control have enacted voting restrictions such as voter photo identification laws.³⁸⁸ At a trial challenging Texas's voter identification law, the Republican chair of the state's house elections committee testified: "I think every Republican member of the legislature would have been lynched if the bill had not passed."³⁸⁹ In light of evidence that voter impersonation fraud is almost nonexistent, some Republicans have defended voter photo identification laws on the ground that many people *believed* such fraud to be a serious concern.³⁹⁰ In other words, because Republicans had spent a decade making false allegations of voter fraud, photo identification laws were now necessary to restore voter confidence in election integrity.

While voter impersonation fraud is essentially a myth, the disparate racial and wealth effects of stringent voter identification laws are real. One national study found that thirty-seven percent of African Americans and twenty-seven percent of Latinos do not have a valid driver's license, while only sixteen percent of whites lack one.³⁹¹ In Texas, Latino voters were between 46 and 120 percent more likely than white voters not to possess any form of government-issued identification.³⁹² Obtaining the free voter identification card offered by Texas requires documentation, the cheapest form of which is a birth certificate that costs twenty-two dollars, and a trip to an office of the Department of Motor Vehicles.³⁹³ As of 2015, such offices did not exist in nearly one-third of Texas counties, especially those with large Latino populations.³⁹⁴ The nearest DMV office could be as far as 250 miles away.³⁹⁵ Eight hundred thousand registered Texas voters lacked the requisite identification to vote under the law,

³⁸⁶ BERMAN, *supra* note 7, at 232; see Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (Apr. 12, 2007), <https://www.nytimes.com/2007/04/12/washington/12fraud.html> [<https://perma.cc/BQS8-BH63>].

³⁸⁷ See, e.g., ANDERSON, *supra* note 6, at 63, 150–53, 157; BERMAN, *supra* note 7, at 231–32; Giovanni Russonello, *Voting by Mail Is Popular. So Is the False Idea that It's Ripe for Fraud.*, N.Y. TIMES (Aug. 17, 2020), <https://nyti.ms/337RJ5W> [<https://perma.cc/469R-8R96>].

³⁸⁸ See BERMAN, *supra* note 7, at 260–61.

³⁸⁹ *Id.* at 308.

³⁹⁰ See *id.* at 290.

³⁹¹ Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 41 (2013).

³⁹² BERMAN, *supra* note 7, at 266.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

while only four instances of voter impersonation fraud had been successfully prosecuted in the state during the ten years preceding the passage of the law and the two years following its enactment.³⁹⁶

A federal court found that about fifteen percent of African Americans in North Carolina lacked a form of identification that was acceptable under the state's recently passed voter identification law, as compared with just four percent of whites.³⁹⁷ One national study of the 2004 election found that voter identification requirements reduced Latino turnout by ten percent, African American and Asian American turnout by six percent, and white turnout by only about two percent.³⁹⁸ A study by the Government Accountability Office found that strict voter identification laws enacted in Kansas and Tennessee reduced voter turnout by two to three percentage points from 2008 to 2012 relative to turnout in similar states without voter identification laws.³⁹⁹ Turnout fell the most among newly registered voters, young people, and African Americans.⁴⁰⁰ Even if voter identification requirements have only a modest effect on turnout, they could easily prove decisive in close elections.⁴⁰¹

About five percent of North Dakota's residents are Native American, and they vote overwhelmingly Democratic.⁴⁰² In 2012, Democrat Heidi Heitkamp won the state's U.S. Senate race by fewer than three thousand votes.⁴⁰³ After her victory, the Republican legislature enacted a voter identification law that requires street addresses, which inhabitants of Native American reservations frequently do not have.⁴⁰⁴ Later, the Republican Secretary of State settled two lawsuits charging that the law intentionally discriminated against Native American voters.⁴⁰⁵

3. *Purging the Voter Rolls.* — Purges of the voter rolls have become another favored Republican method of voter suppression. As voters relocate or die, voter rolls become inaccurate.⁴⁰⁶ Good electoral practice and federal law require periodically removing ineligible voters from the

³⁹⁶ *Id.* at 308.

³⁹⁷ N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 38–39 (M.D.N.C. 2019).

³⁹⁸ BERMAN, *supra* note 7, at 233; TIMOTHY VERCELLOTTI & DAVID ANDERSON, PROTECTING THE FRANCHISE, OR RESTRICTING IT? THE EFFECTS OF VOTER IDENTIFICATION REQUIREMENTS ON TURNOUT 13 (2006), <https://moritzlaw.osu.edu/blogs/tokaji/voter%20id%20and%20turnout%20study.pdf> [<https://perma.cc/SJN7-FURQ>].

³⁹⁹ BERMAN, *supra* note 7, at 309–10.

⁴⁰⁰ *Id.* at 310.

⁴⁰¹ See LEVITSKY & ZIBLATT, *supra* note 35, at 185.

⁴⁰² Maggie Astor, *A Look at Where North Dakota's Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), <https://nyti.ms/2AiSRnN> [<https://perma.cc/838E-BKZB>]; Deirdre Mask, Opinion, *Where the Streets Have No Names, the People Have No Vote*, N.Y. TIMES (Oct. 19, 2018), <https://nyti.ms/2R7bhoD> [<https://perma.cc/CCY2-CUJZ>].

⁴⁰³ Astor, *supra* note 402.

⁴⁰⁴ *Id.*

⁴⁰⁵ Maggie Astor, *North Dakota Tribes Score Key Voting Rights Victory*, N.Y. TIMES (Feb. 13, 2020), <https://nyti.ms/2URBuFo> [<https://perma.cc/N9M8-7MEU>].

⁴⁰⁶ See ANDERSON, *supra* note 6, at 72–74.

rolls.⁴⁰⁷ However, Republicans have used drastically overbroad criteria for purging the rolls, with the purpose and effect of removing voters who disproportionately lean Democratic.⁴⁰⁸ In the dying days of Jim Crow, Mississippi whites did something similar, requiring the reregistration of voters in a third of the state's counties, in which forty percent of the state's black population lived.⁴⁰⁹

In 1993, the National Voter Registration Act,⁴¹⁰ also known as the "motor voter" law, made it easier for citizens to register to vote by enabling registration at various government offices, such as departments of motor vehicles.⁴¹¹ As a quid pro quo for expanding voter access, Republicans demanded that the law require routine maintenance of voter rolls.⁴¹² However, the law provides strict guidelines as to who may be removed from the rolls and how.⁴¹³ The Act forbids using registrants' failure to vote in recent elections as a reason for removing them from the rolls.⁴¹⁴ Yet, in the last two decades, Republican secretaries of state have begun removing registrants for precisely that reason.⁴¹⁵ One such official defended his office's actions on the ground that the federal statute does not permit purging voters *solely* for recent failures to vote but does not preclude purging them if they both failed to vote and failed to return a postcard warning them that they would be purged if they did not do so — a postcard that was sent only to those who had failed to vote.⁴¹⁶

The first of the controversial modern voter purges seems to have occurred in Florida before the 2000 election.⁴¹⁷ In 1997, a court had overturned the result of a Miami mayoral election in which hundreds of absentee ballots had been cast in favor of one of the candidates by dead voters and individuals convicted of felonies, who were ineligible to vote under state law.⁴¹⁸ Within weeks, the state legislature enacted a law requiring a private company to purge the rolls each year.⁴¹⁹ The Voter Integrity Project, a conservative advocacy group that supported purges as a means of preventing fraud, recommended the company that received the contract to conduct the annual purges.⁴²⁰

⁴⁰⁷ See *id.* at 73–74.

⁴⁰⁸ See *id.*

⁴⁰⁹ See BERMAN, *supra* note 7, at 90–91.

⁴¹⁰ 52 U.S.C. §§ 20501–20511.

⁴¹¹ ANDERSON, *supra* note 6, at 72–73.

⁴¹² *Id.* at 73.

⁴¹³ *Id.* at 74; see 52 U.S.C. § 20507.

⁴¹⁴ ANDERSON, *supra* note 6, at 74.

⁴¹⁵ See *id.* at 74–80.

⁴¹⁶ *Id.* at 76.

⁴¹⁷ BERMAN, *supra* note 7, at 207–08.

⁴¹⁸ *Id.* at 209.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

Prior to the 2000 election, Katherine Harris, Florida's Republican Secretary of State, sent county election supervisors a list of fifty-eight thousand alleged felons to purge from the voter rolls.⁴²¹ Although African Americans were only fifteen percent of Florida's registered voters, they constituted forty-four percent of the purge list, which contained many errors.⁴²²

Indeed, voters who knew they were properly registered discovered on Election Day that their names had been removed from the rolls, and poll workers were unable to cure the problem in time.⁴²³ The U.S. Civil Rights Commission later estimated that the error-laden purge might have cost Vice President Al Gore nearly 5,000 votes, which was more than eight times Governor George W. Bush's ultimate margin of victory in Florida in the 2000 election.⁴²⁴

Voter purges disproportionately impact people of color, the poor, and young people — all of whom are relatively more transient.⁴²⁵ Voter purges for inactivity affected twice as many registered voters in Ohio neighborhoods that supported President Obama by more than sixty percent in 2012 than voters in neighborhoods in which he received less than forty percent of the vote.⁴²⁶

Brian Kemp, Georgia's Secretary of State (now Governor), was a maestro of the voter purge.⁴²⁷ Between October 2012 and November 2014, Kemp eliminated 732,800 names from the voter rolls and then purged another 591,548 two years later.⁴²⁸ Kemp's office defended his actions as "voter list maintenance . . . to safeguard . . . the integrity of the ballot box . . . and prevent fraud."⁴²⁹ However, *The Washington Post* reported that no cases of voter impersonation fraud had been successfully prosecuted in Georgia between 2012 and 2016.⁴³⁰

Georgia's voter roll maintenance was combined with an exact-match registration system that produced massive error rates.⁴³¹ Between 2013 and 2016, African Americans in Georgia were one-third of the applicants for voter registration but sixty-four percent of the tens of thousands whose new registrations were rejected or designated "pending" due to

⁴²¹ See *id.* at 207–08.

⁴²² *Id.* at 208.

⁴²³ ANDERSON, *supra* note 6, at 34–36.

⁴²⁴ BERMAN, *supra* note 7, at 213.

⁴²⁵ See ANDERSON, *supra* note 6, at 74, 80.

⁴²⁶ *Id.* at 77.

⁴²⁷ *Id.* at 77–80.

⁴²⁸ *Id.* at 78–79.

⁴²⁹ *Id.* at 79.

⁴³⁰ Sami Edge & Sean Holstege, *No, Voter Fraud Actually Isn't a Persistent Problem*, WASH. POST (Sept. 1, 2016, 6:00 AM), <https://www.washingtonpost.com/news/post-nation/wp/2016/09/01/voter-fraud-is-not-a-persistent-problem> [<https://perma.cc/6KLV-U3VC>].

⁴³¹ See ANDERSON, *supra* note 6, at 80–81.

data mismatches.⁴³² Compared to white voter registrants, Asian American and Latino registrants were more than six times as likely to experience delays in or rejections of their registrations.⁴³³

Interstate Crosscheck, an alliance in which twenty-seven states participated until it was suspended in late 2019, proved a powerful weapon for purging voters in the name of eliminating fraud.⁴³⁴ The program was supposed to identify people registered to vote in two or more states.⁴³⁵ Its database collected voter records, including names, dates of birth, and the last four digits of Social Security numbers.⁴³⁶ Interstate Crosscheck flagged 7.2 million registrants as suspect following its launch in 2005, and several states purged their rolls based on its data.⁴³⁷ For instance, more than 340,000 names on Virginia's list were classified as suspect because Crosscheck identified those people as registered in other states.⁴³⁸ In advance of the 2014 election, the state summarily removed from the rolls approximately 40,000 of those names that already appeared on an inactive voters list.⁴³⁹

The Crosscheck system was massively inaccurate.⁴⁴⁰ Because not all states using it required the same information for voter registration, there were enormous possibilities for error.⁴⁴¹ For example, most states did not require Social Security numbers for voter registration, and Ohio did not even require voters' middle names.⁴⁴² A former FBI agent investigating the more than 35,000 North Carolina voters identified by Crosscheck as improperly registered in multiple states determined that every one of them was a false positive.⁴⁴³ Researchers at several universities have similarly found that Crosscheck had an error rate greater than ninety-nine percent, and its errors disproportionately affected voters from minority groups in which certain last names are prevalent.⁴⁴⁴

A study by the Brennan Center estimated that seventeen million voter registrations were canceled across the United States from 2016 to

⁴³² *Id.* at 81.

⁴³³ *Id.*

⁴³⁴ *Id.* at 85–87. On the program's suspension, see Roxana Hegeman, *Multistate Voter Database Suspended in Lawsuit Settlement*, ASSOCIATED PRESS (Dec. 10, 2019), <https://apnews.com/2c82eb782e578bbb81c121ec453fbee8> [<https://perma.cc/LD2L-XT3Z>].

⁴³⁵ ANDERSON, *supra* note 6, at 85.

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 86; Hegeman, *supra* note 434.

⁴³⁸ ANDERSON, *supra* note 6, at 86.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 86–88.

⁴⁴¹ *Id.* at 87.

⁴⁴² *Id.*

⁴⁴³ *See id.*

⁴⁴⁴ *Id.* at 87–88.

2018.⁴⁴⁵ As recently as late 2019, states such as Georgia and Wisconsin purged or considered purging hundreds of thousands of voters because they had not voted in recent elections or may have moved.⁴⁴⁶

4. *Other Methods of Impeding Voter Registration.* — Beginning in 2008, Republicans exploited fears of voter fraud by ramping up attacks on the Association of Community Organizations for Reform Now (ACORN), a community-based advocacy organization that conducted voter registration.⁴⁴⁷ ACORN employees in some states received bonuses for registering a certain number of voters per day and had submitted fictitious names such as Mickey Mouse.⁴⁴⁸ In a presidential debate, candidate John McCain charged that ACORN “is now on the verge of maybe perpetrating one of the greatest frauds in voter history.”⁴⁴⁹ Although there was no evidence that Mickey actually voted, one poll indicated that fifty-two percent of Republicans believed that ACORN had stolen the election for President Obama,⁴⁵⁰ whose margin of victory was well over nine million votes.⁴⁵¹

In 2010, Republican legislatures began imposing new obstacles to mass voter registration drives.⁴⁵² Invoking ACORN’s voter registration irregularities as justification, Florida enacted a statute requiring organizations registering large numbers of voters to fulfill several bureaucratic requirements and submit completed voter registration forms to the state board of elections within forty-eight hours or face possible fines and felony prosecution.⁴⁵³ As a result of the new law, the League of Women Voters, which had conducted voter registration drives for seven decades in Florida, ceased its operations in the state.⁴⁵⁴ African Americans and Latinos in Florida had been twice as likely to register through such efforts as white people had been.⁴⁵⁵ Only three people had been arrested for voter fraud in Florida over the preceding three years, fewer than the number of shark attacks in the state.⁴⁵⁶

⁴⁴⁵ Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds> [https://perma.cc/9JGM-K9CF].

⁴⁴⁶ Reis Thebault & Hannah Knowles, *Georgia Purged 309,000 Voters from Its Rolls. It’s the Second State to Make Cuts in Less than a Week.*, WASH. POST (Dec. 17, 2019, 10:10 PM), <https://www.washingtonpost.com/nation/2019/12/17/georgia-purged-voters-its-rolls-its-second-state-make-cuts-less-than-week> [https://perma.cc/DS2T-ZH3X].

⁴⁴⁷ BERMAN, *supra* note 7, at 256.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 257.

⁴⁵⁰ *See id.* at 256–57.

⁴⁵¹ *See* FED. ELECTION COMM’N, FEDERAL ELECTIONS 2008, at 5 (2009), <https://www.fec.gov/resources/cms-content/documents/federaelections2008.pdf> [https://perma.cc/7LNB-KM98].

⁴⁵² BERMAN, *supra* note 7, at 257, 261.

⁴⁵³ *Id.* at 261–62.

⁴⁵⁴ *Id.* at 262.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

In Georgia, Secretary of State Kemp launched an investigation of the voter registration methods of the Asian American Legal Advocacy Center, but after two years, he found no wrongdoing to charge.⁴⁵⁷ Then he turned his attention to the New Georgia Project, a group seeking to register more black voters.⁴⁵⁸ While he claimed to be investigating fraud, Kemp privately remarked that if Democrats succeeded at registering people of color, the party might start to win statewide elections.⁴⁵⁹ Again, Kemp's investigation came up empty-handed, though his fraud allegations captured media attention.⁴⁶⁰

5. *Suppressing the Youth Vote.* — The majority of young people today, especially those attending college, do not think well of the Republican Party or President Trump. A 2019 poll of eighteen- to twenty-nine-year-olds revealed that nearly twice as many of those who said they were likely to vote identified as Democrats than as Republicans, and nearly seventy percent of them disapproved of President Trump's job performance.⁴⁶¹ Rather than changing the party's policies to try to appeal to these young people, Republican legislatures are making it harder for them to vote.⁴⁶²

In 2014 in Florida, the Republican Secretary of State barred early voting sites from public university campuses, a decision later invalidated by a federal court.⁴⁶³ In 2016, Floridians aged eighteen to twenty-nine supported Hillary Clinton by eighteen percentage points over Donald Trump.⁴⁶⁴ Two years later, Florida voters cast about sixty thousand on-campus ballots,⁴⁶⁵ more than the margin of victory in both the Senate and gubernatorial elections.⁴⁶⁶ Unwilling to abandon their efforts to suppress

⁴⁵⁷ ANDERSON, *supra* note 6, at 152.

⁴⁵⁸ *See id.*

⁴⁵⁹ *See id.* at 152–53.

⁴⁶⁰ *See id.* at 153; *see also* Rebekah Barber, *Is Georgia's Secretary of State Unjustly Targeting Voting Rights Activists Again?*, FACING SOUTH (Oct. 4, 2017), <https://www.facingsouth.org/2017/10/georgias-secretary-state-unjustly-targeting-voting-rights-activists-again> [<https://perma.cc/SZV5-GFJJ>].

⁴⁶¹ HARVARD PUB. OP. PROJECT, HARVARD KENNEDY SCH. INST. OF POL., SURVEY OF YOUNG AMERICANS' ATTITUDES TOWARD POLITICS AND PUBLIC SERVICE 3, 7 (2019), https://iop.harvard.edu/sites/default/files/content/190419_Harvard%20IOP%20Spring%202019_Topline.pdf [<https://perma.cc/YDJ5-F39X>].

⁴⁶² *See* Michael Wines, *The Student Vote Is Surging. So Are Efforts to Suppress It.*, N.Y. TIMES (Oct. 24, 2019), <https://nyti.ms/2MFBaFb> [<https://perma.cc/3GPY-XN83>].

⁴⁶³ *Id.*

⁴⁶⁴ *See Decision 2016: Florida Results*, NBC NEWS (Nov. 22, 2016, 2:12 PM), <https://www.nbcnews.com/politics/2016-election/fl> [<https://perma.cc/G2KZ-L3ND>].

⁴⁶⁵ Wines, *supra* note 462.

⁴⁶⁶ *See Florida Election Results*, N.Y. TIMES (May 15, 2019, 2:09 PM), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-florida-elections.html> [<https://perma.cc/T7CT-C63M>].

the college student vote, in 2019 the Republican-controlled legislature enacted a law requiring all early voting sites to offer “sufficient non-permitted parking,” which is hard to come by on college campuses.⁴⁶⁷

After narrowly losing both a Senate race in New Hampshire and the state’s presidential contest in 2016, Republicans, including President Trump, complained that thousands of out-of-staters had illegally voted.⁴⁶⁸ Most of those supposedly illegal voters turned out to be college students entitled to vote under state law.⁴⁶⁹ In response, Republicans enacted a law requiring out-of-state college students who drive to establish “domicile” in New Hampshire to be eligible to vote.⁴⁷⁰ Among other steps, establishing domicile would require obtaining a state driver’s license and car registration at the cost of hundreds of dollars.⁴⁷¹ During the Jim Crow era, poll taxes, of which the New Hampshire law could be said to be a modern variant, significantly reduced turnout rates.⁴⁷²

In 2011 in Wisconsin, Republicans severely restricted the use of student identification cards for voting.⁴⁷³ Poll workers were required to check signatures only on student identification cards, some of which lack signatures because colleges and universities have determined that putting a signature on an identification card that doubles as a debit card and a dorm-room key is a security risk.⁴⁷⁴ The law also mandated that identification cards used for voting expire within two years⁴⁷⁵ while most college identification cards last for four. Republicans defended the law as an antifraud measure, but Wisconsin had no recent recorded cases of student voter impersonation fraud.⁴⁷⁶ The college student voting rate fell substantially in Wisconsin in 2016, as compared with the rate in both earlier Wisconsin elections and the nationwide election that year.⁴⁷⁷ President

⁴⁶⁷ Wines, *supra* note 462.

⁴⁶⁸ ANDERSON, *supra* note 6, at 91–92.

⁴⁶⁹ *Id.* at 92.

⁴⁷⁰ Wines, *supra* note 462.

⁴⁷¹ *Id.*

⁴⁷² ANDERSON, *supra* note 6, at 9–10, 153.

⁴⁷³ See Kayla Huynh, *Wisconsin Erected Barriers to College Voters. The Pandemic Added More.*, WIS. PUB. RADIO (June 22, 2020, 5:00 AM), <https://www.wpr.org/wisconsin-erected-barriers-college-voters-pandemic-added-more> [https://perma.cc/82EN-8V7U].

⁴⁷⁴ Wines, *supra* note 462.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*; see also NANCY THOMAS, INGER BERGOM, ISHARA CASELLAS CONNORS, PRABHAT GAUTAM, ADAM GISMONDI & ALENA ROSKO, INST. FOR DEMOCRACY & HIGHER EDUC., DEMOCRACY COUNTS: A REPORT ON U.S. COLLEGE AND UNIVERSITY STUDENT VOTING 4, 14 (2017), https://idhe.tufts.edu/sites/default/files/NSLVE%20Report%202012-2016_1.pdf [https://perma.cc/P4HN-CYDH].

⁴⁷⁷ Wines, *supra* note 462.

Trump won Wisconsin by fewer than 23,000 votes;⁴⁷⁸ the University of Wisconsin system alone enrolls about 170,000 students.⁴⁷⁹

6. *Other Barriers to Voting.* — Republicans have enacted other barriers to participation for Democratic voters. In the early 2000s, early voting became popular among voters who preferred to avoid long lines on Election Day or considered another day more convenient for casting their ballots.⁴⁸⁰ In 2004, early voting was considered a bipartisan reform, and Governor Jeb Bush of Florida called it a “great” idea.⁴⁸¹ Early voting proved especially attractive to African American voters.⁴⁸² In 2008, with Obama on the ballot, African Americans in Florida constituted thirteen percent of the electorate but more than thirty-five percent of early voters.⁴⁸³

Following the Democrats’ success with early voting operations, Florida Republicans shortened the early voting period from fourteen days to eight.⁴⁸⁴ In Ohio, where Obama had received fewer votes than McCain on Election Day yet still carried the state owing to his advantage with early voters, Republicans reduced the number of early voting days by more than two-thirds, from thirty-five to eleven.⁴⁸⁵ Both states also prohibited voting on the Sunday before the election, a day on which black churches had hosted “Souls to the Polls” events.⁴⁸⁶ A Republican campaign consultant in Florida admitted that the increase in turnout and success of Democratic early voting operations “certainly sent a chill down our spines.”⁴⁸⁷

After *Shelby County*, North Carolina Republicans reduced the number of early voting days, even though, according to one state legislator, around eighty-five percent of North Carolinians supported early voting.⁴⁸⁸ The bill’s sponsor explained that while he had supported early voting when it was first introduced, now he felt it had become “maybe

⁴⁷⁸ ANDERSON, *supra* note 6, at xv.

⁴⁷⁹ Wines, *supra* note 462; see *Fall Semester Enrollment Comparison with Prior Year*, UNIV. OF WIS. SYS. (2019), <https://www.wisconsin.edu/news/download/UW-Preliminary-Enrollment-Totals-2019.pdf> [<https://perma.cc/7H6N-J7D9>].

⁴⁸⁰ See BERMAN, *supra* note 7, at 262.

⁴⁸¹ *Id.*

⁴⁸² See *id.* at 262–63.

⁴⁸³ ANDERSON, *supra* note 6, at 118.

⁴⁸⁴ See BERMAN, *supra* note 7, at 263.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at 295–98; see also Adam Liptak & Michael Wines, *Strict North Carolina Voter ID Law Thwarted After Supreme Court Rejects Case*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/us/politics/voter-id-laws-supreme-court-north-carolina.html> [<https://perma.cc/V5KK-NX6T>] (discussing the Fourth Circuit’s invalidation of the law as unconstitutional and the Supreme Court’s refusal to hear an appeal).

tainted in one direction.”⁴⁸⁹ After Democrats won the Wisconsin gubernatorial election in 2018, Republicans used a lame-duck session to reduce the number of early voting days.⁴⁹⁰

Early voting can also be truncated by reducing the number of sites where it takes place.⁴⁹¹ When President Obama carried Indiana in 2008, Republicans attributed his surprise victory to voters in Marion County, where most of the state’s African Americans lived.⁴⁹² Republican legislators passed a bill, signed into law by then-Governor Mike Pence, that allowed counties with more than 325,000 residents to establish more than one early voting site only if the bipartisan county election board unanimously agreed to do so, meaning that Republican board members had an effective veto over the establishment of multiple early voting sites.⁴⁹³ Only three of the state’s ninety-two counties had populations that large, and sixty-two percent of Indiana’s blacks lived in two of them.⁴⁹⁴ Early voting in one of those counties dropped by twenty-six percent after this law was enacted.⁴⁹⁵ By contrast, Republican-friendly Hamilton County established two additional early voting sites, resulting in a sixty-three percent increase in early voting.⁴⁹⁶

In Ohio, the secretary of state allocates to each county just one polling station for early voting, which means that Hamilton County, with a population of more than 800,000, and Pickaway County, with a population of less than 60,000, each get only a single early voting site.⁴⁹⁷ Franklin County, which is home to Columbus, has more than 274,000 African American residents, Pickaway only 1,881.⁴⁹⁸ The chairman of the Franklin County Republican Party explained that he did not think the state should “contort the voting process to accommodate the urban — read African American — voter turnout machine.”⁴⁹⁹

Reducing the numbers of early voting days and early voting sites inevitably creates longer lines to vote on Election Day. In 2012 in

⁴⁸⁹ BERMAN, *supra* note 7, at 296.

⁴⁹⁰ See Ari Berman, *A Federal Court Just Blocked Wisconsin Republicans’ Attacks on Early Voting*, MOTHER JONES (Jan. 17, 2019), <https://www.motherjones.com/politics/2019/01/federal-court-blocked-wisconsin-republican-early-voting> [<https://perma.cc/AL37-VQNU>].

⁴⁹¹ ANDERSON, *supra* note 6, at 151.

⁴⁹² See *id.*

⁴⁹³ See *id.* at 151–52.

⁴⁹⁴ *Id.* at 151.

⁴⁹⁵ *Id.* at 152.

⁴⁹⁶ Fatima Hussein, *Republicans Limiting Early Voting in Marion County, Letting It Bloom in Suburbs*, INDYSTAR (Aug. 10, 2017, 12:09 PM), <https://www.indystar.com/story/news/2017/08/10/silencing-vote-data-shows-unequal-barrier-indiana-polls/435450001> [<https://perma.cc/C22H-RPZS>].

⁴⁹⁷ ANDERSON, *supra* note 6, at 118.

⁴⁹⁸ *Id.* at 118–19.

⁴⁹⁹ Stephanie Mencimer, *Even Without Voter ID Laws, Minority Voters Face More Hurdles to Casting Ballots*, MOTHER JONES (Nov. 3, 2014), <https://www.motherjones.com/politics/2014/11/minority-voters-election-long-lines-id> [<https://perma.cc/5CC8-UDQ3>].

Florida, where legislators had cut six days of early voting, an estimated 200,000 people did not vote because of long lines at the polls.⁵⁰⁰ Two Ohio Republican secretaries of state have restricted the number of polling stations available for early voting in urban areas, creating wait times as long as four or five hours and thus discouraging people in these Democratic-leaning districts from voting.⁵⁰¹

The 2004 presidential election came down to Ohio.⁵⁰² A Republican-controlled county election board allocated strongly Democratic precincts in Columbus seventeen fewer voting machines than the number allocated four years earlier, while mostly Republican precincts received eight additional machines.⁵⁰³ Democratic precincts experienced massive lines at the polls, with some people voting near Ohio State University facing wait times of four to five hours.⁵⁰⁴ One survey estimated that three percent of Ohio's voters, about 174,000 people in total, abandoned the long lines and went home without voting.⁵⁰⁵ President George W. Bush won the state by 118,000 votes.⁵⁰⁶ On average, African Americans in Ohio waited in line for fifty-two minutes to vote, while whites waited only eighteen minutes.⁵⁰⁷

7. *Undoing Election Results.* — In recent years, Republicans have employed several methods of undoing election results when voter suppression did not suffice to win elections.

(a) *Eviscerating the Powers of Democratic Governors.* — Beginning in 2016 in North Carolina, Republican legislatures have responded to Democratic victories in gubernatorial elections by passing laws during lame-duck sessions that deprive the new governors of powers traditionally allocated to the chief executive. While democratic theory does not require any particular allocation of powers between legislatures and governors, that distribution ought not to depend on which party happens to hold the governorship at a particular moment. Stealing powers from a duly elected government official is the stuff of autocrats.⁵⁰⁸

In 2016, Democrat Roy Cooper won the North Carolina gubernatorial contest by about ten thousand votes.⁵⁰⁹ During its lame-duck session, the Republican-controlled legislature passed a bill, signed into law

⁵⁰⁰ See BERMAN, *supra* note 7, at 269–70.

⁵⁰¹ See ANDERSON, *supra* note 6, at 77.

⁵⁰² *Bush Wins Second Term as Kerry Concedes*, CNN (Nov. 3, 2004, 1:13 PM), <https://www.cnn.com/2004/ALLPOLITICS/11/03/prez.main/index.html> [<https://perma.cc/7YB9-CUYJ>].

⁵⁰³ BERMAN, *supra* note 7, at 220–21.

⁵⁰⁴ *Id.* at 221.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ See LEVITSKY & ZIBLATT, *supra* note 35, at 77.

⁵⁰⁹ Richard Fausset, *Pat McCrory, North Carolina Governor, Concedes After Acrimonious Race*, N.Y. TIMES (Dec. 5, 2016), <https://nyti.ms/2gIhqBf> [<https://perma.cc/M8NA-MHCX>].

by the outgoing Republican governor, that required state senate approval of the governor's cabinet appointments, abrogated his power to appoint members to the governing boards of state universities, and reduced the number of state employees the governor can appoint by more than 1,000.⁵¹⁰ The law also changed election administration, requiring the body supervising state elections to be evenly divided between Republicans and Democrats, with Republicans to hold the chairmanship during even years, when all statewide elections are held.⁵¹¹ The legislature also shrank the state court of appeals by three seats, depriving Governor Cooper of the opportunity to fill vacancies.⁵¹²

In 2018, Democrats won the gubernatorial elections in Kansas, Michigan, and Wisconsin.⁵¹³ In each state, Republican legislatures repeated some version of the North Carolina experiment.⁵¹⁴ In addition to depriving Democratic Governor Tony Evers of traditional appointment powers, the Wisconsin legislature removed his power to make rules for Medicaid expansion and negated the authority of the newly elected Democratic attorney general to determine whether Wisconsin would participate in litigation challenging the constitutionality of the Affordable Care Act (ACA).⁵¹⁵ Wisconsin Democrats also feared that Republicans would try to take unprecedented steps to prevent the newly elected Democratic governor from participating in the redistricting process that will take place after the 2020 census.⁵¹⁶ This move would have enabled the Republicans to preserve some of the most gerrymandered

⁵¹⁰ Richard Fausset, *North Carolina Governor Signs Law Limiting Successor's Power*, N.Y. TIMES (Dec. 16, 2016), <https://nyti.ms/2hPYhP5> [<https://perma.cc/2BYL-EHQ8>]; Richard Fausset & Jonathan Martin, *Battle Lines Turn North Carolina's Moderation into a Distant Memory*, N.Y. TIMES (Dec. 23, 2016), <https://nyti.ms/2ioYLrA> [<https://perma.cc/M83W-ZUYW>].

⁵¹¹ See Fausset, *supra* note 510; Caitlin Mac Neal, *In Last-Minute Power Grab, NC GOPers Push to Curb Dem Gov's Authority*, TALKING POINTS MEMO (Dec. 15, 2016, 8:41 AM), <https://talkingpointsmemo.com/livewire/north-carolina-legislature-limit-governor-power> [<https://perma.cc/A3F6-79N5>].

⁵¹² Trip Gabriel, *In North Carolina, Republicans Stung by Court Rulings Aim to Change the Judges*, N.Y. TIMES (Oct. 18, 2017), <https://nyti.ms/2kYtnXn> [<https://perma.cc/32T7-ASYW>].

⁵¹³ Valerie Bauerlein & Dan Frosch, *Democrats Win Governor Races in Midwestern States as GOP Takes Florida*, WALL ST. J. (Nov. 7, 2018), <https://www.wsj.com/articles/hard-fought-governors-races-go-down-to-the-wire-1541560336> [<https://perma.cc/DLL5-NWSU>].

⁵¹⁴ See, e.g., ANDERSON, *supra* note 6, at 191; Igor Derysh, *Kansas Republicans Push Bill to Strip New Democratic Governor's Powers*, SALON (Apr. 23, 2019, 8:04 PM), <https://www.salon.com/2019/04/23/kansas-republicans-push-bill-to-to-strip-new-democratic-governors-powers> [<https://perma.cc/VB5F-XVHV>].

⁵¹⁵ See Tara Golshan, *How Republicans Are Trying to Strip Power from Democratic Governors-Elect*, VOX (Dec. 14, 2018, 1:41 PM), <https://www.vox.com/policy-and-politics/2018/12/4/18123784/gop-legislature-wisconsin-michigan-power-grab-lame-duck> [<https://perma.cc/K5TX-38CU>]; Dan Kaufman, Opinion, *Wisconsin Is About to Make a Huge Mistake*, N.Y. TIMES (Dec. 3, 2018), <https://nyti.ms/2zDbhPu> [<https://perma.cc/YS4A-7KKC>].

⁵¹⁶ Todd Richmond, *Wisconsin Democrats Fear GOP Redistricting End-Around*, ASSOCIATED PRESS (Nov. 28, 2018), <https://apnews.com/2f28ee1f0c5249e3bbf3515f58c8b299> [<https://perma.cc/3WL6-NJRH>].

state legislative districts in the nation,⁵¹⁷ though no such plan has yet been implemented. Also, North Carolina and Florida Republicans pursued court-packing schemes to deprive Democratic governors, if elected, of the traditional prerogative to appoint judges.⁵¹⁸

(b) *Circumventing Inconvenient Referenda Results.* — Populist autocrats often favor referenda.⁵¹⁹ Republicans supported them in past decades when they reliably produced anti-gay policies.⁵²⁰ However, in recent years, state voter initiatives and referenda have been used to enact policies that most Republican legislators have refused to support, such as raising the minimum wage,⁵²¹ expanding Medicaid,⁵²² and ending partisan gerrymandering.⁵²³ In response, Republican legislatures have attempted to circumvent inconvenient referendum results.

Reflecting growing revulsion toward mass incarceration, in 2018 Florida voters approved by a margin of nearly two to one an initiative ending disfranchisement for as many as 1.4 million citizens with felony convictions who had completed their sentences.⁵²⁴ In response, Republicans passed a law requiring those people to pay all court costs,

⁵¹⁷ Reid J. Epstein, *Why Wisconsin Republicans Insisted on an Election in a Pandemic*, N.Y. TIMES (Apr. 15, 2020), <https://nyti.ms/2RheAos> [<https://perma.cc/5UK7-N35S>]; see also ROYDEN & LI, *supra* note 360, at 7.

⁵¹⁸ Lynn Bonner, *NC Voters Reject Constitutional Amendments Limiting Governor's Power; 4 Others Pass*, RALEIGH NEWS & OBSERVER (Nov. 7, 2018, 1:52 AM), <https://www.newsobserver.com/news/politics-government/article221039145.html> [<https://perma.cc/E5QP-9Y2F>]; Gabriel, *supra* note 512; Mark Joseph Stern, *Rick Scott Is Preparing to Pack the State Supreme Court After His Term Ends*, SLATE (Sept. 12, 2018, 6:50 PM), <https://slate.com/news-and-politics/2018/09/rick-scott-plans-to-pack-the-florida-supreme-court-after-his-term-ends.html> [<https://perma.cc/QG7B-KJQG>].

⁵¹⁹ See MOUNK, *supra* note 31, at 47–50; cf. DIAMOND, *supra* note 28, at 62–63 (discussing populists' focus on engaging in a “direct” relationship with the people rather than working through representative democracy); Scheppele, *supra* note 31, at 568–69 (summarizing use of referenda by European leaders).

⁵²⁰ See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 69, 106 (2013) [hereinafter KLARMAN, FROM THE CLOSET].

⁵²¹ See, e.g., Dave Jamieson, *Minimum Wage Raise Passes in Four GOP States*, HUFFPOST (Nov. 5, 2014), https://www.huffpost.com/entry/minimum-wage-raise-passes_n_6095458 [<https://perma.cc/G49A-WGXJ>].

⁵²² See, e.g., Sarah Kliff, *Republican Leaders Want to End Obamacare. Their Voters Are Expanding It.*, N.Y. TIMES (July 1, 2020), <https://nyti.ms/2NOhpuZ> [<https://perma.cc/WU79-S2GL>].

⁵²³ See, e.g., Dave Zweifel, *Plain Talk: How Long Can Republicans Ignore the People's Voice on Redistricting?*, CAP. TIMES (Apr. 17, 2020), https://madison.com/ct/opinion/column/dave_zweifel/plain-talk-how-long-can-republicans-ignore-the-peoples-voice-on-redistricting/article_f6f6595-f095-5d90-ab76-5419dcdadfod.html [<https://perma.cc/F68U-W2KU>].

⁵²⁴ Stephen Wolf, *Embracing Jim Crow-Era Rules, Florida GOP Enacts Poll Tax that Could Ban Up to 1 Million from Voting*, DAILY KOS (June 28, 2019, 6:40 PM), <https://www.dailykos.com/stories/2019/6/28/1855828/-Embracing-Jim-Crow-era-rules-Florida-GOP-enacts-poll-tax-that-could-ban-up-to-1-million-from-voting> [<https://perma.cc/Y44K-S3N4>].

fees, and restitution before regaining suffrage rights, a requirement completely absent from the initiative.⁵²⁵ Under the statute, roughly 800,000 of those potentially reenfranchised by the initiative will be unable to regain their voting rights.⁵²⁶

In 2018, Missouri voters approved by initiative, as did voters in several other states,⁵²⁷ a constitutional amendment to end partisan gerrymandering by requiring that legislative districts be initially drawn by a nonpartisan demographer instructed to pursue a fair distribution of power between the parties.⁵²⁸ Fearful of losing their electoral advantage, Republican legislators proposed another constitutional amendment to eviscerate the voter initiative by eliminating the demographer's role and instructing the electoral commission to prioritize compactness rather than partisan fairness.⁵²⁹ This shift would disadvantage Democratic candidates, whose supporters cluster around St. Louis and Kansas City.⁵³⁰ The Republican amendment would also leave open the door to apportionment based on citizenship rather than total population, which would reduce Democratic and Latino political power.⁵³¹ To mislead voters, Republicans added to the amendment trivial ethics and lobbying restrictions on state lawmakers.⁵³²

In 2016 in South Dakota, voters approved an initiative enacting campaign finance reform, including reduced contribution limits, greater disclosure requirements, increased enforcement, and a public voucher system.⁵³³ Republican legislators declared a state of emergency, which allowed them to repeal the initiative and prevent voters from reenacting it in the next election.⁵³⁴

⁵²⁵ *Id.*

⁵²⁶ *Id.*; see also Lawrence Mower, *Florida Felons Lose Voting Rights Case in Federal Appeals Court*, TAMPA BAY TIMES (Sept. 11, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/09/11/florida-felons-lose-voting-rights-case-in-federal-appeals-court> [https://perma.cc/W5FT-9YAU].

⁵²⁷ See Michael Wines, *In the War Against Gerrymandering, an Army of Voters Meets a Dug-In Foe*, N.Y. TIMES (Aug. 15, 2019), <https://nyti.ms/2H5MPdq> [https://perma.cc/VQ2F-ZUR7].

⁵²⁸ See Stephen Wolf, *Voting Rights Roundup: Missouri GOP's Ballot Measure Would Gut Redistricting Reform but May Yet Fail*, DAILY KOS (May 15, 2020, 5:28 PM), <https://www.dailykos.com/stories/2020/5/15/1945371/-Voting-Rights-Roundup-Missouri-GOP-s-ballot-measure-would-gut-redistricting-reform-but-may-yet-fail> [https://perma.cc/5HL5-FQYA].

⁵²⁹ See *id.*

⁵³⁰ See *id.*; *Missouri Election Results 2018*, POLITICO (Sept. 12, 2020, 1:11 PM), <https://www.politico.com/election-results/2018/missouri> [https://perma.cc/X8E5-XUX8].

⁵³¹ See Wolf, *supra* note 528.

⁵³² See *id.*

⁵³³ BENJAMIN I. PAGE & MARTIN GILENS, *DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT* 267–68 (2020).

⁵³⁴ See *id.* at 268; Amber Phillips, *South Dakota Republicans Just Got Rid of the State's First Independent Ethics Commission*, WASH. POST (Feb. 3, 2017, 8:52 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/24/south-dakota-republicans-are-about-to-get-rid-of-the-states-first-independent-ethics-commission> [https://perma.cc/V9NJ-9KY7].

In 2018 in Michigan, Republicans undertook an extraordinary bait and switch to undermine proposed ballot initiatives to approve increases in the minimum wage and mandatory sick pay.⁵³⁵ By enacting these proposals through legislation, Republicans managed to keep the initiatives off the ballot.⁵³⁶ Then, after the election, the lame-duck Republican governor signed a Republican bill that eviscerated the reforms in the earlier law.⁵³⁷ Legislative override of a voter initiative would have required a supermajority that Republicans could not have easily generated after the election.⁵³⁸

(c) *Delaying or Canceling Elections.* — In January 2018, a Democrat won a stunning upset in a special election for a Wisconsin state senate seat.⁵³⁹ At least partially in response to the prospect of such Democratic victories, Republican Governor Scott Walker refused to set dates for special elections to fill two legislative seats that became vacant in December 2017.⁵⁴⁰ State law specified that if a legislative vacancy occurred “before the 2nd Tuesday in May in the year in which a regular election is held to fill that seat,” then the seat “shall be filled as promptly as possible by special election.”⁵⁴¹ Governor Walker argued that because the two legislative vacancies had arisen in December of the year *preceding* the regular election, he was not required to hold a special election for the seats⁵⁴² — a textually plausible but functionally ridiculous reading of the statute. When a state trial judge, a Walker appointee, rejected the governor’s interpretation, Republican legislators denounced her.⁵⁴³

⁵³⁵ See Michael Wines, *A Power Grab? Politics as Usual? Michigan’s Governor Will Decide*, N.Y. TIMES (Dec. 17, 2018), <https://nyti.ms/2GjjCxs> [<https://perma.cc/928K-JE47>].

⁵³⁶ See *id.*

⁵³⁷ David Eggert, *Michigan Governor Signs Bills to Gut Wage, Sick Time Laws*, ASSOCIATED PRESS (Dec. 14, 2018), <https://apnews.com/64856cae9c7481cb5709929ec2c95c8> [<https://perma.cc/3BS6-4YBZ>].

⁵³⁸ See *id.*

⁵³⁹ See Andrew Prokop, *Democrats Just Picked Up a Wisconsin State Senate Seat in a District Trump Won by 17 Points*, VOX (Jan. 17, 2018, 10:10 AM), <https://www.vox.com/policy-and-politics/2018/1/17/16899932/special-elections-2018-results> [<https://perma.cc/YT64-GRQ5>].

⁵⁴⁰ See Mark Sommerhauser, *Two GOP Lawmakers Resign to Take Jobs in Scott Walker Administration*, WIS. STATE J. (Dec. 30, 2017), https://madison.com/wsj/news/local/govt-and-politics/two-gop-lawmakers-resign-to-take-jobs-in-scott-walker-administration/article_cab8b784-2338-5913-b46b-abb409d5b1be.html [<https://perma.cc/EYN7-9D83>].

⁵⁴¹ WIS. STAT. § 8.50(4)(d) (2020).

⁵⁴² See Sommerhauser, *supra* note 540.

⁵⁴³ Matthew DeFour, *Scott Walker, Republican Lawmakers Call for Swift Changes to Special Election Law*, WIS. STATE J. (Mar. 24, 2018), https://madison.com/wsj/news/local/govt-and-politics/scott-walker-republican-lawmakers-call-for-swift-changes-to-special/article_64450368-6531-5016-8166-d5a5d5056734.html [<https://perma.cc/ZY8P-AW75>]; Ed Treleven, *Chief Judge Asks Assembly Speaker to Apologize for “Attack” on Dane County Judge*, WIS. STATE J. (Mar. 23, 2018), https://madison.com/wsj/news/local/courts/chief-judge-asks-assembly-speaker-to-apologize-for-attack-on-dane-county-judge/article_82b87de2-7143-590d-979b-cb98f46ed285.html [<https://perma.cc/D9T7-H8AY>].

In May 2020, Georgia Governor Brian Kemp canceled an election to fill a seat on the state supreme court.⁵⁴⁴ Governor Kemp took advantage of Justice Blackwell's decision to announce that he would retire several weeks before the expiration of his term at the end of the year.⁵⁴⁵ Under a poorly worded provision of the state constitution, Governor Kemp was able to both appoint Justice Blackwell's replacement and delay the new justice's first appearance on the ballot for more than two years — in a state in which Democrats have a good chance to win statewide elections for the first time in more than a decade this fall.⁵⁴⁶

(d) *Subjecting Voters to the Risk of Death for Political Advantage.* — In 2020 in Wisconsin, the Republican legislature refused to postpone an election despite the risks posed by high levels of COVID-19 in the state.⁵⁴⁷ Almost every other state that had elections scheduled for April had postponed them or canceled the in-person component of the elections because of the pandemic, and Democratic Governor Evers asked the legislature to postpone Wisconsin's April 7 election.⁵⁴⁸ It appeared that the state supreme court seat at issue would determine the outcome of a lawsuit seeking to force the secretary of state to purge more than 200,000 registered voters from the rolls before the 2020 election; that purge could easily determine the outcome of the presidential contest in Wisconsin, which in 2016 Trump had won by less than 23,000 votes.⁵⁴⁹ Republican legislators apparently had calculated that reduced turnout would help their candidate in the state supreme court contest, and they rejected the governor's request.⁵⁵⁰

When Governor Evers then issued an executive order to delay the election on his own authority, Republican legislators challenged the order, and the conservative majority on the state supreme court blocked it.⁵⁵¹ When a federal district judge extended the deadline for the receipt

⁵⁴⁴ See Ian Millhiser, *Georgia Republicans Cancel Election for State Supreme Court, So Governor Can Appoint a Republican*, VOX (May 19, 2020, 8:30 AM), <https://www.vox.com/2020/5/19/21262376/georgia-republicans-cancel-election-state-supreme-court-barrow-kemp-blackwell> [https://perma.cc/AB9E-4RFC].

⁵⁴⁵ See *id.*

⁵⁴⁶ *Id.*; Mike DeBonis, *Democrats Grow Bullish on Senate Prospects as Georgia Voters Cast Ballots*, WASH. POST (June 9, 2020, 11:14 PM), https://www.washingtonpost.com/powerpost/june-9-primaries/2020/06/09/5c98f2e2-aa5d-11ea-9d9-a81c1a491c52_story.html [https://perma.cc/82XK-XE7X].

⁵⁴⁷ Reid J. Epstein, *Upset Victory in Wisconsin Supreme Court Race Gives Democrats a Lift*, N.Y. TIMES (Apr. 13, 2020), <https://nyti.ms/3cgjg62> [https://perma.cc/XM9Q-WMBY].

⁵⁴⁸ *Id.*; see also Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List.*, N.Y. TIMES (Aug. 10, 2020), <https://nyti.ms/2vkwU8a> [https://perma.cc/3T4H-X4FG].

⁵⁴⁹ See Epstein, *supra* note 547; ANDERSON, *supra* note 6, at xv.

⁵⁵⁰ See Epstein, *supra* note 547.

⁵⁵¹ Nick Corasaniti, Reid J. Epstein & Lisa Lerer, *Wisconsin Is Set to Vote on Tuesday After Court Overrules Governor's Postponement*, N.Y. TIMES (Apr. 6, 2020), <https://nyti.ms/3aR9s1O> [https://perma.cc/2SHF-USUG].

of absentee ballots — to accommodate the large number of such ballots that had been requested but not delivered to voters in a timely fashion — the Republican majority of the U.S. Supreme Court effectively overturned that decision by requiring that ballots be postmarked by Election Day.⁵⁵² In several states, Republicans are blocking Democratic efforts to expand absentee voting and vote-by-mail in the face of the pandemic.⁵⁵³

8. *Conclusion.* — Politics is and always has been a nasty business. Historically, both Democrats and Republicans have gerrymandered legislative districts to their advantage, set election dates that they assumed would benefit their candidates, and shaped the electorate based on calculations of political advantage. Yet what the Republican Party has done in the first two decades of the twenty-first century, including well before Donald Trump entered politics, amounts to the most comprehensive assault on democratic governance since Jim Crow rule ended in the American South.⁵⁵⁴ The party has aggressively gerrymandered legislative districts; purged the voter rolls; imposed countless impediments to registration and turnout, especially for the poor, the young, and people of color; circumvented and obstructed voter initiatives; and undermined the results when it has lost elections. As one elderly African American veteran of the civil rights movement recounted after North Carolina Republicans enacted their omnibus voter suppression law in 2013: “I felt like I was living life over again. Everything that I worked for for the last fifty years was being lost.”⁵⁵⁵

D. *The Republican Party’s Complicity with President Trump*

Sections B and C have considered, respectively, President Trump’s authoritarian bent and the Republican Party’s assault on democratic governance at the state level, where most of the rules regulating the American political system are formulated. This section looks at how national Republican officeholders have become complicit in President Trump’s assault on democratic norms and institutions.

⁵⁵² Adam Liptak, *Supreme Court Blocks Extended Voting in Wisconsin*, N.Y. TIMES (Apr. 6, 2020), <https://nyti.ms/2UQ6J3o> [<https://perma.cc/KB9Z-X64F>]; see also Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205, 1206–07 (2020).

⁵⁵³ See, e.g., Ian Millhiser, *Texas’s Election Law Could Disenfranchise Millions During a Pandemic*, VOX (Apr. 4, 2020, 8:30 AM), <https://www.vox.com/2020/4/4/21204571/texas-election-law-disenfranchise-millions-pandemic-coronavirus-absentee-ballots> [<https://perma.cc/EP2A-KPE4>]; Elise Viebeck, Amy Gardner & Michael Scherer, *Trump, GOP Challenge Efforts to Make Voting Easier amid Coronavirus Pandemic*, WASH. POST (Apr. 4, 2020, 5:02 PM), https://www.washingtonpost.com/politics/trump-gop-challenge-efforts-to-make-voting-easier-amid-coronavirus-pandemic/2020/04/04/61f889fe-75bb-11ea-87da-77a8136c1a6d_story.html [<https://perma.cc/M3MV-P3J9>].

⁵⁵⁴ See BERMAN, *supra* note 7, at 264; see also ANDERSON, *supra* note 6, at 2–3, 5, 8.

⁵⁵⁵ BERMAN, *supra* note 7, at 302.

I. *The Republican Presidential Primaries.* — A little over forty percent of Republican voters supported Trump during the presidential primaries in 2016.⁵⁵⁶ The party elite sought desperately to prevent his becoming the party's nominee, partly because they assumed he would be a weak candidate in the general election⁵⁵⁷ and partly because they justifiably doubted that he was really a Republican.⁵⁵⁸ Most of the party's elite favor cutting government spending on Social Security, decreasing taxes on the wealthy, preventing "wasteful" infrastructure spending, promoting immigration of low-wage workers, and supporting international trade.⁵⁵⁹ Trump rejected all of these positions, some of which are quite unpopular with the party's base, and was able to secure the nomination partly because he was less dependent than the other Republican candidates were on the big donors who supported those positions.⁵⁶⁰

In parliamentary democracies, party insiders generally choose the parties' candidates for prime minister.⁵⁶¹ The Framers of the U.S. Constitution designed the Electoral College system to ensure that elites directly picked the President.⁵⁶² While that system quickly evolved to nullify the independent role of presidential electors, party insiders continued to choose presidential candidates.⁵⁶³ In the early years of the republic, party congressional caucuses chose presidential candidates, and in the 1830s, party conventions dominated by state and local party officials took over the task.⁵⁶⁴ Primary elections did not exist until early in the twentieth century, and not until 1972 did those elections, together with party caucuses in some states, become the principal vehicles for selecting presidential candidates.⁵⁶⁵ After street riots erupted around the Democratic Party convention in Chicago in 1968, party officials introduced democratic reforms in the presidential selection process to

⁵⁵⁶ See Philip Bump, *Trump Got the Most GOP Votes Ever — Both for and Against Him — And Other Fun Facts*, WASH. POST (June 8, 2016, 2:29 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/06/08/donald-trump-got-the-most-votes-in-gop-primary-history-a-historic-number-of-people-voted-against-him-too> [<https://perma.cc/67LL-2D6P>].

⁵⁵⁷ See Alexander Burns, *G.O.P. Fears Donald Trump as Zombie Candidate: Damaged but Unstoppable*, N.Y. TIMES (Apr. 1, 2016), <https://nyti.ms/1RQhABd> [<https://perma.cc/SX6L-FYDA>].

⁵⁵⁸ See Hans Noel, Opinion, *Why Can't the G.O.P. Stop Trump?*, N.Y. TIMES (Mar. 1, 2016), <https://nyti.ms/1QIDDpL> [<https://perma.cc/8PM5-65AD>]; see also ABRAMOWITZ, *supra* note 346, at 121–22, 142–43; Alexander Burns & Jonathan Martin, *Republican Leaders Map a Strategy to Derail Donald Trump*, N.Y. TIMES (Mar. 19, 2016), <https://nyti.ms/25bwsBb> [<https://perma.cc/MG8T-QDDZ>].

⁵⁵⁹ PAGE & GILENS, *supra* note 533, at 101.

⁵⁶⁰ See *id.* at 100–04.

⁵⁶¹ See LEVITSKY & ZIBLATT, *supra* note 35, at 39.

⁵⁶² KLARMAN, FRAMERS' COUP, *supra* note 340, at 231.

⁵⁶³ LEVITSKY & ZIBLATT, *supra* note 35, at 40–41.

⁵⁶⁴ *Id.* at 41.

⁵⁶⁵ *Id.* at 42, 50.

ensure that Democratic voters would select the party's presidential nominee; the Republican Party largely followed suit.⁵⁶⁶ Today, for insiders to play any significant role in influencing the parties' choice of presidential nominees is regarded by many to be illegitimate, as Bernie Sanders's supporters made clear in 2016.⁵⁶⁷

Popular and potentially authoritarian figures in American history, such as businessman Henry Ford, Senator Huey Long, and Senator Joseph McCarthy, have occasionally entertained presidential ambitions.⁵⁶⁸ Yet none of them could have secured a major party nomination because of strong elite opposition.⁵⁶⁹ The former governor of Alabama, George Wallace, ran for President in 1968 on a populist, white nationalist platform not very different from that of Donald Trump in 2016, but he never had a realistic chance of securing the Democratic nomination and ran instead as an independent candidate, winning about thirteen percent of the popular vote.⁵⁷⁰ Thus, while the screening of presidential candidates by party elites was not particularly democratic, it did protect the democratic system from subversion by an authoritarian figure.⁵⁷¹ Two months after Trump announced his candidacy in June 2015, bookmakers put the odds of his becoming President at one hundred to one.⁵⁷²

Yet Trump had fame as a result of New York tabloids and NBC's reality television show *The Apprentice*, and he raised a great deal of money on the internet.⁵⁷³ More importantly, Trump received as much as two billion dollars' worth of earned media coverage during the primaries,⁵⁷⁴ in part because television viewers could not take their eyes off of him. Trump also benefited from early support from right-wing media figures such as Sean Hannity and Ann Coulter, who had been laying the groundwork for an outsider candidate such as Trump for more than a

⁵⁶⁶ See *id.* at 48–50.

⁵⁶⁷ See Bill Barrow, *Dems Pledge to Limit Superdelegates, but Don't Say How*, ASSOCIATED PRESS (Mar. 10, 2018), <https://apnews.com/3fc78f03569848f19b0fecb294c9ofdd> [https://perma.cc/J4CB-AXVL].

⁵⁶⁸ LEVITSKY & ZIBLATT, *supra* note 35, at 7, 35–36, 43–47.

⁵⁶⁹ See *id.* at 7, 36, 43–46.

⁵⁷⁰ *Id.* at 46–47.

⁵⁷¹ See *id.* at 38–39.

⁵⁷² *Id.* at 55.

⁵⁷³ Marc Fisher, *Donald Trump, Remade by Reality TV*, WASH. POST (Jan. 27, 2016), <https://www.washingtonpost.com/sf/national/2016/01/27/deciders-trump> [https://perma.cc/J2JJ-8AM3]; Shane Goldmacher, *Trump Shatters GOP Records with Small Donors*, POLITICO (Sept. 19, 2016, 5:04 AM), <https://www.politico.com/story/2016/09/trump-shatters-gop-records-with-small-donors-228338> [https://perma.cc/K9MV-4974].

⁵⁷⁴ See LEVITSKY & ZIBLATT, *supra* note 35, at 58; Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES (Mar. 15, 2016), <https://nyti.ms/22ir8te> [https://perma.cc/V4UW-H6C8].

decade by stoking racial grievances, attacking Democrats as traitors, and encouraging an authoritarian bent among Republicans.⁵⁷⁵

When establishment donors and prominent conservative pundits were unable to put a dent in Trump's candidacy, party leaders tried to block his nomination.⁵⁷⁶ Mitt Romney, the party's 2012 presidential nominee, called Trump a "fraud" and a "phony," and John McCain, the party's presidential candidate in 2008, called him ignorant and "dangerous."⁵⁷⁷ Yet such attacks had little discernible adverse impact on Trump-inclined voters and may even have redounded to his advantage.⁵⁷⁸ Moreover, once Trump had acquired democratic legitimacy by winning primary contests, the party could not plausibly have intervened to unbind his convention delegates.⁵⁷⁹ The party primary process had failed its gatekeeping function and enabled a deeply unfit and dangerous man to become the presidential candidate of one of the two mainstream political parties.⁵⁸⁰ But that did not oblige Republican voters and party leaders to support him in the general election.

2. *The General Election.* — Democratic failures in Europe in the 1930s and South America in the 1970s demonstrate the importance of mainstream politicians' resisting autocratic demagogues when they have the chance.⁵⁸¹ Failures to do so are usually attributable to some combination of overconfidence that establishment politicians can control the demagogue once in power and "ideological collusion," meaning the authoritarian's agenda overlaps with their own.⁵⁸² History is full of examples, including Benito Mussolini and Adolf Hitler, of authoritarian figures being invited into power by more mainstream politicians making such calculations.⁵⁸³

⁵⁷⁵ See LEVITSKY & ZIBLATT, *supra* note 35, at 58, 156; Glenn Thrush, *Ann Coulter, Doyenne of the Deplorables*, POLITICO (Sept. 13, 2016, 5:27 AM), <https://www.politico.com/story/2016/09/ann-coulter-off-message-228070> [<https://perma.cc/D35V-93MV>].

⁵⁷⁶ See LEVITSKY & ZIBLATT, *supra* note 35, at 59.

⁵⁷⁷ Alexander Burns & Michael Barbaro, *Mitt Romney and John McCain Denounce Donald Trump as a Danger to Democracy*, N.Y. TIMES (Mar. 3, 2016, 11:07 PM), <https://nyti.ms/1QvpLzY> [<https://perma.cc/Y533-ML78>].

⁵⁷⁸ See Harry Enten, *GOP Voters Are Rallying Behind Trump as if He Were Any Other Candidate*, FIVETHIRTYEIGHT (June 1, 2016, 7:00 AM), <https://fivethirtyeight.com/features/gop-voters-are-rallying-behind-trump-as-if-he-were-any-other-candidate> [<https://perma.cc/N2DS-CZJD>].

⁵⁷⁹ LEVITSKY & ZIBLATT, *supra* note 35, at 59–60.

⁵⁸⁰ See *id.* at 60, 67.

⁵⁸¹ *Id.* at 67.

⁵⁸² *Id.* (citing sociologist Ivan Ermakoff for the term "ideological collusion").

⁵⁸³ *Id.* at 11–15.

Recently, in Austria and France, mainstream politicians endorsed candidates of parties to which they were ideologically opposed in order to exclude far-right radicals from power.⁵⁸⁴ Many Republican leaders had opposed Trump in the primaries, and some had worked hard to prevent his securing the nomination, but in the general election they overwhelmingly rallied around his candidacy.⁵⁸⁵ Supporting Hillary Clinton was inconceivable to most of them.⁵⁸⁶ Moreover, they calculated that if Trump won the general election, he might be coopted to their purposes — cutting taxes, reducing economic regulation, and appointing conservative judges.⁵⁸⁷

Even after the October 2016 release of the *Access Hollywood* tape, which featured Trump bragging that he could “grab [women] by the pussy” without repercussion, most Republican politicians remained unwilling to break with him.⁵⁸⁸ Primary opponent Ted Cruz, a Texas senator who had called Trump a “pathological liar” and “utterly amoral,” endorsed him after the Republican convention.⁵⁸⁹ So did Senator Marco Rubio, who had previously called Trump “dangerous”⁵⁹⁰ and warned that we should never hand “the nuclear codes of the United States to an erratic individual.”⁵⁹¹ Senate Majority Leader McConnell endorsed Trump, as did Speaker of the House Paul Ryan, who had refused to campaign with Trump after the release of the *Access Hollywood* video but then reconsidered after his own approval ratings among Republicans dropped twenty-eight points in ten days.⁵⁹²

Had a significant number of prominent Republicans made a joint statement denouncing Trump as incompetent and a threat to democratic

⁵⁸⁴ *Id.* at 30, 68, 70.

⁵⁸⁵ KLEIN, *supra* note 347, at 176–77; JOHN SIDES, MICHAEL TESLER & LYNN VAVRECK, *IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA* 143–44 (2019).

⁵⁸⁶ See DAVID FRUM, *TRUMPOCRACY: THE CORRUPTION OF THE AMERICAN REPUBLIC* 42–43 (2018); KLEIN, *supra* note 347, at 177.

⁵⁸⁷ See KLEIN, *supra* note 347, at 177; Hook, *supra* note 335.

⁵⁸⁸ David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), http://wapo.st/2dSXbkQ?tid=ss_tw [<https://perma.cc/E7T2-R3KA>]; see also FRUM, *supra* note 586, at 17–18, 42–43.

⁵⁸⁹ KLEIN, *supra* note 347, at 177; see Katie Zezima, *Cruz Reverses Himself, Endorses Trump*, WASH. POST (Sept. 23, 2016, 6:13 PM), <https://www.washingtonpost.com/news/post-politics/wp/2016/09/23/cruz-to-reverse-himself-and-support-trump> [<https://perma.cc/TV3R-HP2B>].

⁵⁹⁰ Ed O’Keefe, *Rubio Called Trump a Dangerous “Con Man.” Now He Says Trump Should Be President.*, WASH. POST (May 27, 2016), https://www.washingtonpost.com/politics/rubio-called-trump-a-dangerous-con-man-now-he-says-trump-should-be-president/2016/05/27/b837e16c-2410-11e6-aa84-42391ba52c91_story.html [<https://perma.cc/66B9-967K>].

⁵⁹¹ Bianca Padró Ocasio, *Rubio: I Still Believe Trump Can’t Be Trusted with the Nuclear Codes*, POLITICO (June 9, 2016, 6:42 PM), <https://www.politico.com/story/2016/06/marco-rubio-donald-trump-nuclear-codes-224155> [<https://perma.cc/T9ND-S5T5>].

⁵⁹² FRUM, *supra* note 586, at 42; LEVITSKY & ZIBLATT, *supra* note 35, at 69; see also David Frum, *How to Build an Autocracy*, THE ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872> [<https://perma.cc/A33R-BEXZ>].

institutions, it might have made a difference.⁵⁹³ A commitment to democracy occasionally entails being willing to lose a high-stakes election.⁵⁹⁴ Instead, Republican endorsements normalized Trump, turning the election into a fairly standard two-party competition.⁵⁹⁵ Under current conditions of extreme political polarization and negative partisanship, combined with a narrowly divided electorate and an undemocratic Electoral College system,⁵⁹⁶ Trump narrowly prevailed.⁵⁹⁷

3. *The Early Trump Administration.* — When President Trump took office, it was widely assumed — and Republicans gave assurances — that Congress, the courts, honored military figures in the Cabinet, and the federal bureaucracy would constrain him.⁵⁹⁸ While most Republican elected officials did not offer much constraint, other actors and institutions did initially defend traditional democratic norms and the rule of law.⁵⁹⁹ However, such constraints have badly eroded over time.⁶⁰⁰ The Trump Administration has been an object lesson in how much democracy depends upon norms and how much the enforcement of those norms depends on the support of individual actors and public opinion.⁶⁰¹

Early in the Administration, as revelations of the Trump campaign's contacts with Russians multiplied, Democrats demanded an investigation by a special counsel and a select congressional committee.⁶⁰² However, most prominent Republicans had little interest in launching a wide-scale investigation of a newly elected Republican President, and some downplayed the significance of the revelations relative to their legislative priorities.⁶⁰³ Representative Devin Nunes, Chair of the House Intelligence Committee, colluded with the White House to undermine the Russia investigation that he was supposedly overseeing.⁶⁰⁴ Republicans also voiced little concern about false statements to Congress by Attorney

⁵⁹³ See LEVITSKY & ZIBLATT, *supra* note 35, at 69–71.

⁵⁹⁴ Cf. *id.* at 24–25 (identifying isolation and avoidance of antidemocratic candidates, even if they may deliver votes, as components of gatekeeping); Huq & Ginsburg, *supra* note 36, at 167 (discussing the importance of politicians' prioritization of the maintenance of democracy).

⁵⁹⁵ LEVITSKY & ZIBLATT, *supra* note 35, at 70.

⁵⁹⁶ See *infra* sections II.E.1, pp. 154–58; II.E.6, pp. 171–74; IV.A, pp. 231–42.

⁵⁹⁷ LEVITSKY & ZIBLATT, *supra* note 35, at 71.

⁵⁹⁸ See Packer, *supra* note 168; see also FRUM, *supra* note 586, at 96–97.

⁵⁹⁹ See Susan B. Glasser, *Trump National Security Team Blindsided by NATO Speech*, POLITICO MAG. (June 5, 2017), <https://www.politico.com/magazine/story/2017/06/05/trump-nato-speech-national-security-team-215227> [<https://perma.cc/3R5H-LP29>]; Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, THE ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921> [<https://perma.cc/79AG-WMKN>].

⁶⁰⁰ See Packer, *supra* note 168.

⁶⁰¹ See *id.*

⁶⁰² Matt Flegenheimer, *Despite Democrats' Demands, Broad Inquiry on Russia Ties Isn't Assured*, N.Y. TIMES (Feb. 15, 2017), <https://nyti.ms/2lkGwbB> [<https://perma.cc/9ZWM-NPS7>].

⁶⁰³ See *id.*

⁶⁰⁴ FRUM, *supra* note 586, at 134.

General—designate Jeff Sessions about his connections with Russians or repeated revisions by White House senior advisor Jared Kushner of his security clearance application to rectify omissions of his many foreign entanglements.⁶⁰⁵

Republican leaders who might have criticized the President's transgressive behavior instead made excuses for him.⁶⁰⁶ Utah Representative Jason Chaffetz wrote off the Trump White House's misbehavior on the grounds that Americans knew what they were getting when they elected Trump.⁶⁰⁷ Speaker of the House Ryan and Senate Majority Leader McConnell excused President Trump's troubling actions, such as pressuring the FBI to suspend the Russia investigation, on the grounds that he was "new" to the business of government⁶⁰⁸ and "learning the job."⁶⁰⁹

However, the first year of President Trump's presidency also featured many institutional actors abiding by traditional norms that constrain the Executive.⁶¹⁰ Attorney General Sessions resisted repeated requests from the White House not to recuse himself from the Russia investigation, insisting instead that he would abide by the recommendation of the Department of Justice's ethics officials.⁶¹¹ Department guidelines clearly required the Attorney General's recusal after it was revealed that he had not fully disclosed the extent of his contacts with Russian officials during the presidential campaign, and he recused himself.⁶¹² Later, despite constant public criticism and insults from the President, Attorney General Sessions refused to unrecuse himself.⁶¹³

Deputy Attorney General Rod Rosenstein was another senior Administration official who, early in President Trump's tenure, did his job by the book and resisted pressure to do otherwise.⁶¹⁴ Rosenstein was a career Justice Department lawyer who was named Deputy Attorney General early in the Administration.⁶¹⁵ In May 2017, President Trump decided to fire FBI Director Comey, probably at least in part because

⁶⁰⁵ See *id.* at 96; Matt Zapposky, *Why Jared Kushner Has Had to Update His Disclosure of Foreign Contacts More than Once*, WASH. POST (July 17, 2017), https://www.washingtonpost.com/world/national-security/why-jared-kushner-has-had-to-update-his-disclosure-of-foreign-contacts-more-than-once/2017/07/17/b04e8158-6b05-11e7-96ab-5f38140b38cc_story.html [<https://perma.cc/8RWP-QCT5>].

⁶⁰⁶ See, e.g., FRUM, *supra* note 586, at 15.

⁶⁰⁷ See *id.* at 96.

⁶⁰⁸ *Id.* at 97.

⁶⁰⁹ *Id.* at 96.

⁶¹⁰ See Goldsmith, *supra* note 599.

⁶¹¹ 2 MUELLER, *supra* note 153, at 49, 51.

⁶¹² See Michael S. Schmidt & Julie Hirschfeld Davis, *Trump Asked Sessions to Retain Control of Russia Inquiry After His Recusal*, N.Y. TIMES (May 29, 2018), <https://nyti.ms/2xrXxsc> [<https://perma.cc/X8CH-HHJG>].

⁶¹³ See 2 MUELLER, *supra* note 153, at 3, 5, 51, 61, 107, 109–11.

⁶¹⁴ See, e.g., *id.* at 67, 70.

⁶¹⁵ See Rebecca R. Ruiz, *Justice Official's Reputation for Impartiality Is Tested by Comey Firing*, N.Y. TIMES (May 10, 2017), <https://nyti.ms/2pyCbjI> [<https://perma.cc/X6G7-WGLR>].

Comey refused to publicly exonerate the President of complicity with Russian interference in the election.⁶¹⁶ President Trump used as a pretext a memo Deputy Attorney General Rosenstein had written criticizing Director Comey for statements he made in his July 2016 press conference chastising Hillary Clinton for reckless behavior in using a private email server but clearing her of criminal wrongdoing.⁶¹⁷

Media coverage of Director Comey's firing was largely negative, which infuriated President Trump, who then asked Rosenstein to hold a press conference and claim responsibility for the idea of firing Director Comey, which would have been untrue.⁶¹⁸ Deputy Attorney General Rosenstein refused to lie and threatened to resign should the White House continue to characterize him as a key driver of the decision to fire Director Comey.⁶¹⁹ After the story broke that President Trump had earlier tried to pressure Director Comey into dropping the Russia investigation, Rosenstein quickly appointed Robert Mueller as Special Counsel to take it over.⁶²⁰

For the first portion of Trump's presidency, some Administration officials remained committed to traditional norms of democratic governance, and President Trump allowed himself to be constrained by "adults" in the room, such as Secretary of Defense James Mattis and Chief of Staff John Kelly.⁶²¹ But after the 2018 midterm elections, the situation changed.

4. *The 2018 Midterm Elections.* — Most of the few Republican officeholders who had been bold enough to criticize President Trump during his first two years in office left Congress in 2018.⁶²² Senator Bob Corker of Tennessee had been a prominent critic of the President, once referring to the White House as "an adult day care center."⁶²³ But Senator Corker chose to retire in 2018 rather than endure a primary

⁶¹⁶ See 2 MUELLER, *supra* note 153, at 4, 61–62.

⁶¹⁷ See Ruiz, *supra* note 615.

⁶¹⁸ 2 MUELLER, *supra* note 153, at 70.

⁶¹⁹ *Id.*; Philip Rucker, Ashley Parker, Sari Horwitz & Robert Costa, *Inside Trump's Anger and Impatience — And His Sudden Decision to Fire Comey*, WASH. POST (May 10, 2017), https://www.washingtonpost.com/politics/how-trumps-anger-and-impatience-prompted-him-to-fire-the-fbi-director/2017/05/10/d9642334-359c-11e7-b373-418f6849a004_story.html [<https://perma.cc/G5A4-W5TM>].

⁶²⁰ Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), <https://nyti.ms/2rsbpec> [<https://perma.cc/G8JW-TA2E>].

⁶²¹ See Packer, *supra* note 168.

⁶²² See Sean Sullivan, *The Last Stand of Congress's Never Trump Brigade*, WASH. POST (Dec. 2, 2018, 12:54 PM), https://www.washingtonpost.com/powerpost/the-last-stand-of-congresss-never-trump-brigade/2018/12/02/55babb72-f41a-11e8-aeaa-b85fd44449f5_story.html [<https://perma.cc/S7SA-SGGW>].

⁶²³ Bob Corker (@SenBobCorker), TWITTER (Oct. 8, 2017, 11:13 AM), <https://twitter.com/SenBobCorker/status/917045348820049920> [<https://perma.cc/PBF9-BE2D>].

contest against a fervent supporter of President Trump.⁶²⁴ Senator Jeff Flake of Arizona, another frequent Trump critic, likewise retired to avoid a tough primary contest.⁶²⁵ Senator John McCain, yet another nemesis of the President, died in the summer of 2018.⁶²⁶

The situation was similar in the House. Congressman Dave Trott, a two-term Republican representative from Michigan, found himself sufficiently alarmed by President Trump's behavior in the summer of 2017 that he criticized the President in a private meeting with Republican legislators.⁶²⁷ A colleague warned Representative Trott that someone had probably reported his criticism to President Trump and that the representative should be prepared for a "barrage" of critical tweets.⁶²⁸ Representative Trott soon determined that running for reelection as a Trump critic would be untenable and retired from the House.⁶²⁹ A full forty percent of the Republican congressional delegation of 2016 has retired, announced retirement, or lost bids for reelection, including many who were willing to publicly criticize President Trump.⁶³⁰

Republican officeholders facing primary challenges quickly learned the power of presidential opposition. Representative Mark Sanford of South Carolina, a Trump critic, was defeated in a primary by a first-term state representative endorsed by the President.⁶³¹ Many of the most independent-minded Republican House members, who tended to represent swing constituencies, lost their seats in the midterm elections.⁶³² The remaining Republican House caucus was "a whole lot Trumpier," according to former Representative Sanford.⁶³³ The leading voice of consistent

⁶²⁴ Kevin Freking, *Departure of Trump's GOP Critics in Senate Leaves a Void*, ASSOCIATED PRESS (Jan. 1, 2019), <https://apnews.com/c7291fffd58a84249bc1527d7def953a3> [<https://perma.cc/QAK3-69KB>]; Sullivan, *supra* note 622.

⁶²⁵ Freking, *supra* note 624.

⁶²⁶ Robert D. McFadden, *John McCain, War Hero, Senator, Presidential Contender, Dies at 81*, N.Y. TIMES (Aug. 25, 2018), <https://nyti.ms/2P9j8tx> [<https://perma.cc/4VRS-U7VA>].

⁶²⁷ Jonathan Martin & Maggie Haberman, *Fear and Loyalty: How Donald Trump Took Over the Republican Party*, N.Y. TIMES (Dec. 22, 2019), <https://nyti.ms/35Lnujh> [<https://perma.cc/X78K-79ZC>].

⁶²⁸ *Id.*

⁶²⁹ *Id.*

⁶³⁰ *Id.*

⁶³¹ See Russell Berman, *Mark Sanford's Unforgivable Sin*, THE ATLANTIC (June 13, 2018), <https://www.theatlantic.com/politics/archive/2018/06/sanford-loss-trump-republicans/562727> [<https://perma.cc/3RS5-FUY5>].

⁶³² Martin & Haberman, *supra* note 627.

⁶³³ Tim Alberta, *Who Will Betray Trump?*, POLITICO MAG. (Nov. 8, 2019), <https://www.politico.com/magazine/story/2019/11/08/trump-impeachment-republicans-congress-229904> [<https://perma.cc/8SG4-KBVZ>].

dissent was Representative Justin Amash, and he announced his departure from the Republican Party after calling for impeachment proceedings against President Trump in response to the Mueller Report.⁶³⁴

President Trump's hold on the institutional Republican Party also solidified over his first two years in office. In 2016, some Republican state party chairmen were willing to criticize President Trump, but by 2019, Trump loyalists controlled the most significant state parties and firmly discouraged any criticism of the President.⁶³⁵ When a Nebraska Republican legislator criticized party leaders for having allowed President Trump to “hijack” the party's agenda, the state party quickly urged him to resign his membership.⁶³⁶ President Trump and his aides have aggressively shaped state party leadership, and the President remains immensely popular among the party's base.⁶³⁷

The best example of institutional actors and constraints weakening over time is the performance in office of William Barr, who replaced Sessions as Attorney General after the 2018 midterm elections.⁶³⁸ Barr, who had already served a stint as Attorney General in the Administration of President George H. W. Bush, had established an admirable reputation in the Washington, D.C., legal establishment⁶³⁹ — a reputation that one might have assumed he would be careful not to jeopardize in the twilight of his career. However, Attorney General Barr's performance in office has so thoroughly undermined norms demanding the separation of law enforcement from politics that hundreds of former prosecutors of both parties have demanded his resignation.⁶⁴⁰

In March 2019, one of Attorney General Barr's first acts in office was to mislead the nation about the contents of the Mueller Report, which enabled President Trump to promote a narrative of his “complete and total exoneration.”⁶⁴¹ Upon receipt of the Report, Attorney General Barr wrote a four-page letter purporting to state its key findings, and that letter contained all of the information that the public would have

⁶³⁴ Max Burman, *Rep. Justin Amash Announces He's Leaving Republican Party*, NBC NEWS (July 4, 2019, 9:12 AM), <https://www.nbcnews.com/politics/congress/rep-justin-amash-announces-he-s-leaving-republican-party-n1026561> [<https://perma.cc/A9KX-GKNR>].

⁶³⁵ See Alexander Burns & Jonathan Martin, *Trump's Takeover of the Republican Party Is Almost Complete*, N.Y. TIMES (Apr. 3, 2019), <https://nyti.ms/2JZDoQs> [<https://perma.cc/R6BE-WMUQ>].

⁶³⁶ Grant Schulte, *Some GOP Lawmakers Face Backlash for Bucking the Party*, ASSOCIATED PRESS (Aug. 6, 2019), <https://apnews.com/80968645243c452c9909724bc42f9176> [<https://perma.cc/8YZL-VJAA>].

⁶³⁷ See *infra* notes 778–782 and accompanying text.

⁶³⁸ See Packer, *supra* note 168.

⁶³⁹ See *id.*

⁶⁴⁰ See Laura Jarrett, *More than 2,000 Former Prosecutors and Other DOJ Officials Call On Attorney General Bill Barr to Resign*, CNN (Feb. 17, 2020, 5:29 PM), <https://www.cnn.com/2020/02/16/politics/prosecutors-doj-officials-barr-resign/index.html> [<https://perma.cc/G4HN-SBZ2>].

⁶⁴¹ RUCKER & LEONNIG, *supra* note 131, at 388; *id.* at 386–88.

about the Report until Attorney General Barr released a redacted version four weeks later.⁶⁴²

Attorney General Barr's letter accurately quoted the Report's language that "the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities."⁶⁴³ However, he omitted the immediately preceding words: "Although the investigation established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the Campaign expected it would benefit electorally from information stolen and released through Russian efforts"⁶⁴⁴

In his public comments made immediately prior to the public release of the redacted report, Attorney General Barr insisted that Special Counsel Mueller had found no evidence of "collusion" between Trump's campaign and Russia.⁶⁴⁵ This was deeply misleading. The Report carefully explained that "collusion" is not a recognized offense under federal law, and thus prosecutors had focused only on the concept of "conspiracy," which requires an actual agreement between the parties.⁶⁴⁶ In fact, the Report identified "numerous links between the Russian government and the Trump Campaign,"⁶⁴⁷ including direct communications between campaign officials and entities claiming to be American political activists that were actually created by the Russian Internet Research Agency⁶⁴⁸ and discussions between Russian actors and campaign officials over "dirt" that the Russian government had obtained on Hillary Clinton.⁶⁴⁹ Furthermore, the Report noted that some avenues of the conspiracy investigation had been blocked by the recalcitrance of witnesses such as campaign manager Paul Manafort,⁶⁵⁰ which the President himself probably fomented,⁶⁵¹ and the invocation of the Fifth

⁶⁴² *Id.* at 386–89.

⁶⁴³ Letter from William P. Barr, Att'y Gen., U.S. Dep't of Just., to Lindsey Graham, Chairman, Comm. on the Judiciary; Dianne Feinstein, Ranking Member, Comm. on the Judiciary; Jerrold Nadler, Chairman, Comm. on the Judiciary & Doug Collins, Ranking Member, Comm. on the Judiciary 2 (Mar. 24, 2019) [hereinafter Barr Letter]; 1 MUELLER, *supra* note 153, at 2.

⁶⁴⁴ RUCKER & LEONNIG, *supra* note 131, at 390; Barr Letter, *supra* note 643, at 2; 1 MUELLER, *supra* note 153, at 1–2.

⁶⁴⁵ Laura McGann, *Robert Mueller's Report Shows William Barr's Statements Were Incomplete at Best*, VOX (Apr. 18, 2019, 3:04 PM), <https://www.vox.com/2019/4/18/18485465/bill-barr-summary-clipped-quotes-mueller-report-collusion-coordination> [https://perma.cc/748N-KD32].

⁶⁴⁶ See 1 MUELLER, *supra* note 153, at 2.

⁶⁴⁷ *Id.* at 1.

⁶⁴⁸ *Id.* at 14, 35.

⁶⁴⁹ See, e.g., *id.* at 5, 9, 81, 89.

⁶⁵⁰ See *id.* at 9–10.

⁶⁵¹ See 2 MUELLER, *supra* note 153, at 131–32.

Amendment by some witnesses, possibly including the President's son, Donald Trump Jr.⁶⁵²

With regard to President Trump's possible obstruction of justice, Attorney General Barr publicly suggested that the President had no motive to obstruct the investigation because there was no evidence that he was involved in an underlying crime related to Russian interference in the election.⁶⁵³ This was also deeply misleading. The Report explicitly noted several possible motives for President Trump to obstruct the investigation whether or not he and his campaign had conspired with Russians to interfere with the election. First, there was the politically damaging fact that Trump had lied throughout the campaign and into his presidency about his lack of business dealings with Russia even though he had been actively pursuing a deal for a Trump Tower Moscow.⁶⁵⁴ Second, the meeting at Trump Tower between senior campaign officials and Russians promising incriminating information on Hillary Clinton possibly violated a federal criminal statute forbidding the solicitation of a "thing of value" from a foreign actor in connection with an American election.⁶⁵⁵ Third, the campaign seemed to have advance notice of WikiLeaks's release of information hacked from Democratic Party members' email accounts, which was at least politically embarrassing to the Trump campaign and possibly suggested the commission of another federal crime.⁶⁵⁶

The Mueller team had declined to make a "traditional prosecutorial judgment" as to whether the President had committed the crime of obstruction of justice because, per an Office of Legal Counsel opinion, a sitting President cannot be indicted or criminally prosecuted,⁶⁵⁷ and Special Counsel Mueller's team had decided it would be unfair to declare that President Trump was probably guilty of a crime when he would have no immediate opportunity to rebut the charge in court.⁶⁵⁸ Yet Attorney General Barr, in describing this aspect of the Report in his

⁶⁵² See 1 MUELLER, *supra* note 153, at 10; Rebecca Shabad, *Mueller Won't Say Whether Trump Jr. Threatened to Invoke the Fifth*, NBC NEWS (July 24, 2019, 1:58 PM), <https://www.nbcnews.com/politics/donald-trump/mueller-won-t-say-whether-trump-jr-threatened-voke-5th-n1033881> [<https://perma.cc/BT2Z-5X3K>].

⁶⁵³ See Barr Letter, *supra* note 643, at 3.

⁶⁵⁴ See 1 MUELLER, *supra* note 153, at 67; 2 MUELLER, *supra* note 153, at 18; Meg Kelly, *The President's Misleading Statements on Trump Tower Moscow: A Timeline*, WASH. POST (Dec. 3, 2018, 3:00 AM), <https://www.washingtonpost.com/politics/2018/12/03/president-trumps-misleading-statements-trump-tower-moscow-timeline> [<https://perma.cc/8DCP-NWMT>].

⁶⁵⁵ 52 U.S.C. § 30121(a)(1)(A); see 1 MUELLER, *supra* note 153, at 110, 185–86.

⁶⁵⁶ See, e.g., 1 MUELLER, *supra* note 153, at 52–60; Rosalind S. Helderman, *Two Crimes Benefited Trump's Campaign in 2016. Ever Since, the President Has Worked to Block Scrutiny of Those Schemes*, WASH. POST (July 17, 2020, 7:49 AM), https://www.washingtonpost.com/politics/two-crimes-benefited-trumps-campaign-in-2016-ever-since-the-president-has-worked-to-block-scrutiny-of-those-schemes/2020/07/15/6b48cba8-c52b-11ea-a99f-3bbdfbf1af38_story.html [<https://perma.cc/2SM8-ELSU>].

⁶⁵⁷ 2 MUELLER, *supra* note 153, at 1.

⁶⁵⁸ *Id.* at 2.

letter, implied that Special Counsel Mueller had found the obstruction of justice issue a close call rather than deciding not to make any determination at all for the reason just noted.⁶⁵⁹

In his press conference, Attorney General Barr also declared that the White House had “fully cooperated” with Special Counsel Mueller’s inquiry.⁶⁶⁰ This is hard to fathom given that President Trump had refused a request to be personally interviewed by the Special Counsel’s investigators and he had repeatedly tried to get the Special Counsel fired.⁶⁶¹ In testimony to Congress, Attorney General Barr also denied knowing why Special Counsel Mueller’s legal team was reportedly unhappy with how Attorney General Barr had initially characterized the Report, even though Special Counsel Mueller had written Attorney General Barr a letter explaining his concerns.⁶⁶²

Attorney General Barr’s misleading characterization of the Report shaped public opinion in the three weeks before he released the redacted version of it.⁶⁶³ When President Trump falsely claimed that the Mueller Report had totally exonerated him, which the Report explicitly declined to do,⁶⁶⁴ Attorney General Barr said nothing publicly to correct President Trump’s statements.⁶⁶⁵ In March 2020, Judge Walton, an appointee of President George W. Bush, found the Attorney General’s descriptions of the Report so misleading that his letter “cause[d] the Court to seriously question whether Attorney General Barr made a calculated attempt to influence public discourse about the Mueller Report in favor of President Trump.”⁶⁶⁶

The contrast between Secretary of State Rex Tillerson and his successor, Mike Pompeo, also illustrates how the “adults” had left the room, unleashing President Trump. Secretary of State Tillerson criticized President Trump during a well-attended meeting, which annoyed the President.⁶⁶⁷ In March 2018, President Trump fired Secretary of State

⁶⁵⁹ See Barr Letter, *supra* note 643, at 3.

⁶⁶⁰ McGann, *supra* note 645.

⁶⁶¹ See, e.g., 2 MUELLER, *supra* note 153, at 13, 88.

⁶⁶² Isaac Stanley-Becker, “I Don’t Know”: Barr’s Professed Ignorance Prompts Calls for His Resignation After Mueller Letter, WASH. POST (May 1, 2019, 5:48 AM), <https://www.washingtonpost.com/nation/2019/05/01/i-dont-know-barrs-professed-ignorance-prompts-democrats-seek-his-resignation-after-mueller-letter> [<https://perma.cc/33TU-4ZWK>].

⁶⁶³ See Packer, *supra* note 168.

⁶⁶⁴ Compare Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 24, 2019, 4:42 PM), <https://twitter.com/realDonaldTrump/status/1109918388133023744> [<https://perma.cc/7A66-XBEK>], with 2 MUELLER, *supra* note 153, at 182.

⁶⁶⁵ See, e.g., Stanley-Becker, *supra* note 662.

⁶⁶⁶ Elec. Priv. Info. Ctr. v. U.S. Dep’t of Just., 442 F. Supp. 3d 37, 50–51 (D.D.C. 2020).

⁶⁶⁷ RUCKER & LEONNIG, *supra* note 131, at 177–78.

Tillerson and replaced him with CIA Director Mike Pompeo.⁶⁶⁸ During the Kansas Republican presidential caucus in 2016, then-Representative Pompeo, who had campaigned for Senator Rubio, warned that Trump would be “an authoritarian president who ignored our Constitution.”⁶⁶⁹ However, after Trump’s election, Pompeo lobbied for a national security job and became CIA Director and then Secretary of State.⁶⁷⁰

In the latter role, Secretary of State Pompeo failed to defend Ambassador Marie Yovanovitch from a smear campaign orchestrated by President Trump’s personal lawyer Rudy Giuliani and two American businessmen, who viewed her anticorruption efforts as an obstacle to their complex scheme to sell liquefied natural gas to Ukraine’s state-run gas company.⁶⁷¹ Secretary of State Pompeo then lied to the press as to whether he had been asked by State Department personnel to defend Ambassador Yovanovitch.⁶⁷² When the House of Representatives began investigating President Trump’s shakedown of Ukraine, Secretary of State Pompeo ordered State Department personnel not to cooperate with House subpoenas for documents and depositions, accusing the House committees that issued the subpoenas of attempting to “bully . . . the distinguished professionals” at the State Department.⁶⁷³ Recently, Secretary of State Pompeo reportedly persuaded President Trump to fire the State Department Inspector General, who was investigating Secretary of State Pompeo’s possible misuse of Department personnel for personal errands.⁶⁷⁴

5. *The Mueller Report.* — Despite the misleading characterizations by President Trump and Attorney General Barr, the Mueller Report contained sufficiently incriminating information about the President such that it probably would have ended any other administration in

⁶⁶⁸ Peter Baker, Gardiner Harris & Mark Landler, *Trump Fires Rex Tillerson and Will Replace Him with C.I.A. Chief Pompeo*, N.Y. TIMES (Mar. 13, 2018), <https://nyti.ms/2tHTxC9> [<https://perma.cc/5SFT-D8V8>].

⁶⁶⁹ RUCKER & LEONNIG, *supra* note 131, at 16.

⁶⁷⁰ See *id.* at 16–17, 217.

⁶⁷¹ See Braktkton Booker, *State Department Files Show Giuliani, Pompeo Contact Before Ukraine Ambassador’s Exit*, NPR (Nov. 23, 2019, 5:45 PM), <https://www.npr.org/2019/11/23/782311262/state-department-files-show-giuliani-pompeo-contact-before-ukraine-ambassadors-e> [<https://perma.cc/B6A5-8SK6>]; Desmond Butler & Michael Biesecker, *Giuliani Pals Leveraged GOP Access to Seek Ukraine Gas Deal*, ASSOCIATED PRESS (Dec. 24, 2019), <https://apnews.com/oca41649b35f73d1c61265e02bo86360> [<https://perma.cc/69YY-V78M>].

⁶⁷² See Lauren Lantry, *Under Oath, Pompeo’s Former Adviser Contradicts Secretary’s Comments on “This Week,”* ABC NEWS (Nov. 4, 2019, 7:34 PM), <https://abcnews.go.com/Politics/oath-pompeos-adviser-contradicts-secretarys-comments-week/story?id=66749635> [<https://perma.cc/J9CV-J4HE>] (“‘So you were never asked [to defend Ambassador Yovanovitch]?’ Stephanopoulos asked. ‘Not — not — not once — not once, George, did Ambassador McKinley say something to me during that entire time period,’ Pompeo answered.”); Packer, *supra* note 168.

⁶⁷³ Packer, *supra* note 168.

⁶⁷⁴ Edward Wong, *Inspector General’s Firing Puts Pompeo’s Use of Taxpayer Funds Under Scrutiny*, N.Y. TIMES (May 17, 2020), <https://nyti.ms/2LHY79j> [<https://perma.cc/62U7-RZ2G>].

American history. While Special Counsel Mueller found insufficient evidence of actual coordination to charge a conspiracy between the Trump campaign and Russians, he also found that a conspiracy did not remain unconsummated for lack of effort on either side.⁶⁷⁵ On July 27, 2016, President Trump declared at a news conference: “Russia, if you’re listening, I hope you’re able to find the 30,000 emails that are missing. I think you will probably be rewarded mightily by our press.”⁶⁷⁶ Special Counsel Mueller discovered that within a few hours of President Trump’s statement, a unit of Russian military intelligence targeted email accounts connected to Hillary Clinton’s personal office.⁶⁷⁷

In the fall of 2016, Donald Trump Jr. was in direct contact with WikiLeaks about the release of Democratic emails that would prove harmful to Hillary Clinton’s campaign.⁶⁷⁸ On October 7, 2016, *The Washington Post* released the *Access Hollywood* videotape, which led many Republican leaders to condemn Trump’s comments and prompted some Republicans to call for Trump to step aside from the presidential race.⁶⁷⁹ Thirty-two minutes after the tape was released, WikiLeaks posted the hacked emails of Clinton campaign chair John Podesta.⁶⁸⁰ The Podesta emails quickly diverted some of the negative media attention generated by the *Access Hollywood* video.⁶⁸¹ Roger Stone, Trump’s friend and political advisor, appeared to have had advance knowledge of the Podesta email dump, which may have saved Trump’s campaign.⁶⁸² Trump mentioned WikiLeaks and his “love” for the organization dozens of times in the final months of the campaign, and there is substantial evidence that Trump himself was trying to coordinate with WikiLeaks.⁶⁸³

Volume II of the Mueller Report, on the President’s obstruction of justice, is devastating to President Trump. Over a thousand former federal prosecutors signed an open letter stating that President Trump’s conduct, as detailed in the Report, would have resulted in an indictment for obstruction of justice of anyone other than a sitting President.⁶⁸⁴

Analyzing Supreme Court precedent, the Mueller team concluded that official actions of a President, such as firing an FBI Director or

⁶⁷⁵ See 1 MUELLER, *supra* note 153, at 173.

⁶⁷⁶ Michael S. Schmidt, *Trump Invited the Russians to Hack Clinton. Were They Listening?*, N.Y. TIMES (July 13, 2018), <https://nyti.ms/2mj2WJI> [<https://perma.cc/V76Z-24Z4>]; see also 1 MUELLER, *supra* note 153, at 49.

⁶⁷⁷ 1 MUELLER, *supra* note 153, at 49.

⁶⁷⁸ *Id.* at 59–60.

⁶⁷⁹ See FRUM, *supra* note 586, at 17–18.

⁶⁸⁰ *Id.* at 19.

⁶⁸¹ See *id.*

⁶⁸² See *id.*

⁶⁸³ *Id.* at 138–40; 1 MUELLER, *supra* note 153, at 51–60.

⁶⁸⁴ RUCKER & LEONNIG, *supra* note 131, at 408.

ordering the termination of a federal criminal investigation, are not immunized from criminal prosecution under federal obstruction of justice statutes.⁶⁸⁵ Accordingly, the Report analyzed ten incidents in which the President arguably obstructed the Russia investigation.⁶⁸⁶

For example, the Report found that President Trump had ordered White House Counsel Don McGahn to have Special Counsel Mueller terminated in June 2017 after newspapers reported that the Special Counsel was investigating whether President Trump had obstructed justice by firing FBI Director Comey.⁶⁸⁷ In January 2018, after newspapers accurately reported this episode, President Trump directed White House Counsel McGahn to lie about it and create a false record to back up that lie.⁶⁸⁸ Special Counsel Mueller also determined that President Trump had tried to convince Attorney General Sessions to unrecuse himself from the Russia investigation and then limit it to the possibility of Russian meddling in *future* elections.⁶⁸⁹ President Trump also repeatedly assailed the Attorney General, implied his job was in jeopardy, and thus arguably pressured him to satisfy the President's wishes regarding the investigation.⁶⁹⁰

Special Counsel Mueller also presented voluminous evidence that the President had obstructed justice with regard to former aides who were being prosecuted for lying to the Special Counsel and/or Congress to protect the President: Flynn, Cohen, and Manafort.⁶⁹¹ Through personal aides and his own statements, President Trump conveyed that he “love[d]” and supported these subordinates who were now in legal jeopardy,⁶⁹² urging them to “stay strong,”⁶⁹³ predicting that they would not “flip,”⁶⁹⁴ and implying that he would pardon them if they did not “rat” on him by cooperating with the investigation.⁶⁹⁵ In Manafort's case, President Trump made such statements *while* a federal jury was deliberating on his fate.⁶⁹⁶ As the Report noted, the fact that some of President Trump's obstructive acts occurred in broad daylight, while unusual, did not immunize them from prosecution.⁶⁹⁷

While many Democrats responded to the Mueller Report by demanding that the House begin impeachment proceedings, only one

⁶⁸⁵ See 2 MUELLER, *supra* note 153, at 8, 169.

⁶⁸⁶ See *id.* at 24–156.

⁶⁸⁷ See *id.* at 4, 77–78, 84–85.

⁶⁸⁸ *Id.* at 5–6, 113.

⁶⁸⁹ *Id.* at 97, 107–12.

⁶⁹⁰ See *id.* at 110–11.

⁶⁹¹ See *id.* at 120–56.

⁶⁹² *Id.* at 146; see also *id.* at 43–44, 123–24, 132–33, 146–47.

⁶⁹³ *Id.* at 44, 146.

⁶⁹⁴ *Id.* at 146.

⁶⁹⁵ *Id.* at 6.

⁶⁹⁶ *Id.* at 123–25, 132–33.

⁶⁹⁷ *Id.* at 7, 157.

Republican, Representative Amash of Michigan, supported impeachment.⁶⁹⁸ Most Republicans echoed the deeply misleading characterizations of the Report by Attorney General Barr and President Trump, declaring that the Report had found “no collusion and no obstruction.”⁶⁹⁹ When Special Counsel Mueller delivered a widely panned performance during his House testimony on July 24, 2019, impeachment proceedings seemed a remote possibility.⁷⁰⁰ Then, on the very next day, President Trump placed a phone call to the President of Ukraine.⁷⁰¹

6. *Impeachment.* — The extent to which the Republican Party had become complicit with President Trump became fully evident during the impeachment proceedings in the fall and winter of 2019–2020. Most of the facts are not disputed. On July 25, 2019, President Trump called President Zelensky of Ukraine and, in the context of discussing American military aid, asked President Zelensky for a “favor.”⁷⁰² President Trump wanted President Zelensky to announce two investigations: one into whether President Trump’s political adversary, Joe Biden, had played an improper role as Vice President in securing the dismissal of a Ukrainian prosecutor who was supposedly investigating criminal activity by a Ukrainian natural gas company on whose board Biden’s son Hunter served and another investigation into a theory that Ukraine had interfered in the 2016 presidential election.⁷⁰³

Despite President Trump’s repeated insistence that his phone call was “perfect,”⁷⁰⁴ the readout issued by the White House revealed that President Trump was pressuring Ukraine to dig up dirt on his political opponent by threatening to withhold desperately needed military aid and a coveted invitation to President Zelensky to make an official visit

⁶⁹⁸ See Justin Amash (@justinamash), TWITTER (May 18, 2019, 3:30 PM), <https://twitter.com/justinamash/status/1129831615952236546> [<https://perma.cc/HK4D-JY6C>]; Glenn Thrush, *Breaking with Party, G.O.P. Lawmaker Says Trump’s Conduct Reaches “Threshold of Impeachment,”* N.Y. TIMES (May 18, 2019), <https://nyti.ms/2HoZg4y> [<https://perma.cc/NUE3-CFMV>].

⁶⁹⁹ Matt Zapotosky & Devlin Barrett, *Mueller Did Not Find the Trump Campaign Conspired with Russia, Attorney General Says*, WASH. POST (Mar. 24, 2019, 7:17 PM), https://www.washingtonpost.com/world/national-security/republicans-and-democrats-brace-for-renewed-battles-over-mueller-report/2019/03/23/56d9f214-4db3-11e9-b79a-961983b7e0cd_story.html [<https://perma.cc/N629-V76Q>]; see Peter Baker & Nicholas Fandos, *Reaction to Mueller Report Divides Along Partisan Lines*, N.Y. TIMES (Apr. 19, 2019), <https://nyti.ms/2UstkzB> [<https://perma.cc/XT9H-N6SC>].

⁷⁰⁰ See Peter Baker, *The Blockbuster that Wasn’t: Mueller Disappoints the Democrats*, N.Y. TIMES (July 24, 2019), <https://nyti.ms/2Z9JiS7> [<https://perma.cc/D6QT-YB7A>]; Robert Mueller Testifies Before Two House Committees, C-SPAN (July 24, 2019), <https://www.c-span.org/video/?462628-1/robert-mueller-congressional-testimony> [<https://perma.cc/PE3P-UUKH>].

⁷⁰¹ See H. PERMANENT SELECT COMM. ON INTEL., THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT, H.R. REP. NO. 116-335, at 13 (2019) [hereinafter HOUSE REPORT].

⁷⁰² *Id.* at 88.

⁷⁰³ *Id.* at 88–90.

⁷⁰⁴ *Id.* at 176.

to the White House.⁷⁰⁵ President Trump's phone call was both straight out of the authoritarian playbook and a quintessentially impeachable offense under the U.S. Constitution.

The Constitution provides that the President (and other specified officeholders) may be removed from office through impeachment for "high Crimes and Misdemeanors."⁷⁰⁶ While that term is vague, it is possible to determine if President Trump's behavior qualifies as impeachable without precisely defining the contours of the term. There are three convenient baselines against which to measure President Trump's conduct. First, would the Constitution's Framers have considered it impeachable? Second, was President Trump's behavior worse than President Bill Clinton's, which nearly all Republicans considered impeachable two decades earlier? Third, if President Obama had called President Putin in the summer of 2016 to ask him to dig up dirt on Donald Trump, would Republicans have considered that action impeachable?

When the Framers approved an impeachment provision, they expressed three general concerns.⁷⁰⁷ First, impeachment was appropriate for government officials who placed their own *private* interests ahead of the public good.⁷⁰⁸ Second, the President would be especially susceptible to *foreign* influence because, unlike a king, the President would neither be the richest man in the nation nor necessarily regard his identity as fully suffused with the nation's interests.⁷⁰⁹ Third, *elections* were a point of special vulnerability to foreign influence.⁷¹⁰ President Trump's phone call to Ukraine hit the trifecta.

Moving from the Framers' concerns to recent precedents, was there a serious argument that President Trump's transgression was less egregious than President Clinton's, which most Republicans considered impeachable in 1998–1999?⁷¹¹ The articles of impeachment against President Clinton charged him with lying under oath about having sex with a White House intern and obstructing justice by suborning perjury to cover up his affair.⁷¹² There is no doubt that he was guilty as

⁷⁰⁵ See *id.* at 86–90; Memorandum of Telephone Conversation with President Zelensky of Ukraine (July 25, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf> [<https://perma.cc/WMV9-ABEH>].

⁷⁰⁶ U.S. CONST. art. II, § 4.

⁷⁰⁷ See Michael J. Klarman, Opinion, *Trump's Ukraine Shakedown: The Original Understanding of Impeachment*, BOS. GLOBE (Dec. 2, 2019, 8:16 PM), <https://www.bostonglobe.com/2019/12/02/opinion/trumps-ukraine-shakedown> [<https://perma.cc/3WPD-LZEG>].

⁷⁰⁸ *Id.*

⁷⁰⁹ *Id.*

⁷¹⁰ *Id.*

⁷¹¹ See Andrew Glass, *House Votes to Impeach Clinton, Oct. 8, 1998*, POLITICO (Oct. 8, 2017, 6:53 AM), <https://www.politico.com/story/2017/10/08/house-votes-to-impeach-clinton-oct-8-1998-243550> [<https://perma.cc/7XFC-QKH8>].

⁷¹² H.R. Res. 611, 105th Cong., 144 CONG. REC. 27,828–29 (1998); see Glass, *supra* note 711.

charged.⁷¹³ Many Democrats severely criticized his behavior.⁷¹⁴ Their principal defense against impeachment was that President Clinton, in essence, had lied about a sexual affair, and this did not qualify as a “high Crime[]” or “Misdemeanor[.]”⁷¹⁵

As noted, “high Crimes and Misdemeanors” is not a self-defining term. President Clinton’s conduct did not involve the sort of abuse of *office* that the Framers primarily had in mind when providing for impeachment.⁷¹⁶ However, President Clinton did abuse the public *trust* when he wagged his finger on national television and insisted: “I did not have sexual relations with that woman.”⁷¹⁷ Given the vagueness of the constitutional standard, the fact that President Clinton’s behavior was wrong but not an egregious misuse of official power or threat to the nation’s welfare, and the growing polarization of the parties by the late 1990s, most Democrats and Republicans naturally disagreed on whether President Clinton should be impeached and removed from office.⁷¹⁸

What is surprising is that any reasonable person could think impeachment was warranted for President Clinton but not for President Trump. That nearly all Republicans voted to impeach President Clinton and remove him from office,⁷¹⁹ but only one Republican, Senator Mitt Romney, voted to remove President Trump,⁷²⁰ demonstrates the extent to which today’s Republican Party has sold its soul for political power. Had President Obama done something analogous to what President Trump did, Republicans would have demanded his head on a platter.⁷²¹

Republicans’ arguments against impeachment reveal the scope of their complicity with President Trump. Early on, Republicans argued that the process of the House committees’ investigation of President Trump was unfair because it was conducted in private, unlike the House Judiciary

⁷¹³ See RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 11 (1999).

⁷¹⁴ See Richard L. Berke, *Testing of a President: The Reaction; Scathing and Sad, Democrats React to Clinton Speech*, N.Y. TIMES (Aug. 19, 1998), <https://www.nytimes.com/1998/08/19/us/testing-president-reaction-scathing-sad-democrats-react-clinton-speech.html> [<https://perma.cc/NWB4-H985>].

⁷¹⁵ See 144 CONG. REC. 28,035–113 (1998).

⁷¹⁶ Michael J. Klarman, Essay, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 645 (1999) [hereinafter Klarman, *Constitutional Fetishism*].

⁷¹⁷ See *id.* at 645 & n.56; see also THE FEDERALIST NO. 65, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁷¹⁸ Klarman, *Constitutional Fetishism*, *supra* note 716, at 656.

⁷¹⁹ Glass, *supra* note 711.

⁷²⁰ Dan Balz & Robert Costa, *Romney Votes to Convict Trump on Charge of Abuse of Power, Becoming the Lone Republican to Break Ranks*, WASH. POST (Feb. 5, 2020, 7:16 PM), https://www.washingtonpost.com/politics/with-his-vote-to-convict-trump-on-abuse-of-power-romney-will-break-with-his-party--and-awaits-the-consequences/2020/02/05/a76dce74-4841-11ea-ab15-b5df3261b710_story.html [<https://perma.cc/HZJ9-5STY>].

⁷²¹ See Alberta, *supra* note 633; Nicholas Kristof, Opinion, *What if It Were Obama on Trial?*, N.Y. TIMES (Jan. 25, 2020), <https://nyti.ms/2TVJbdd> [<https://perma.cc/F3W6-XPTK>].

Committee’s impeachment proceedings against President Clinton.⁷²² Moreover, they complained that the President was not permitted to call witnesses.⁷²³

This process argument was unpersuasive at best. Independent Counsel Ken Starr had investigated President Clinton for over four years.⁷²⁴ The House Judiciary Committee’s hearings on President Clinton’s impeachment did not seek additional facts; the members simply interrogated Independent Counsel Starr, whose report was an impeachment referral to the House.⁷²⁵ There was no analogous investigation of President Trump’s Ukraine affair. Attorney General Barr’s Justice Department had blocked any criminal investigation,⁷²⁶ and Special Counsel Mueller had investigated something entirely different.⁷²⁷ The House Intelligence Committee’s investigation of the Ukraine matter was more analogous to a prosecutor’s use of a grand jury to investigate an alleged crime; those proceedings are secret, and the accused is not permitted to call witnesses.⁷²⁸

Republicans also argued that all of the testimony indicating that President Trump had pressured an ally into investigating his political adversary was “hearsay.”⁷²⁹ This was untrue: Gordon Sondland, President

⁷²² See Letter from Pat A. Cipollone, Couns. to the President, White House, to Nancy Pelosi, Speaker, House of Reps., Eliot L. Engel, Chairman, House Foreign Affs. Comm., Adam B. Schiff, Chairman, House Permanent Select Comm. on Intel. & Elijah E. Cummings, Chairman, House Comm. on Oversight & Reform 1 (Oct. 8, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/10/PAC-Letter-10.08.2019.pdf> [<https://perma.cc/U459-UB99>]; Bobby Allyn, *White House Says President Trump Won’t Participate in Wednesday Impeachment Hearing*, NPR (Dec. 1, 2019, 5:39 PM), <https://www.npr.org/2019/12/01/783989343/as-impeachment-inquiry-moves-to-judiciary-committee-republicans-attack-the-proce> [<https://perma.cc/B8MS-P35L>].

⁷²³ Letter from Pat A. Cipollone, *supra* note 722.

⁷²⁴ Alison Mitchell & Lizette Alvarez, *Testing of a President: The Overview; Report by Starr Sent to House; Impeachment Process Weighed; Clinton Seeks Party’s Support*, N.Y. TIMES (Sept. 10, 1998), <https://www.nytimes.com/1998/09/10/us/testing-president-overview-report-starr-sent-house-impeachment-process-weighed.html> [<https://perma.cc/27E9-J92C>].

⁷²⁵ See *Kenneth Starr Takes the Stand*, WASH. POST (1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/ivideo.htm> [<https://perma.cc/7S75-V3L5>].

⁷²⁶ See Igor Derysh, *Trump’s Ukraine Call Was Referred to DOJ as Possible Crime. Barr’s Team Shut It Down*, SALON (Sept. 25, 2019, 9:30 PM), <https://www.salon.com/2019/09/25/trumps-ukraine-call-was-referred-to-doj-as-possible-crime-barrs-team-shut-it-down> [<https://perma.cc/AW3Q-CWDW>].

⁷²⁷ 2 MUELLER, *supra* note 153, at 1–2.

⁷²⁸ See, e.g., Robert Black, *Even Impeachment Has to Follow the Rules*, THE ATLANTIC (Dec. 11, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/impeachment-politics-law/603331> [<https://perma.cc/E8LZ-R2ZQ>].

⁷²⁹ Editorial Board, Opinion, *The Disorienting Defenses of Donald Trump*, N.Y. TIMES (Nov. 10, 2019), <https://nyti.ms/2pNhF57> [<https://perma.cc/5S9L-BK4X>]; see Danny Cevallos, *Republicans Blasted “Hearsay” Impeachment Testimony. But They Were in Congress, Not Court.*, NBC NEWS (Nov. 14, 2019, 7:12 PM), <https://www.nbcnews.com/politics/politics-news/hearsay-might-be-barred-court-congressional-hearing-entirely-different-n1082111> [<https://perma.cc/A9TJ-GZPW>].

Trump's ambassador to the European Union at the time, testified to statements the President had made directly to him.⁷³⁰ This argument was also hypocritical since President Trump himself had barred his inner circle of advisors, who could have provided direct evidence of President Trump's extortion, from testifying before Congress.⁷³¹ The rule against hearsay in criminal proceedings has sensible exceptions for when a defendant is responsible for the absence of testimony from individuals who directly witnessed an incident.⁷³²

Next, Republicans argued that President Trump had been genuinely concerned about Ukrainian corruption and thus was entitled to withhold military assistance until President Zelensky agreed to launch an investigation into the Bidens.⁷³³ The notion of President Trump as an anticorruption crusader is difficult to conjure. First, he has run one of the most corrupt presidential administrations in recent history,⁷³⁴ criticized the Foreign Corrupt Practices Act as "unfair" to American businesses,⁷³⁵ and failed to express public concern about any other instance of foreign corruption. Second, the Department of Defense had confirmed that Ukraine satisfied anticorruption benchmarks for the release of U.S. military aid.⁷³⁶ Third, if President Trump had been genuinely concerned about Ukrainian corruption, it is a mystery why he released the aid once the whistleblower complaint had been filed.⁷³⁷ The only reason to have done so was President Trump's recognition that he had acted unlawfully and been caught. Fourth, Ambassador Sondland testified that President Trump cared only about the *announcement* of a Ukrainian investigation into the Bidens, not that an actual investigation occur.⁷³⁸ Fifth, the Bidens had already been investigated by the media, and no criminal wrongdoing was found.⁷³⁹

⁷³⁰ See Nicholas Fandos & Michael S. Schmidt, *Sondland Says He Followed Trump's Orders to Pressure Ukraine*, N.Y. TIMES (Nov. 20, 2019), <https://nyti.ms/2KGDkmN> [<https://perma.cc/W2Z3-KEF4>].

⁷³¹ See Katherine Faulders, *White House Blocks Former Top Trump Aides from Testifying*, ABC NEWS (Sept. 16, 2019, 9:34 PM), <https://abcnews.go.com/Politics/white-house-blocks-top-trump-aides-testifying/story?id=65647492> [<https://perma.cc/5F3X-SLED>].

⁷³² See FED. R. EVID. 804(b)(6).

⁷³³ Editorial Board, *supra* note 729.

⁷³⁴ See *supra* section I.B.5, pp. 28–32.

⁷³⁵ RUCKER & LEONNIG, *supra* note 131, at 170.

⁷³⁶ David Welna, *Pentagon Letter Undercuts Trump Assertion on Delaying Aid to Ukraine over Corruption*, NPR (Sept. 25, 2019, 9:03 PM), <https://www.npr.org/2019/09/25/764453663/pentagon-letter-undercuts-trump-assertion-on-delaying-aid-to-ukraine-over-corruption> [<https://perma.cc/3UQK-4A6G>].

⁷³⁷ See Weiyi Cai & Alicia Parlapiano, *A Guide to the Case for and Against Removing Trump*, N.Y. TIMES (Jan. 27, 2020, 3:00 PM), <https://nyti.ms/2RfFJlv> [<https://perma.cc/EGP5-T93M>].

⁷³⁸ HOUSE REPORT, *supra* note 701, at 11; see also *id.* at 82, 86, 112.

⁷³⁹ Doyle McManus, Opinion, *Deflection 101: "Joe Biden and His Son Are Corrupt, OK?"*, SEATTLE TIMES (Sept. 25, 2019, 9:33 AM), <https://www.seattletimes.com/opinion/deflection-101-joe-biden-and-his-son-are-corrupt-ok> [<https://perma.cc/S2RT-CUK8>].

Some Republicans made the peculiar argument that because Ukraine ultimately received the defense aid, impeachment could not possibly have been warranted.⁷⁴⁰ Had they never heard of attempt liability?

For a while, Republicans argued there was no evidence of a quid pro quo — that while President Trump may have asked for a “favor,” he had not explicitly made the release of the military aid contingent on an investigation of the Bidens and had told Ambassador Sondland he wanted “no quid pro quo.”⁷⁴¹ But then—Acting Chief of Staff Mick Mulvaney spilled the beans during a televised press conference, admitting “[w]e do that all the time with foreign policy,” referring to a quid pro quo, and telling the President’s critics to “[g]et over it.”⁷⁴² The White House forced Chief of Staff Mulvaney, embarrassingly, to walk back his remarks and declare that the media had “misconstrue[d]” them.⁷⁴³ In any event, Ambassador Sondland and William Taylor, the former envoy and Ambassador to Ukraine, confirmed the quid pro quo in their House testimony.⁷⁴⁴

Perhaps worst of all, Republicans joined President Trump’s crusade against the Ukraine whistleblower. The President has insisted that the whistleblower was part of the “deep State”⁷⁴⁵ — a claim that was neither relevant nor supported by any evidence — as well as implied that the whistleblower deserved to be executed⁷⁴⁶ and lied about whether the whistleblower’s charges had been independently corroborated.⁷⁴⁷ Some Republicans demanded that the whistleblower be outed⁷⁴⁸ even though his lawyer was receiving death threats⁷⁴⁹ and the “overwhelming ma-

⁷⁴⁰ See Anne Gearan, *Nikki Haley Claims Top Aides Tried to Recruit Her to “Save the Country” by Undermining Trump*, WASH. POST (Nov. 10, 2019, 11:48 AM), https://www.washingtonpost.com/politics/nikki-haley-claims-top-aides-tried-to-recruit-her-to-save-the-country-by-undermining-trump/2019/11/10/f92bac88-0267-11ea-9518-1e76abco88b6_story.html [https://perma.cc/WEV3-43T3]; see also Cai & Parlapiano, *supra* note 737.

⁷⁴¹ See Cai & Parlapiano, *supra* note 737.

⁷⁴² Philip Bump, *Trump’s Impeachment Defense Waves Away His Chief of Staff’s Admission of Quid Pro Quo*, WASH. POST (Jan. 29, 2020, 11:02 PM), <https://www.washingtonpost.com/politics/2020/01/29/trumps-impeachment-defense-waves-away-his-chief-staffs-admission-quid-pro-quo> [https://perma.cc/MRB8-EBS4].

⁷⁴³ *Id.*

⁷⁴⁴ See HOUSE REPORT, *supra* note 701, at 14, 83.

⁷⁴⁵ See Bertrand, *supra* note 294.

⁷⁴⁶ See *id.* (“‘You know what we used to do in the old days when we were smart with spies and treason, right? We used to handle it a little differently than we do now,’ Trump said, according to audio of the remarks obtained by *The Los Angeles Times*.”).

⁷⁴⁷ See Cohen, *supra* note 270.

⁷⁴⁸ See Mark Hosenball, *Republicans Seek Whistleblower’s Identity in U.S. Impeachment Inquiry*, REUTERS (Oct. 29, 2019, 4:51 PM), <https://www.reuters.com/article/us-usa-trump-whistleblower-identity-idUSKBN1X82J6> [https://perma.cc/85F6-82PZ].

⁷⁴⁹ Bertrand, *supra* note 294.

jority of allegations” in his complaint had been independently confirmed.⁷⁵⁰ Senator Rand Paul actually outed him on the floor of the Senate,⁷⁵¹ putting the whistleblower’s life at risk.

In the end, many Republican senators fell back on the argument of President Trump’s lawyer Alan Dershowitz that a “high Crime[] and Misdemeanor[]” requires an indictable offense, which Democrats had not alleged in the two articles of impeachment.⁷⁵² House Democrats had made the strategic but controversial choice not to allege that President Trump had committed a specific crime such as bribery or solicitation of bribes.⁷⁵³ Of course, they would not have made that choice if the argument that impeachment requires an indictable offense had any merit. The argument made by Dershowitz is not supported by most experts on impeachment and is clearly wrong as a historical matter.⁷⁵⁴ When the Framers discussed examples of impeachable offenses, they frequently invoked behavior that plainly was not criminal.⁷⁵⁵ Republican senators probably settled upon this argument because contesting the facts of President Trump’s behavior, as opposed to whether that behavior qualified as impeachable, would have made them look ridiculous when they were simultaneously blocking testimony from witnesses who could have solidified the factual case against the President.⁷⁵⁶

In the fall of 2019, some political pundits had expressed hope that, despite America’s pathologically polarized politics, the facts of the Ukraine scandal were so clear and President Trump’s behavior so egregious that some Republican officeholders would break ranks, do their

⁷⁵⁰ Cohen, *supra* note 270.

⁷⁵¹ See Kyle Cheney & Burgess Everett, *Rand Paul Reads Alleged Whistleblower’s Name and Republicans “Fine” with It*, POLITICO (Feb. 4, 2020, 8:28 PM), <https://www.politico.com/news/2020/02/04/rand-paul-reads-alleged-whistleblowers-name-senate-floor-110684> [https://perma.cc/KTP6-YHTP].

⁷⁵² Charlie Savage, *Trump Lawyer’s Impeachment Argument Stokes Fears of Unfettered Power*, N.Y. TIMES (Jan. 30, 2020), <https://nyti.ms/2UdgbRh> [https://perma.cc/7HUI-XDR3]; see Cai & Parlapiano, *supra* note 737.

⁷⁵³ Peter Baker, *House Democrats Considered 10 Impeachment Articles Before Narrowing Their Case Against Trump*, N.Y. TIMES (July 22, 2020), <https://nyti.ms/39ljyrS> [https://perma.cc/2QCL-26J2].

⁷⁵⁴ See, e.g., MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 62–64 (2018); CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN’S GUIDE 56 (2017); LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 44–45 (2018).

⁷⁵⁵ See, e.g., SUNSTEIN, *supra* note 754, at 56–60; cf. Klarman, *Constitutional Fetishism*, *supra* note 716, at 645 (suggesting Framers would likely have disagreed among themselves about whether lying under oath and obstructing justice in relation to a private matter constituted impeachable conduct).

⁷⁵⁶ See Fred Barbash, *Madison, Hamilton, Dershowitz: One of These Men Is Not Like the Others, but for the GOP He’s a Better Quote*, WASH. POST (Jan. 29, 2020, 8:40 AM), <https://www.washingtonpost.com/nation/2020/01/29/dershowitz-impeachment-speech> [https://perma.cc/WH26-PCRR].

patriotic duty, and vote to remove him from office.⁷⁵⁷ Instead, the Ukraine affair confirmed that political polarization and negative partisanship are so great that the parties share almost no common ground.⁷⁵⁸ Democracy may not be able to survive under such conditions.

7. *Post-Impeachment.* — On February 5, 2020, the Senate voted along strictly partisan lines — with the sole exception of Republican Senator Romney, who voted in favor of the first article of impeachment — to acquit President Trump of the charges of abuse of power and obstruction of Congress.⁷⁵⁹ Some Republican senators, such as Susan Collins of Maine, rationalized their votes to acquit President Trump by positing that he had been chastened by impeachment and would be “much more cautious in the future.”⁷⁶⁰ President Trump quickly made such Republicans appear foolish, announcing that the lesson he had learned was that the Democrats are “crooked.”⁷⁶¹

Vindicating Democratic predictions that a Senate acquittal would leave President Trump feeling unbound by legal constraint, the President immediately went on a public vendetta against those who had testified against him in the House impeachment proceedings and thus were perceived as disloyal.⁷⁶² Two days after his acquittal, President Trump removed Lieutenant Colonel Alexander Vindman from the National Security Council on the grounds that he had been “very insubordinate,” and President Trump implied that the military might consider further disciplinary action.⁷⁶³ To be clear, Lieutenant Colonel Vindman is an immigrant refugee who dedicated his life to serving his new country and won a Purple Heart for service in Iraq.⁷⁶⁴ He had

⁷⁵⁷ See, e.g., Sheryl Gay Stolberg, *These Republicans May Not Endorse an Impeachment Inquiry. But They Aren't Saying No.*, N.Y. TIMES (Oct. 5, 2019), <https://nyti.ms/2MjIXar> [<https://perma.cc/2S3H-UATZ>].

⁷⁵⁸ See Fareed Zakaria, Opinion, *It's Hard to Be an Optimist About America Right Now*, WASH. POST (Nov. 28, 2019, 10:00 AM), https://www.washingtonpost.com/opinions/its-hard-to-be-an-optimist-about-america-right-now/2019/11/27/8020e526-115b-11ea-b0fc-62cc38411ebb_story.html [<https://perma.cc/SP79-D3PS>].

⁷⁵⁹ See Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), <https://nyti.ms/382Saxs> [<https://perma.cc/H8BJ-N6W8>].

⁷⁶⁰ Fandos & Edmondson, *supra* note 170.

⁷⁶¹ *Id.*

⁷⁶² See Roberta Rampton, Amita Kelly & Franco Ordoñez, *Vindman, Sondland Removed as Trump Purges Impeachment Witnesses*, NPR (Feb. 8, 2020, 3:31 PM), <https://www.npr.org/2020/02/07/803904417/lt-col-alexander-vindman-escorted-out-of-the-white-house-his-lawyer-says> [<https://perma.cc/SC3A-D7U8>].

⁷⁶³ *Id.* (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 8, 2020, 9:41 AM), <https://twitter.com/realDonaldTrump/status/1226154000971681795> [<https://perma.cc/HW4H-594F>]); see Justin Wise, *Trump Adviser Denies Vindman Ouster Was Retaliation: “We Are Not a Banana Republic,”* THE HILL (Feb. 12, 2020, 8:34 AM), <https://thehill.com/homenews/administration/482711-trump-adviser-denies-vindman-ouster-was-retaliation-we-are-not-a> [<https://perma.cc/3NGJ-6VX4>].

⁷⁶⁴ See Mark Leibovich, *A Purple Heart, Combat Badge and Ranger Tab: Vindman Sends a Message*, N.Y. TIMES (Feb. 7, 2020), <https://nyti.ms/37prpUa> [<https://perma.cc/CMM5-QBAR>].

testified truthfully in response to a congressional subpoena, and his reward was to be frog-marched out of the White House on the slander that he disagreed with the President's policies and had lied to Congress.⁷⁶⁵

Despite efforts by some establishment Republicans to protect Ambassador Sondland — probably because of the inexpedient incentive effect of humiliating a man who was a million-dollar donor to the party — he was also unceremoniously dumped,⁷⁶⁶ as were others whose actions during the Ukraine affair, which often consisted of simply doing their jobs, had displeased the White House.⁷⁶⁷ President Trump also appointed Johnny McEntee, a twenty-nine-year-old loyalist, to head the Office of Presidential Personnel, with McEntee reporting directly to the President and given a brief to ferret out government personnel deemed insufficiently loyal to President Trump.⁷⁶⁸

Congressional Republicans expressed virtually no meaningful criticism of President Trump's post-acquittal actions.⁷⁶⁹ When Senator John Cornyn of Texas was asked whether the President and his Justice Department may have interfered in the sentencing of Roger Stone, he waved away the question as “[k]ind of immaterial.”⁷⁷⁰ Senator Lindsey Graham of South Carolina volunteered that he was not “losing any sleep” over the resignation of the four career prosecutors in the Stone case.⁷⁷¹ Senator Collins, plainly irritated when asked to reconcile her prediction before the impeachment vote that the President would be chastened by the experience with his actions since his acquittal, told reporters: “My vote to acquit the president was not based on predicting his future behavior.”⁷⁷²

Since President Trump's acquittal, Senate Republicans appear to have fully enlisted themselves in doing the President's dirty work. As Joe Biden became the Democratic Party's presumptive presidential nominee in the spring of 2020, the Senate Committee on Homeland Security and Governmental Affairs took aggressive steps in its investigation into Hunter Biden's role with Burisma, the Ukraine energy company for which

⁷⁶⁵ See *id.*; Rampton et al., *supra* note 762.

⁷⁶⁶ Peter Baker, Michael S. Schmidt & Maggie Haberman, *Republican Senators Tried to Stop Trump from Firing Impeachment Witness*, N.Y. TIMES (Feb. 14, 2020), <https://nyti.ms/379K2Kl> [<https://perma.cc/A576-PR3B>].

⁷⁶⁷ See Baker, *supra* note 189; Max Boot, Opinion, *This Is How Democracy Dies — In Full View of a Public that Couldn't Care Less*, WASH. POST (Feb. 15, 2020, 7:00 AM), <https://www.washingtonpost.com/opinions/2020/02/15/this-is-how-democracy-dies-full-view-public-that-couldnt-care-less> [<https://perma.cc/gS2Z-YJ28>].

⁷⁶⁸ See Baker, *supra* note 189.

⁷⁶⁹ See Boot, *supra* note 767.

⁷⁷⁰ Fandos & Edmondson, *supra* note 170.

⁷⁷¹ *Id.*

⁷⁷² *Id.*

he served as a board member.⁷⁷³ Republicans insisted that Burisma had been of longstanding interest to them, though Senator Ron Johnson, chair of that committee, acknowledged that the investigation into the Bidens could — and should — affect the presidential election.⁷⁷⁴ Senator Graham, chair of the Senate Judiciary Committee, has subpoenaed numerous former Obama Administration officials in the Republican-led inquiry into the origins of the Russia investigation.⁷⁷⁵ Senator Johnson and Senator Chuck Grassley had previously pressed the Justice Department to investigate whether Democrats conspired with Ukrainian officials to undermine Trump’s presidential campaign in 2016⁷⁷⁶ — a charge that U.S. intelligence officials have determined to be Russian disinformation.⁷⁷⁷

8. *Explanations for Republican Complicity and the End of Bureaucratic Constraint.* — Undoubtedly, the principal reason for Republican officeholders’ complicity with President Trump is the overwhelming and enthusiastic support the President enjoys among Republican voters.⁷⁷⁸ As one Republican representative described after the House voted to move ahead with President Trump’s impeachment: “Trump has touched the nerve of my conservative base like no person in my lifetime.”⁷⁷⁹ President Trump has enjoyed approval ratings among Republicans of nearly ninety percent and above for much of his presidency,⁷⁸⁰ and fifty-three percent of Republicans think President Trump has been a better President than Abraham Lincoln.⁷⁸¹ In 2019,

⁷⁷³ See Nicholas Fandos, *Republicans, Egged On by Trump, Scrutinize Hunter Biden as His Father Surges*, N.Y. TIMES (Mar. 5, 2020), <https://nyti.ms/39tdTzc> [<https://perma.cc/48M5-V6SJ>].

⁷⁷⁴ See *id.*

⁷⁷⁵ See Andrew Desiderio, *Senate Republicans Authorize Subpoenas in Probe Targeting Trump Enemies*, POLITICO (June 11, 2020, 3:07 PM), <https://www.politico.com/news/2020/06/11/senate-republicans-authorize-subpoenas-in-probes-targeting-former-obama-officials-313123> [<https://perma.cc/JY5M-PPHB>].

⁷⁷⁶ See Burgess Everett, *Republican Senators Press DOJ to Probe Clinton and Ukraine*, POLITICO (Sept. 30, 2019, 8:50 PM), <https://www.politico.com/story/2019/09/30/ron-johnson-chuck-grassley-hillary-clinton-ukraine-letter-1518995> [<https://perma.cc/4V3J-N267>].

⁷⁷⁷ See John Cassidy, *The Extraordinary Impeachment Testimony of Fiona Hill*, NEW YORKER (Nov. 22, 2019), <https://www.newyorker.com/news/our-columnists/the-extraordinary-impeachment-testimony-of-fiona-hill> [<https://perma.cc/S8CE-KGN9>]; Katie Shepherd, *Sen. Ted Cruz Echoes Debunked Claims that Ukraine Interfered in 2016 Election*, WASH. POST (Dec. 9, 2019, 9:15 PM), <https://www.washingtonpost.com/nation/2019/12/09/ted-cruz-meet-press-ukrainian-interference-chuck-todd/> [<https://perma.cc/5S28-TSWQ>].

⁷⁷⁸ See Martin & Haberman, *supra* note 627.

⁷⁷⁹ *Id.* (quoting Representative Patrick McHenry).

⁷⁸⁰ *Presidential Approval Ratings — Donald Trump*, GALLUP, <https://news.gallup.com/poll/203198/presidential-approval-ratings-donald-trump.aspx> [<https://perma.cc/VG2U-NQ5C>].

⁷⁸¹ See Kathy Frankovic, *Trump Better than Lincoln? Republicans Think So*, YOUNG (Dec. 2, 2019, 6:45 PM), <https://today.yougov.com/topics/politics/articles-reports/2019/12/02/greatest-republican-president> [<https://perma.cc/PET6-BFM6>].

sixty-two percent of President Trump's supporters said there was nothing he could possibly do that would affect their approval of him.⁷⁸²

Many Republicans who only reluctantly voted for President Trump in 2016 have since become devotees, partly because of their support of his tax cuts, judicial appointments, and economic policies (before the pandemic intervened) and partly because of their revulsion against Democratic attacks on the President.⁷⁸³ In addition, many Republicans admire President Trump's contempt for basic democratic precepts.⁷⁸⁴ In both the 2016 primaries and the general election, support for President Trump was correlated with voters' preferences for strong leadership.⁷⁸⁵ Republicans are also more likely, in general, to prefer strong leaders than Democrats are.⁷⁸⁶ Lack of education is one of the strongest predictors of an authoritarian personality, which sees the world in terms of stark contrasts, defends tradition, and perceives significant distinctions between in-groups and out-groups.⁷⁸⁷ An overwhelming majority of white working-class voters support President Trump.⁷⁸⁸ Racism and religious intolerance also strongly correlate with support for autocracy.⁷⁸⁹ Americans who support surveillance of mosques or targeting Muslims at airport security screenings are three times more likely to favor a strong leader than are those who strongly oppose such religion-based profiling.⁷⁹⁰

Had those within the Administration who had grave concerns about the President's fitness coordinated their actions early on, President Trump might have been stymied.⁷⁹¹ In the summer of 2017, Attorney General Sessions offered his resignation to President Trump.⁷⁹² Had White House Chief of Staff Reince Priebus and White House Counsel Don McGahn not persuaded him to withdraw it, at a time when the Administration was already struggling to handle the fallout from President Trump's firing of Director Comey and the appointment of Special Counsel Mueller, Attorney General Sessions might have publicly disclosed that the President had pressured him to unrecuse himself from

⁷⁸² See Fadel Allassan, *Poll: 62% of Trump Supporters Say Nothing He Could Do Would Change Opinion*, AXIOS (Nov. 5, 2019), <https://www.axios.com/monmouth-poll-trump-approval-a05b8144-1d1b-4296-a0d4-6ca0390b05ee.html> [<https://perma.cc/G27U-C9V2>].

⁷⁸³ See Sabrina Tavernise, *Post Impeachment, a Key Republican Suburban Area Rallies Around Trump*, N.Y. TIMES (Feb. 8, 2020), <https://nyti.ms/2w4o37T> [<https://perma.cc/6LQ9-V4RS>].

⁷⁸⁴ See Packer, *supra* note 168.

⁷⁸⁵ DIAMOND, *supra* note 28, at 151.

⁷⁸⁶ See *id.* at 152.

⁷⁸⁷ See ASHLEY JARDINA, *WHITE IDENTITY POLITICS* 94–95 (2019).

⁷⁸⁸ See DIAMOND, *supra* note 28, at 95–96.

⁷⁸⁹ See *id.* at 152.

⁷⁹⁰ *Id.*

⁷⁹¹ See Bob Bauer, Opinion, *Trump and Barr Are Out of Control*, N.Y. TIMES (Feb. 12, 2020), <https://nyti.ms/38nEqxu> [<https://perma.cc/84N8-RZ79>].

⁷⁹² See RUCKER & LEONNIG, *supra* note 131, at 70.

the Russia investigation and fire Special Counsel Mueller.⁷⁹³ Around this time, White House Counsel McGahn was also on the verge of resigning rather than continuing to do the President’s “crazy shit.”⁷⁹⁴ Chief of Staff Priebus and White House Chief Strategist Steve Bannon talked him out of it.⁷⁹⁵ Similarly, had President Trump’s aides early in the Administration not prevented him from acting on his own worst impulses — such as by firing Attorney General Sessions and Special Counsel Mueller⁷⁹⁶ — the President might not have politically survived the backlash against such obvious obstructions of justice. Much as his aides’ frequent refusals to carry out his orders saved the President from succeeding in his efforts to obstruct justice, their decisions not to resign possibly saved him from an early implosion of his presidency.⁷⁹⁷

When the “adults” in the room gradually began to depart the Administration, none of them said much publicly to alert the nation to its peril.⁷⁹⁸ Both Secretary of Defense Mattis and White House Chief of Staff Kelly had commented to others “that they viewed their job as being ‘babysitter’ to the President,” but they did not publicly avow such sentiments when leaving office.⁷⁹⁹ Perhaps their long careers in the military disinclined them to speak pejoratively of their Commander in Chief.⁸⁰⁰ In December 2018, former Secretary of State Tillerson gave his first extensive public remarks about President Trump since being fired nine months earlier.⁸⁰¹ He criticized President Trump in fairly mild terms, describing someone who is “pretty undisciplined, doesn’t like to read, doesn’t read briefing reports, [and] doesn’t like to get into the details of a lot of things.”⁸⁰² President Trump tweeted in response that Secretary of State Tillerson “didn’t have the mental capacity needed [for his role]. He was dumb as a rock He was lazy as hell.”⁸⁰³

⁷⁹³ See *id.* at 70–71.

⁷⁹⁴ 2 MUELLER, *supra* note 153, at 87.

⁷⁹⁵ See *id.*

⁷⁹⁶ Cf. *id.* at 158 (concluding that President Trump’s efforts to influence the Russia investigation mostly failed “largely because the persons who surrounded the President declined to carry out orders or accede to his requests”).

⁷⁹⁷ See *id.*; Bauer, *supra* note 791.

⁷⁹⁸ See, e.g., Elizabeth McLaughlin & Luis Martinez, *Silence About Trump “Not Going to Be Forever”: Former Defense Secretary James Mattis*, ABC NEWS (Aug. 29, 2019, 2:28 PM), <https://abcnews.go.com/Politics/long-trumps-defense-secretary/story?id=65241703> [<https://perma.cc/K9J3-AMP4>]; Packer, *supra* note 168.

⁷⁹⁹ DANIEL W. DREZNER, *THE TODDLER IN CHIEF: WHAT DONALD TRUMP TEACHES US ABOUT THE MODERN PRESIDENCY* 11–12 (2020).

⁸⁰⁰ See RUCKER & LEONNIG, *supra* note 131, at 136–37.

⁸⁰¹ See Peter Baker, *Trump Says Tillerson Is “Dumb as a Rock” After Former Secretary of State Criticizes Him*, N.Y. TIMES (Dec. 7, 2018), <https://nyti.ms/2zHyIqX> [<https://perma.cc/CBP9-R2AC>].

⁸⁰² *Id.*

⁸⁰³ *Id.* (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2018, 3:02 PM), <https://twitter.com/realDonaldTrump/status/1071132880368132096> [<https://perma.cc/YW5A-MGYZ>]).

Likewise, Republican politicians quickly discovered that criticizing the President led to nasty Twitter attacks from him, an assault from right-wing media, a guaranteed primary opponent, and a likely end to their careers in Republican politics.⁸⁰⁴ President Trump is probably more feared than admired by Republican politicians,⁸⁰⁵ many of whom privately criticize him in strong terms.⁸⁰⁶ Immediately after calling President Trump's behavior "impeachable" upon the release of the Mueller Report, Representative Amash of Michigan lost the support of the powerful DeVos family, who had been big financial backers of his career.⁸⁰⁷ By contrast, Republican politicians who defend President Trump, no matter how absurd their arguments, become instant Republican heroes.⁸⁰⁸ Congresswoman Elise Stefanik of New York, a member of the House Intelligence Committee who aggressively criticized the impeachment proceedings, quickly became a Trump favorite, attracting thousands of new donors and raising millions of dollars in campaign contributions.⁸⁰⁹

Republican politicians have another powerful incentive to suppress their criticism of President Trump: they strongly support much of the Administration's policy agenda, including tax cuts, deregulation, and appointment of conservative judges.⁸¹⁰ Understandably reluctant to vote against policies they support ideologically, these Republican politicians contributed vital legitimacy to the Administration by failing to break with it.⁸¹¹ Those Republicans harboring ambition for higher office, such as Senator Ted Cruz, Senator Marco Rubio, former Ambassador to the United Nations Nikki Haley, and Secretary of State Mike Pompeo, have

⁸⁰⁴ See Martin & Haberman, *supra* note 627.

⁸⁰⁵ See *id.*

⁸⁰⁶ See David Jolly, *Many GOP Politicians Dislike Trump. They're Terrified to Admit It.*, WASH. POST (May 1, 2018, 6:00 AM), <https://www.washingtonpost.com/news/posteverything/wp/2018/05/01/many-gop-politicians-dislike-trump-theyre-terrified-to-admit-it/> [<https://perma.cc/XB9R-L2R5>].

⁸⁰⁷ See Colby Itkowitz, *DeVos Family Ends Financial Support for Rep. Amash*, WASH. POST (May 22, 2019, 9:13 PM), https://www.washingtonpost.com/politics/devos-family-ends-financial-support-for-rep-amash/2019/05/22/81d435cc-7cc2-11e9-a5b3-34f3edf1351e_story.html [<https://perma.cc/8N2X-KZLQ>].

⁸⁰⁸ See Andrew Duehren, Catherine Lucey & Gabriel T. Rubin, *How Trump Has Kept Near-Unanimous GOP Support Through Impeachment*, WALL ST. J. (Jan. 19, 2020, 9:00 AM), <https://www.wsj.com/articles/how-trump-has-kept-near-unanimous-gop-support-through-impeachment-11579442401> [<https://perma.cc/7PZ5-9TT9>].

⁸⁰⁹ See *id.*

⁸¹⁰ See, e.g., Anne Applebaum, *History Will Judge the Complicit*, THE ATLANTIC (July/Aug. 2020), <https://www.theatlantic.com/magazine/archive/2020/07/trumps-collaborators/612250/> [<https://perma.cc/C6ST-GPD2>]; Paul Krugman, Opinion, *How Trump Got Tricked Down*, N.Y. TIMES (Feb. 10, 2020), <https://nyti.ms/39m3tky> [<https://perma.cc/S2US-32CL>] [hereinafter Krugman, *Trickled Down*]; see also Hook, *supra* note 335.

⁸¹¹ See, e.g., Applebaum, *supra* note 810; Krugman, *Trickled Down*, *supra* note 810.

a strong incentive to embrace the President, who remains so popular with Republican voters.⁸¹²

When the House took a vote to authorize a formal impeachment inquiry into President Trump's behavior with regard to Ukraine, not a single Republican voted in favor.⁸¹³ Not even one of the twenty-six Republican House members who had announced they would be retiring at the end of the session voted for impeachment.⁸¹⁴

Federal bureaucrats are usually strongly disincentivized to speak out against illegal actions and norms transgressions.⁸¹⁵ To criticize an administration would be to risk losing their jobs, receiving poor performance reviews that might harm future job prospects, missing out on lucrative future lobbying opportunities, and jeopardizing relationships with former colleagues.⁸¹⁶ Better to keep one's head down.

Marie Yovanovitch, a career foreign service employee and diplomat who was known in Kiev as a champion of anticorruption efforts, was vilified by right-wing media serving the interests of the President.⁸¹⁷ President Trump warned that Ambassador Yovanovitch was "going to go through some things" in his July 2019 phone conversation with President Zelensky.⁸¹⁸ Her boss, Secretary of State Pompeo, declined to express public support for her in the face of a defamatory campaign against her by Rudy Giuliani and others.⁸¹⁹ After testifying in the House impeachment investigation, Ambassador Yovanovitch resigned from the State Department.⁸²⁰ Indeed, many of the career State Department officers who testified in the impeachment proceedings were vilified on right-wing social media, accrued substantial legal bills, and received no support from Secretary of State Pompeo.⁸²¹

⁸¹² See Max Boot, Opinion, *Marco Rubio's Humiliating Transformation into a Trump Fan-Boy Is Complete*, WASH. POST (June 20, 2019, 1:03 PM), <https://www.washingtonpost.com/opinions/2019/06/20/marco-rubios-humiliating-transformation-into-trump-fan-boy-is-complete> [https://perma.cc/S75E-KSNR]; Mike DeBonis, *Ted Cruz Once Called Trump "Utterly Amoral" and a "Sniveling Coward." Then He Worked to Save His Presidency.*, WASH. POST (Feb. 15, 2020, 6:00 AM), https://www.washingtonpost.com/powerpost/ted-cruz-once-called-trump-utterly-amoral-and-a-sniveling-coward-then-he-worked-to-save-his-presidency/2020/02/15/db635480-4e70-11ea-bf44-f5043eb3918a_story.html [https://perma.cc/2QC7-LTXP]; Duehren et al., *supra* note 808; Gearan, *supra* note 740; Wong, *supra* note 674.

⁸¹³ Duehren et al., *supra* note 808.

⁸¹⁴ See Russell Berman, *The 2020 Congressional-Retirement Tracker*, THE ATLANTIC (Feb. 27, 2020, 11:24 AM), <https://www.theatlantic.com/politics/archive/2019/12/retirement-congress-2020-hurd-alexander/596965> [https://perma.cc/ZXE7-MEFK].

⁸¹⁵ See Packer, *supra* note 168.

⁸¹⁶ See *id.*

⁸¹⁷ See *id.*

⁸¹⁸ See Lara Jakes, *Diplomat at Center of Trump Impeachment Retires from State Department*, N.Y. TIMES (Jan. 31, 2020), <https://nyti.ms/3b39bt5> [https://perma.cc/WS89-DVEE].

⁸¹⁹ *Id.*; Packer, *supra* note 168.

⁸²⁰ Jakes, *supra* note 818.

⁸²¹ See Packer, *supra* note 168.

In short, President Trump has “punish[ed] perceived enemies, co-opt[ed] craven allies, and driv[en] out career officials of competence and integrity.”⁸²² To an extent that would have seemed inconceivable in 2016, President Trump has made the Republican Party and the executive branch his hirelings.

g. *The Costs of Complicity.* —

(a) *President Trump’s Unfitness for Office.* — While ordinary voters may not fully recognize President Trump’s unfitness for office, Republican politicians certainly do.⁸²³ Before becoming President, Trump had been a critic of vaccines and a “birther.”⁸²⁴ He had called global warming a Chinese hoax aimed at rendering American manufacturing noncompetitive and promoted the view that windmills cause cancer.⁸²⁵ During one Republican primary debate, he assured the television audience that he had an adequately sized penis.⁸²⁶ He accused a female journalist who asked him hard questions in a primary debate of having been menstruating.⁸²⁷ He implied that one of his female competitors for the nomination was too unattractive to be President.⁸²⁸ Trump has the impulse control, and the fondness for nasty nicknames, of a young child.⁸²⁹

In the White House, President Trump spends four to eight hours a day in front of a television.⁸³⁰ He often makes policy, sometimes through

⁸²² *Id.*

⁸²³ See, e.g., Jolly, *supra* note 806; see also Max Boot, Opinion, *The Republican Party Is Dead*, L.A. TIMES (May 8, 2016, 12:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-boot-republicans-in-exile-20160508-story.html> [<https://perma.cc/5F3N-KCNX>]; cf. Peter Wehner, Opinion, *Why I Will Never Vote for Donald Trump*, N.Y. TIMES (Jan. 14, 2016), <https://nyti.ms/1ROyznW> [<https://perma.cc/W3AN-697W>] (declaring that, despite the author’s past experience working for Republican administrations and campaigns, he would not vote for Trump due to his unfitness for office).

⁸²⁴ See Krieg, *supra* note 248; Abby Phillip, Lena H. Sun & Lenny Bernstein, *Vaccine Skeptic Robert Kennedy Jr. Says Trump Asked Him to Lead Commission on “Vaccine Safety,”* WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/politics/trump-to-meet-with-proponent-of-debunked-tie-between-vaccines-and-autism/2017/01/10/4a5d03c0-d752-11e6-9f9f-5cdb4b7f8dd7_story.html [<https://perma.cc/HYV4-39JR>].

⁸²⁵ See Aaron Blake, *Trump’s 10 Most Absurd Claims*, WASH. POST (Apr. 3, 2019, 4:13 PM), <https://www.washingtonpost.com/politics/2019/04/03/trumps-most-absurd-claims> [<https://perma.cc/7JPL-7WBH>].

⁸²⁶ See Jenna Johnson, *Size Really Matters to Donald Trump — On Everything*, WASH. POST (Mar. 4, 2016, 1:55 AM), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/04/size-really-matters-to-donald-trump-on-everything> [<https://perma.cc/PY25-8TK4>].

⁸²⁷ See Michael D. Shear & Eileen Sullivan, *“Horseface,” “Lowlife,” “Fat, Ugly”: How the President Demeans Women*, N.Y. TIMES (Oct. 16, 2018), <https://nyti.ms/2QWUnSd> [<https://perma.cc/9UQB-HQGA>].

⁸²⁸ See *id.*

⁸²⁹ See Daniel W. Drezner, *Immature Leadership: Donald Trump and the American Presidency*, 96 INT’L AFFS. 383, 389 (2020); Shear & Sullivan, *supra* note 827; Wehner, *supra* note 823.

⁸³⁰ Maggie Haberman, Glenn Thrush & Peter Baker, *Inside Trump’s Hour-by-Hour Battle for Self-Preservation*, N.Y. TIMES (Dec. 9, 2017), <https://nyti.ms/2kLyMRS> [<https://perma.cc/RS32-SFTV>].

tweets, based on what he has just seen on Fox News.⁸³¹ This can be problematic because, among other reasons, Fox is not meticulous about the accuracy of its stories.⁸³² Thus, for example, a bogus account of the South African government's seizing land from white farmers traveled from a right-wing conspiracy website to Fox, and then to President Trump's Twitter feed, where he demanded a State Department investigation.⁸³³ The thirty-five-day shutdown of the federal government in the winter of 2018–2019 was driven by right-wing media personalities attacking President Trump as “[g]utless”⁸³⁴ after he indicated support for a budget deal that did not include funding for the Mexican border wall.⁸³⁵ Former White House aides and political pundits said they believe President Trump is “more influenced” by Fox News personalities than by his own staff or intelligence experts.⁸³⁶

President Trump often does not read his daily intelligence briefings, even after they have been condensed to a page or two, with maps and pictures added, in an effort to hold his attention.⁸³⁷ Gary Cohn, the former director of President Trump's National Economic Council, explained that preparing “a meaningful, substantive briefing for the president” was “pointless” because he had a ten-minute attention span.⁸³⁸ On more than one occasion, President Trump has publicized classified information, not for any strategic reason, but probably because he was too foolish not to do so.⁸³⁹ On one of those occasions, President Trump, apparently seeking to impress visiting Russians with the nifty intelligence capabilities of the U.S. government, potentially endangered the life of an Israeli intelligence agent who had penetrated the Islamic State.⁸⁴⁰

The list of things that President Trump does not know is extensive. While the presidency is not a trivia contest like *Jeopardy!*, a President needs a basic understanding of the world to succeed. In a conversation

⁸³¹ See Mayer, *supra* note 281.

⁸³² See *id.*

⁸³³ See Kimon de Greef & Palko Karasz, *Trump Cites False Claims of Widespread Attacks on White Farmers in South Africa*, N.Y. TIMES (Aug. 23, 2018), <https://nyti.ms/201qRy7> [<https://perma.cc/2EAY-VUAE>].

⁸³⁴ Ann Coulter, *Gutless President in Wall-Less Country*, BREITBART (Dec. 19, 2018), <https://www.breitbart.com/politics/2018/12/19/coulter-gutless-president-in-wall-less-country> [<https://perma.cc/E7QX-A8KP>].

⁸³⁵ See RUCKER & LEONNIG, *supra* note 131, at 349–50.

⁸³⁶ See Mayer, *supra* note 281.

⁸³⁷ See RUCKER & LEONNIG, *supra* note 131, at 166; Max Boot, *Donald Trump Is Proving Too Stupid to Be President*, FOREIGN POL'Y (June 16, 2017, 2:31 PM), <https://foreignpolicy.com/2017/06/16/donald-trump-is-proving-too-stupid-to-be-president> [<https://perma.cc/T5KY-CAGZ>].

⁸³⁸ Drezner, *supra* note 829, at 389.

⁸³⁹ See Michelle Goldberg, Opinion, *Psst! Don't Tell Trump*, N.Y. TIMES (Sept. 9, 2019), <https://nyti.ms/2UNjYQv> [<https://perma.cc/C27D-GZ5M>].

⁸⁴⁰ See, e.g., *id.*; Adam Goldman, Eric Schmitt & Peter Baker, *Israel Said to Be Source of Secret Intelligence Trump Gave to Russians*, N.Y. TIMES (May 16, 2017), <https://nyti.ms/2rmVYE4> [<https://perma.cc/3ZVS-TPKT>].

President Trump had with Secretary of State Tillerson early in the Administration, he revealed that he did not understand that an executive order cannot repeal a statute.⁸⁴¹ One individual briefed extensively on the run-up to President Trump's first NATO meeting described it as "preparing to deal with a child — someone with a short attention span and mood who has no knowledge of NATO, no interest in in-depth policy issues, nothing."⁸⁴²

Rather than hiding his ignorance, President Trump often proudly proclaims it to the world, explaining that he can reach the right decisions without much additional knowledge because he has "a lot of common sense."⁸⁴³ President Trump frequently celebrates his hunches, which he seems to prefer to the evidence-based conclusions of scientists.⁸⁴⁴ He also manifests an unfounded confidence in his ability to know more about a topic than the experts do: "I know more about ISIS than the generals do."⁸⁴⁵ When Chief of Staff Kelly would arrange a subject matter briefing for the President, Trump would often complain: "I don't want to talk to anyone. I know more than they do. I know better than anybody else."⁸⁴⁶ According to President Trump, infectious disease experts at the Centers for Disease Control and Prevention (CDC) expressed astonishment at how much he knew about the coronavirus.⁸⁴⁷ President Trump also possesses the dangerous characteristic of being highly resistant to changing his mind once he comes to believe something, no matter how ill-informed his judgment.⁸⁴⁸

Limited capacity in a national leader might be offset by capable advisors, but President Trump has put his amateurish son-in-law in charge of

⁸⁴¹ See RUCKER & LEONNIG, *supra* note 131, at 170–71.

⁸⁴² Robbie Gramer, *NATO Frantically Tries to Trump-Proof President's First Visit*, FOREIGN POL'Y (May 15, 2017, 9:53 AM), <https://foreignpolicy.com/2017/05/15/nato-frantically-tries-to-trump-proof-presidents-first-visit-alliance-europe-brussels> [<https://perma.cc/Z4Z5-VWJ6>].

⁸⁴³ Boot, *supra* note 837.

⁸⁴⁴ See, e.g., Linda Qiu, Bill Marsh & Jon Huang, *The President vs. the Experts: How Trump Played Down the Coronavirus*, N.Y. TIMES (Mar. 18, 2020), <https://nyti.ms/2vwoqIe> [<https://perma.cc/84UN-ATPX>] (reporting on President Trump's "hunch" that the coronavirus fatality rate determined by public health experts was "really a false number").

⁸⁴⁵ Aaron Blake, *19 Things Donald Trump Knows Better than Anyone Else, According to Donald Trump*, WASH. POST (Oct. 4, 2016, 1:16 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/04/17-issues-that-donald-trump-knows-better-than-anyone-else-according-to-donald-trump> [<https://perma.cc/M38F-XJUW>].

⁸⁴⁶ RUCKER & LEONNIG, *supra* note 131, at 165.

⁸⁴⁷ See David Nakamura, "Maybe I Have a Natural Ability": Trump Plays Medical Expert on Coronavirus by Second-Guessing the Professionals, WASH. POST (Mar. 6, 2020, 8:21 PM), https://www.washingtonpost.com/politics/maybe-i-have-a-natural-ability-trump-plays-medical-expert-on-coronavirus-by-second-guessing-the-professionals/2020/03/06/3ee0574c-5ffb-11ea-9055-5fa12981bbbf_story.html [<https://perma.cc/CM28-VTG4>].

⁸⁴⁸ See Micah Zenko, *The Coronavirus Is the Worst Intelligence Failure in U.S. History*, FOREIGN POL'Y (Mar. 25, 2020, 1:52 PM), <https://foreignpolicy.com/2020/03/25/coronavirus-worst-intelligence-failure-us-history-covid-19> [<https://perma.cc/5MBN-Z6XF>].

everything from Middle East policy to Mexico trade negotiations to the coronavirus response.⁸⁴⁹ While President Obama had a Nobel Prize-winning physicist, Secretary of Energy Steven Chu, handle the oil spill in the Gulf of Mexico in 2010, President Trump assigned his son-in-law to deal with ventilator shortages in the early stages of the coronavirus pandemic; the operation did not go well.⁸⁵⁰ President Trump takes advice on whom to pardon from media personality Kim Kardashian West and reportedly asked former baseball player Alex Rodriguez how to handle the pandemic.⁸⁵¹ He selected Cabinet officials partly based on whether they looked the part.⁸⁵²

Perhaps President Trump's most egregious malfeasance in office has been his failure to fully acknowledge or redress Russia's "sweeping and systematic" interference in the 2016 presidential election.⁸⁵³ When President Trump sided with President Putin over his own intelligence agencies by expressing doubt about whether such interference had occurred, former CIA Director John Brennan called it "nothing short of treasonous," while Senator McCain labeled it "one of the most disgraceful performances by an American president in memory."⁸⁵⁴ President Trump apparently fears that acknowledging such interference would delegitimize his victory in the 2016 election.⁸⁵⁵ More importantly, President Trump is not taking the steps necessary to prevent a repetition of Russian interference in 2020.⁸⁵⁶ National security officials who wish to speak with President Trump about protecting the 2020 election are discouraged from doing so because the topic upsets him.⁸⁵⁷ He has failed in his oath to defend the nation from foreign enemies.

⁸⁴⁹ See Peter Baker, Maggie Haberman, Zolan Kanno-Youngs & Noah Weiland, *Kushner Puts Himself in Middle of White House's Chaotic Coronavirus Response*, N.Y. TIMES (Apr. 2, 2020), <https://nyti.ms/3bNl5ak> [<https://perma.cc/X9KJ-NQVR>]; Brian Bennett, *Inside Jared Kushner's Unusual White House Role*, TIME (Jan. 16, 2020, 6:08 AM), <https://time.com/5766186/jared-kushner-interview> [<https://perma.cc/94EG-XGUY>].

⁸⁵⁰ See Pod Save America, *Ratings to Die For*, CROOKED MEDIA, at 14:25–15:45 (Mar. 30, 2020) (downloaded using iTunes).

⁸⁵¹ See Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), <https://nyti.ms/2M3ykrh> [<https://perma.cc/7D7R-MKZD>]; Jordan Hoffman, *Trump Reportedly Consults Alex Rodriguez During Coronavirus Pandemic*, VANITY FAIR (Mar. 28, 2020), <https://www.vanityfair.com/news/2020/03/trump-reportedly-consults-alex-rodriguez-during-coronavirus-pandemic> [<https://perma.cc/R2NN-LQ52>].

⁸⁵² RUCKER & LEONNIG, *supra* note 131, at 17.

⁸⁵³ 1 MUELLER, *supra* note 153, at 1.

⁸⁵⁴ RUCKER & LEONNIG, *supra* note 131, at 275.

⁸⁵⁵ See 2 MUELLER, *supra* note 153, at 23.

⁸⁵⁶ See, e.g., Robert Draper, *Unwanted Truths: Inside Trump's Battles with U.S. Intelligence Agencies*, N.Y. TIMES MAG. (Aug. 25, 2020), <https://nyti.ms/3oFcvYc> [<https://perma.cc/8B3X-WYDS>]; Nakashima et al., *supra* note 193.

⁸⁵⁷ See, e.g., RUCKER & LEONNIG, *supra* note 131, at 166; Draper, *supra* note 856.

Nothing described here would be news to Republican officeholders, yet they have remained mostly silent in the face of President Trump's manifest unfitness for office.

(b) *The Coronavirus Pandemic*. — For the first three years of the Trump Administration, the United States miraculously survived President Trump's incompetence in part because there was no war or major natural catastrophe, barring the possible exception of Hurricane Maria, with its devastating impact on Puerto Rico and the Administration's shameful response.⁸⁵⁸ Then came the coronavirus pandemic.

The Administration's response to the pandemic will go down in American history as one of the nation's greatest intelligence and administrative failures.⁸⁵⁹ Although President Trump says that "[n]obody" could have predicted the pandemic,⁸⁶⁰ in September 2018, more than sixteen months before the coronavirus appeared in the United States, Lisa Monaco, President Obama's Homeland Security and Counterterrorism Advisor, wrote in *Foreign Policy* that "[t]he prevailing laissez-faire attitude toward funding pandemic preparedness within President Donald Trump's White House is creating new vulnerabilities in the health infrastructure of the United States."⁸⁶¹

In fact, experts have been warning for nearly two decades of a catastrophic infectious disease pandemic.⁸⁶² During the presidential transition period, when Obama Administration national security officials briefed their successors on world security threats, a deadly pandemic was a leading concern.⁸⁶³ After the Ebola outbreak in West Africa in 2014, the Obama Administration had created the Directorate for Global Health Security and Biodefense within the National Security Council with the mission of preventing or preparing for the next pandemic.⁸⁶⁴ The Trump Administration eliminated that position in 2018.⁸⁶⁵

⁸⁵⁸ See Paul Krugman, Opinion, *It's a MAGA Microbe Meltdown*, N.Y. TIMES (Mar. 12, 2020), <https://nyti.ms/2U4G3dx> [<https://perma.cc/S4FB-U639>] [hereinafter Krugman, *Microbe Meltdown*]; Frances Robles, *Trump Calls Storm Response in Puerto Rico, Where 3,000 Died, "One of the Best,"* N.Y. TIMES (Sept. 11, 2018), <https://nyti.ms/2NgsWab> [<https://perma.cc/6VNR-4JRX>].

⁸⁵⁹ See, e.g., Zenko, *supra* note 848.

⁸⁶⁰ David E. Sanger, Eric Lipton, Eileen Sullivan & Michael Crowley, *Before Virus Outbreak, a Cascade of Warnings Went Unheeded*, N.Y. TIMES (Mar. 22, 2020), <https://nyti.ms/2U1tyAs> [<https://perma.cc/EAD7-AGU7>].

⁸⁶¹ Lisa Monaco & Vin Gupta, *The Next Pandemic Will Be Arriving Shortly*, FOREIGN POL'Y (Sept. 28, 2018, 5:01 PM), <https://foreignpolicy.com/2018/09/28/the-next-pandemic-will-be-arriving-shortly-global-health-infectious-avian-flu-ebola-zoonotic-diseases-trump> [<https://perma.cc/WV7U-GS5A>].

⁸⁶² See Sanger et al., *supra* note 860.

⁸⁶³ See Monaco & Gupta, *supra* note 861.

⁸⁶⁴ See Beth Cameron, *I Ran the White House Pandemic Office. Trump Closed It.*, WASH. POST (Mar. 13, 2020, 9:32 AM), https://www.washingtonpost.com/outlook/nsc-pandemic-office-trump-closed/2020/03/13/a70de09c-6491-11ea-acca-80c22bbe96f_story.html [<https://perma.cc/4535-BEZW>].

⁸⁶⁵ See *id.*

In addition, an effective disaster response requires officeholders who have the experience and expertise to think creatively about government action.⁸⁶⁶ Yet at least in part because of President Trump's disdain for expertise and the Republican Party's general contempt for government, the Department of Homeland Security (DHS) and the Department of Veterans Affairs confronted the nation's largest public health crisis in a century with vacant positions, acting officials, and a lack of experts.⁸⁶⁷ At DHS, the Acting Secretary could not tell a Senate committee how many respirators or protective face masks were available in the country, and Veterans Affairs employees scrambled to order medical supplies from Amazon.⁸⁶⁸

Once the pandemic hit, the Administration's response was disastrous.⁸⁶⁹ The director of the CDC knew how bad the situation was in China from a phone call with infectious disease experts there around the beginning of the year.⁸⁷⁰ Throughout January, President Trump received memos from advisors and reports from intelligence agencies, which he may or may not have read, explaining that the COVID-19 outbreak in China was serious and ultimately would pose a tremendous threat to the United States.⁸⁷¹

Yet President Trump took only one constructive action in the two months after receiving these initial warnings: on January 31, he restricted the entry into the United States of foreigners who had recently visited China.⁸⁷² However, President Trump did not order a quarantine of American citizens returning from China,⁸⁷³ and there is now evidence that most of the COVID-19 cases on the East Coast and many of the cases in the Midwest originated with travel from Europe, not China.⁸⁷⁴ Beyond taking this one action, President Trump was so focused on not

⁸⁶⁶ See Pod Save America, *supra* note 850, at 17:50–19:30.

⁸⁶⁷ See Jennifer Steinhauer & Zolan Kanno-Youngs, *Job Vacancies and Inexperience Mar Federal Response to Coronavirus*, N.Y. TIMES (Mar. 26, 2020), <https://nyti.ms/2WI4bp5> [<https://perma.cc/7VYW-549Y>].

⁸⁶⁸ *Id.*

⁸⁶⁹ See Michael D. Shear, Abby Goodnough, Sheila Kaplan, Sheri Fink, Katie Thomas & Noah Weiland, *The Lost Month: How a Failure to Test Blinded the U.S. to Covid-19*, N.Y. TIMES (Apr. 1, 2020), <https://nyti.ms/2JkLno5> [<https://perma.cc/G5K2-7KQK>].

⁸⁷⁰ See *id.*

⁸⁷¹ See Shane Harris, Greg Miller, Josh Dawsey & Ellen Nakashima, *U.S. Intelligence Reports from January and February Warned About a Likely Pandemic*, WASH. POST (Mar. 20, 2020, 8:10 PM), https://www.washingtonpost.com/national-security/us-intelligence-reports-from-january-and-february-warned-about-a-likely-pandemic/2020/03/20/299d8cda-6ad5-11ea-b5f1-a5a804158597_story.html [<https://perma.cc/B67L-E7UZ>].

⁸⁷² See Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020); David Leonhardt, Opinion, *A Complete List of Trump's Attempts to Play Down Coronavirus*, N.Y. TIMES (Mar. 15, 2020), <https://nyti.ms/2vmSmcH> [<https://perma.cc/T3W5-GPYK>].

⁸⁷³ See Leonhardt, *supra* note 872.

⁸⁷⁴ See Benedict Carey & James Glanz, *Travel from New York City Seeded Wave of U.S. Outbreaks*, N.Y. TIMES (Sept. 28, 2020), <https://nyti.ms/3cdCeum> [<https://perma.cc/3B4R-XVYW>].

alarming investors or disrupting the economy during his reelection year that he spent February and the first half of March denying that the pandemic posed any threat to the nation and squandering the opportunity to learn from the experiences of China and Italy.⁸⁷⁵

President Trump repeatedly downplayed the threat of the coronavirus. “It’s one person coming in from China, and we have it under control. It’s going to be just fine.” (January 22).⁸⁷⁶ “It’s going to disappear . . . like a miracle.” (February 27).⁸⁷⁷ A vaccine will be available “very quickly.” (February 29).⁸⁷⁸

The Administration’s failure to take effective action in response to the pandemic was at least as harmful as President Trump’s deceptive words of reassurance. The CDC wasted weeks by rejecting the World Health Organization’s (WHO) test for COVID-19, which worked, while developing its own test, which did not.⁸⁷⁹ Private labs were initially barred from developing their own tests.⁸⁸⁰ On March 6, President Trump lied, insisting that “[a]nybody that wants a test can get a test”⁸⁸¹ around a time when the nation had tested only 4,300 people altogether.⁸⁸² At that point, South Korea, which has one-sixth the population of the United States, was conducting up to 10,000 tests a day.⁸⁸³ Had widespread testing been available earlier, perhaps New Orleans would have shut down Mardi Gras, which might have protected the city from being overrun with cases.⁸⁸⁴ A study from Columbia University found that had social distancing guidelines been enforced just one week earlier than they were, about 36,000 lives would have been saved; if the guidelines had been enforced two weeks earlier, then about 54,000 lives would have been saved.⁸⁸⁵

During the nearly two months in which he had advance notice of what was coming, President Trump did not investigate and correct the nation’s testing problems, invoke the Defense Production Act to stock up on personal protective equipment, or mobilize the Army Corps of

⁸⁷⁵ See Leonhardt, *supra* note 872; Serwer, *supra* note 198.

⁸⁷⁶ Leonhardt, *supra* note 872.

⁸⁷⁷ *Id.*

⁸⁷⁸ *Id.*

⁸⁷⁹ See, e.g., *id.*

⁸⁸⁰ See *id.*

⁸⁸¹ *Id.*

⁸⁸² See Quinta Jurecic & Benjamin Wittes, *Incompetence Exacerbated by Malevolence*, THE ATLANTIC (Mar. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/incompetence-exacerbated-by-malevolence/607696> [<https://perma.cc/5U2J-RLKU>].

⁸⁸³ See *id.*

⁸⁸⁴ See Pod Save America, *supra* note 850, at 4:55–6:35.

⁸⁸⁵ See James Glanz & Campbell Robertson, *Lockdown Delays Cost at Least 36,000 Lives, Data Show*, N.Y. TIMES (May 22, 2020), <https://nyti.ms/2LK7JR7> [<https://perma.cc/B6CN-RELN>].

Engineers to build new hospitals.⁸⁸⁶ When Secretary of Health and Human Services Alex Azar pleaded with the White House on February 5 for \$2 billion worth of masks and other supplies, President Trump cut the request by seventy-five percent.⁸⁸⁷ Indeed, two days later, Secretary of State Pompeo tweeted that the United States was sending tons of personal protective equipment to *China*.⁸⁸⁸ President Trump did not declare a state of emergency until March 13.⁸⁸⁹

Matters did not materially improve once President Trump finally involved himself in the government's response. On March 11, the President gave a national television address to reassure financial markets and the nation.⁸⁹⁰ However, his speech was so "riddled with errors" and his presentation so lethargic that stock market futures fell in real time as he spoke.⁸⁹¹ President Trump then began holding, and dominating, daily press conferences with his coronavirus task force.⁸⁹² He had obviously not prepared before many of the press conferences, lied constantly, blamed the Obama Administration and "Do Nothing" Democrats for the pandemic,⁸⁹³ ignited political battles with Democratic

⁸⁸⁶ See Susan E. Rice, Opinion, *Trump Is the Wartime President We Have (Not the One We Need)*, N.Y. TIMES (Apr. 7, 2020), <https://nyti.ms/2JNPCsy> [<https://perma.cc/DQ7U-6SRN>]; Serwer, *supra* note 198.

⁸⁸⁷ Amy Goldstein, Lena H. Sun & Beth Reinhard, *Desperate for Medical Equipment, States Encounter a Beleaguered National Stockpile*, WASH. POST (Mar. 28, 2020, 10:58 PM), https://www.washingtonpost.com/national/health-science/desperate-for-medical-equipment-states-encounter-a-beleaguered-national-stockpile/2020/03/28/1f4f9a0a-6f82-11ea-aa80-c2470c6b2034_story.html [<https://perma.cc/YU55-H23P>].

⁸⁸⁸ Mike Pompeo (@SecPompeo), TWITTER (Feb. 7, 2020, 12:41 PM), <https://twitter.com/secpompeo/status/1225836989393534976> [<https://perma.cc/9Q43-ZZ3G>].

⁸⁸⁹ See Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020); Serwer, *supra* note 198.

⁸⁹⁰ See Philip Rucker, Ashley Parker & Josh Dawsey, *Ten Minutes at the Teleprompter: Inside Trump's Failed Attempt to Calm Coronavirus Fears*, WASH. POST (Mar. 12, 2020, 7:57 PM), https://www.washingtonpost.com/politics/trump-coronavirus-teleprompter-speech/2020/03/12/81bc8a3a-647a-11ea-acca-80c22bbe96f_story.html [<https://perma.cc/EgDT-QFE2>].

⁸⁹¹ See *id.*

⁸⁹² See Philip Bump & Ashley Parker, *13 Hours of Trump: The President Fills Briefings with Attacks and Boasts, but Little Empathy*, WASH. POST (Apr. 26, 2020, 3:14 PM), https://www.washingtonpost.com/politics/13-hours-of-trump-the-president-fills-briefings-with-attacks-and-boasts-but-little-empathy/2020/04/25/7eec5abo-8590-11ea-a3eb-e9fc93160703_story.html [<https://perma.cc/5UTV-4W5S>].

⁸⁹³ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 25, 2020, 11:06 AM), <https://twitter.com/realDonaldTrump/status/1254064154954076163> [<https://perma.cc/2FMY-54UL>]; see Bump & Parker, *supra* note 892.

governors,⁸⁹⁴ insulted reporters who asked challenging questions,⁸⁹⁵ undermined his scientific advisors,⁸⁹⁶ embraced conspiracy theories regarding the origins of the coronavirus,⁸⁹⁷ accepted no responsibility “at all” for inadequate testing supplies,⁸⁹⁸ constantly congratulated himself on the Administration’s “perfect[]” response to the pandemic,⁸⁹⁹ and repeatedly changed course with little explanation.⁹⁰⁰

Just two weeks after declaring a national emergency and announcing social distancing guidelines, President Trump began talking about “open[ing] up” the country for Easter, apparently in response to conservative media pundits’ and politicians’ expressing sentiments such as “I’d rather die than kill the country.”⁹⁰¹ President Trump encouraged protestors, some of whom were armed, to “liberate” their states, which contravened the very guidance he had given to keep the states closed and to reopen “one careful step at a time.”⁹⁰² President Trump promoted guidelines urging everyone to wear a mask but declined to wear one himself.⁹⁰³ Soon thereafter, he retweeted material making fun of Democratic presidential candidate Joe Biden for wearing a mask and

⁸⁹⁴ See, e.g., Sarah Mervosh & Katie Rogers, *Governors Fight Back Against Coronavirus Chaos: ‘It’s Like Being on eBay with 50 Other States,’* N.Y. TIMES (Mar. 31, 2020), <https://nyti.ms/2RoO8PQ> [<https://perma.cc/N45D-ZREY>].

⁸⁹⁵ See Peter Baker & Maggie Haberman, *Used to Meeting Challenges with Bluster and Force, Trump Confronts a Crisis Unlike Any Before,* N.Y. TIMES (Mar. 21, 2020), <https://nyti.ms/2wv6Urp> [<https://perma.cc/K2UR-V5ZW>]; Bump & Parker, *supra* note 892.

⁸⁹⁶ See Baker & Haberman, *supra* note 895; Bump & Parker, *supra* note 892.

⁸⁹⁷ See Mark Mazzetti, Julian E. Barnes, Edward Wong & Adam Goldman, *Trump Officials Are Said to Press Spies to Link Virus and Wuhan Labs,* N.Y. TIMES (May 14, 2020), <https://nyti.ms/2zH5JWZ> [<https://perma.cc/47PM-D4RR>].

⁸⁹⁸ John F. Harris, *Trump Is an Authoritarian Weakman,* POLITICO MAG. (Mar. 26, 2020, 1:16 PM), <https://www.politico.com/news/magazine/2020/03/26/trump-is-an-authoritarian-weakman-149573> [<https://perma.cc/K3JZ-AE8T>].

⁸⁹⁹ Peter Baker, *For Trump, Coronavirus Proves to Be an Enemy He Can’t Tweet Away,* N.Y. TIMES (Mar. 8, 2020), <https://nyti.ms/2Qo7K65> [<https://perma.cc/LL7D-6YPH>].

⁹⁰⁰ Aaron Blake, *12 of Trump’s Worst Coronavirus Contradictions,* WASH. POST (Apr. 23, 2020, 3:31 PM), <https://www.washingtonpost.com/politics/2020/04/23/12-trumps-worst-coronavirus-contradictions/> [<https://perma.cc/BQZ5-7BZB>].

⁹⁰¹ Katie Shepherd, *“I Would Rather Die than Kill the Country”: The Conservative Chorus Pushing Trump to End Social Distancing,* WASH. POST (Mar. 25, 2020, 6:52 AM), <https://www.washingtonpost.com/nation/2020/03/25/coronavirus-glenn-beck-trump/> [<https://perma.cc/N3G5-JK7W>]; see also Dana Milbank, Opinion, *Trump Barrels Toward Calamity,* WASH. POST (Mar. 24, 2020, 6:31 PM), <https://www.washingtonpost.com/opinions/2020/03/24/trumps-new-pandemic-plan-survival-fittest/> [<https://perma.cc/27F3-CFY2>].

⁹⁰² Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions,* N.Y. TIMES (Apr. 29, 2020), <https://nyti.ms/3ai5yhx> [<https://perma.cc/6EEK-E5AQ>]; see also Nicholas Bogel-Burroughs & Jeremy W. Peters, *“You Have to Disobey”: Protesters Gather to Defy Stay-at-Home Orders,* N.Y. TIMES (Apr. 20, 2020), <https://nyti.ms/2VzKI7U> [<https://perma.cc/SH8G-XD5W>].

⁹⁰³ See Colby Itkowitz, *Trump Calls Mask Wearing “Politically Correct,” Biden Calls Him a “Fool,”* WASH. POST (May 26, 2020, 8:34 PM), https://www.washingtonpost.com/politics/trump-calls-mask-wearing-politically-correct-biden-calls-him-a-fool/2020/05/26/a58025e6-9f9c-11ea-81bb-c2f70f01034b_story.html [<https://perma.cc/T7C8-J6K2>].

denounced a reporter wearing one at the President's press conference for being "politically correct."⁹⁰⁴

Against the advice of his science experts, President Trump promoted the use of an antimalarial drug, hydroxychloroquine, which anecdotal reports had suggested might be helpful in treating COVID-19 patients but which had not been fully tested in clinical trials: "I'm a smart guy. I feel good about it. And we're going to see."⁹⁰⁵ He added: "[W]hat the hell do you have to lose?"⁹⁰⁶ People's lives, it turned out. When the drugs were tested in clinical trials, they produced no benefit, and one study indicated that hydroxychloroquine and a related drug may increase the risk of heart problems in some patients.⁹⁰⁷ President Trump then urged his science advisors to look into the possibility of directly injecting disinfectants into the bloodstream and using ultraviolet rays internally.⁹⁰⁸

Throughout the President's disastrous pandemic performance, Republican officeholders voiced almost no public criticism.⁹⁰⁹ Instead, many of them "echo[ed] the servile praise of conservative media outlets and Trump [Administration] officials."⁹¹⁰

10. *Conclusion.* — The Constitution's Framers assumed that Congress would check an unfit, corrupt, or power-hungry President.⁹¹¹ But their assumptions were grounded in a world without modern political parties.⁹¹² The institutional incentive of congressional representatives and senators to constrain Presidents may be swamped by the political incentive to support chief executives of their own party⁹¹³ —

⁹⁰⁴ *Id.*

⁹⁰⁵ Katie Thomas & Denise Grady, *Trump's Embrace of Unproven Drugs to Treat Coronavirus Defies Science*, N.Y. TIMES (Mar. 20, 2020), <https://nyti.ms/2QzfDjg> [<https://perma.cc/NZ5A-ECHB>].

⁹⁰⁶ *Id.*

⁹⁰⁷ See Katie Thomas, *Federal Agency Halts Studies of Hydroxychloroquine, Drug Trump Promoted*, N.Y. TIMES (June 20, 2020), <https://nyti.ms/311PqQ4> [<https://perma.cc/N6DA-462X>]; Katie Thomas & Knvul Sheikh, *Small Chloroquine Study Halted over Risk of Fatal Heart Complications*, N.Y. TIMES (Sept. 14, 2020), <https://nyti.ms/2RyHKiL> [<https://perma.cc/8AAW-5WC5>].

⁹⁰⁸ See William J. Broad & Dan Levin, *Trump Muses About Light as Remedy, but also Disinfectant, Which Is Dangerous*, N.Y. TIMES (Apr. 24, 2020), <https://nyti.ms/2VSTqyd> [<https://perma.cc/W8XC-Y7QQ>].

⁹⁰⁹ See Alexander Burns, Jonathan Martin & Maggie Haberman, *As Trump Ignores Virus Crisis, Republicans Start to Break Ranks*, N.Y. TIMES (Aug. 25, 2020), <https://nyti.ms/2COWx4q> [<https://perma.cc/9WJ6-K6TE>]; Serwer, *supra* note 198.

⁹¹⁰ Serwer, *supra* note 198.

⁹¹¹ See THE FEDERALIST NO. 51, *supra* note 717, at 319–20 (James Madison).

⁹¹² See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006).

⁹¹³ See Huq & Ginsburg, *supra* note 36, at 145; Levinson & Pildes, *supra* note 912, at 2323.

especially in an era like today's, characterized by extreme political polarization and negative partisanship.⁹¹⁴

Congressional Republicans did not want President Trump investigated by Special Counsel Mueller, were untroubled by his systematic obstruction of that investigation, voted against his impeachment and removal from office over his shakedown of Ukraine, and did not mind his systematic obstruction of congressional oversight. Since his Senate acquittal, they have 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. They do not seem to mind the campaign finance violations that possibly won Trump the presidency, his arguably daily violations of the Foreign Emoluments Clause, or his strange ardor for President Putin and Prince Mohammed bin Salman.

The effectiveness of institutional constraints depends on the willingness of institutional actors to use them.⁹¹⁵ A Republican Party that has systematically suppressed votes to remain in power has manifested little interest in constraining a President with an increasingly authoritarian bent.⁹¹⁶ Republicans have even resisted Democratic efforts to protect the 2020 elections from foreign interference, perhaps because they assume, if it occurs, it will be to their benefit.⁹¹⁷

How did we get to this point?

II. EXPLANATIONS

Groups lose their enthusiasm for democracy when they conclude that they are going to lose not only the next election but also most future ones and that their political opponents are not just wrong about policy but represent an existential threat to deeply held values.⁹¹⁸ This Part investigates how most Republicans came to believe these two things.

⁹¹⁴ See *infra* section II.E, pp. 153–77.

⁹¹⁵ See Huq & Ginsburg, *supra* note 36, at 125–26.

⁹¹⁶ See DIAMOND, *supra* note 28, at 88, 282; Paul Waldman, Opinion, *Republicans Are Serious About Voter Suppression. Here's How to Stop Them.*, WASH. POST (May 18, 2020, 3:24 PM), <https://www.washingtonpost.com/opinions/2020/05/18/republicans-are-serious-about-voter-suppression-heres-how-stop-them/> [<https://perma.cc/5GPG-7V86>]; cf. Huq & Ginsburg, *supra* note 36, at 167 (arguing that the maintenance of democracy depends on whether “partisan agendas” overpower democratic commitments).

⁹¹⁷ See Heather Cox Richardson, *February 20, 2020*, LETTERS FROM AN AMERICAN (Feb. 21, 2020), <https://heathercoxrichardson.substack.com/p/february-20-2020> [<https://perma.cc/XP8Y-XJDL>]; see also DIAMOND, *supra* note 28, at 87.

⁹¹⁸ See DIAMOND, *supra* note 28, at 23–28; cf. KLEIN, *supra* note 347, at 208 (questioning whether Democrats would view the Supreme Court as legitimate if Republicans maintained control of the Senate and declined to consider Democratic nominees to the bench).

A. *The Disappearing White Majority*

Racial resentment is the most important factor accounting for the recent degradation of American democracy.⁹¹⁹ As the United States has become more racially diverse, the racial divide between Democrats and Republicans has also widened.⁹²⁰ The world has almost no experience with true multiracial democracy.⁹²¹ In previous centuries, the peaceful coexistence of diverse ethnic and religious groups in Europe occurred mostly within monarchies, such as the Hapsburg and Ottoman Empires, not in democracies, where citizens hold political power and are theoretically considered one another's equals.⁹²² Democracy succeeded in much of Europe only after World War II, by which time most of the ethnic heterogeneity had been eliminated by two world wars.⁹²³

For most of its history, the United States has had a large and politically dominant white majority.⁹²⁴ The African American share of the population has ranged from about ten to just under twenty percent,⁹²⁵ but only for a relatively brief period during Reconstruction and since the 1965 Voting Rights Act have blacks been permitted to participate in any significant way in American democracy.⁹²⁶ Up until recent decades, other racial groups comprised minuscule percentages of the population,⁹²⁷ except in particular locales at specific times, such as Chinese immigrants in California just before the Civil War, who were nearly ten percent of the state's population.⁹²⁸ America's recently burgeoning racial and ethnic diversity is largely a consequence of the Immigration and Nationality Act of 1965.⁹²⁹

⁹¹⁹ Cf. ABRAMOWITZ, *supra* note 346, at xviii, 8–9 (discussing how racial differences drove partisanship and the rise of President Trump).

⁹²⁰ *Id.* at 8–9.

⁹²¹ LEVITSKY & ZIBLATT, *supra* note 35, at 227, 231.

⁹²² MOUNK, *supra* note 31, at 162–63.

⁹²³ *See id.* at 164.

⁹²⁴ *See id.* at 168–69.

⁹²⁵ U.S. CENSUS BUREAU, A LOOK AT THE 1940 CENSUS 9 (Mar. 30, 2012, 9:15 AM), https://www.census.gov/newsroom/cspan/1940census/CSPAN_1940slides.pdf [<https://perma.cc/5D58-YCVR>]; *Description of Table 4*, U.S. CENSUS BUREAU (Apr. 2, 2001), <https://www2.census.gov/programs-surveys/decennial/2000/phc/phc-t-01/tab04.pdf> [<https://perma.cc/4VKT-JZAA>]; Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 19 (U.S. Census Bureau, Working Paper No. 56, 2002), <https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twpso056.pdf> [<https://perma.cc/8YM3-4XXG>].

⁹²⁶ *See, e.g.*, ANDERSON, *supra* note 6, at 2–3, 22–23; *see also* ABRAMOWITZ, *supra* note 346, at 24–25; MOUNK, *supra* note 31, at 201–02.

⁹²⁷ *See* ABRAMOWITZ, *supra* note 346, at 23–24; *see also* U.S. CENSUS BUREAU, A LOOK AT THE 1940 CENSUS, *supra* note 925, at 9.

⁹²⁸ ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 70 (1988).

⁹²⁹ JARDINA, *supra* note 787, at 11, 157–58.

In the 1950s, African Americans, the only substantial nonwhite racial group, were about ten percent of the voting-age population.⁹³⁰ Most of them still lived in the South, where they were generally disfranchised.⁹³¹ Whites were about ninety-three percent of Democratic voters and ninety-seven percent of Republican voters.⁹³² Up until the mid-twentieth century, the major parties did not fundamentally disagree on issues of race.⁹³³ Both parties had liberal and conservative wings, on race and in general.⁹³⁴ African Americans voted roughly two to one Democratic in presidential elections in the 1950s, mostly because they had benefited from New Deal economic policies.⁹³⁵ President Franklin D. Roosevelt had been too dependent on the political support of white southerners to endorse even federal antilynching and anti-poll tax legislation.⁹³⁶ The New Deal had been so popular with the white working class that white blue-collar workers in the North overall self-identified as Democrats by a margin of fifty-eight to thirty-four percent.⁹³⁷ Republican Dwight D. Eisenhower's two landslide victories in presidential elections in the 1950s — despite the higher proportion of voters identifying as Democrats than as Republicans over that decade — demonstrated that party affiliation was relatively weak, especially at the presidential level, and that President Eisenhower, the nation's preeminent military hero of World War II, was remarkably popular.⁹³⁸

The foundational event in the modern American political history of race was Senator Barry Goldwater's defeat of Governor Nelson Rockefeller for the Republican Party's presidential nomination in 1964.⁹³⁹ Rockefeller, the liberal governor of New York, enjoyed strong support among black leaders.⁹⁴⁰ Goldwater, the conservative senator from Arizona, was one of only six Republican senators to vote against that year's landmark Civil Rights Act.⁹⁴¹ Senator Goldwater believed that

⁹³⁰ ABRAMOWITZ, *supra* note 346, at 23.

⁹³¹ *Id.* at 23–24.

⁹³² *Id.* at 15–16.

⁹³³ See KLEIN, *supra* note 347, at 28–29.

⁹³⁴ See ABRAMOWITZ, *supra* note 346, at 27–28; KLEIN, *supra* note 347, at 28–30.

⁹³⁵ See ABRAMOWITZ, *supra* note 346, at 18–20, 23–24; KLARMAN, JIM CROW, *supra* note 233, at 110–11.

⁹³⁶ KLARMAN, JIM CROW, *supra* note 233, at 109–10.

⁹³⁷ ABRAMOWITZ, *supra* note 346, at 19, 22, 24.

⁹³⁸ See *id.* at 22–23, 28.

⁹³⁹ See *id.* at 21; GEOFFREY KABASERVICE, RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY 95–96, 109, 116, 122 (2012).

⁹⁴⁰ See KABASERVICE, *supra* note 939, at 90–93, 117–18.

⁹⁴¹ *Id.* at 97–98.

government should not tell employers or owners of places of public accommodation whom they could employ or serve.⁹⁴² With regard to the Supreme Court's school desegregation ruling in *Brown v. Board of Education*,⁹⁴³ Senator Goldwater argued that while the Constitution prevented states from segregating the races, it also forbade them from requiring integration.⁹⁴⁴ Few blacks attended the Republican convention as delegates that year, and former professional baseball player Jackie Robinson, who did attend, declared afterwards: "I now believe I know how it felt to be a Jew in Hitler's Germany."⁹⁴⁵

When Senator Goldwater narrowly won the Republican nomination, black voters did not have much difficulty deciding whether to support Senator Goldwater, who campaigned in the South with the white supremacist senator from South Carolina, Strom Thurmond,⁹⁴⁶ or President Lyndon B. Johnson, who had declared within a week of President John F. Kennedy's assassination that there could be "[n]o memorial oration or eulogy [that] could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long."⁹⁴⁷ In November 1964, over ninety percent of African American voters supported President Johnson.⁹⁴⁸ In a landslide defeat, Senator Goldwater carried only his home state and the five states of the Deep South, where blacks were overwhelmingly disfranchised and whites deserted President Johnson in droves.⁹⁴⁹

Although congressional Republicans supported the Civil Rights Act in higher percentages than Democrats, and southern Democratic senators conducted the longest filibuster in history against it,⁹⁵⁰ Democrats nonetheless received most of the credit for the law because they controlled the national government when it was enacted and because Senator Goldwater had so forcefully opposed it.⁹⁵¹ Upon the law's enactment, President Johnson reflected: "I think we just delivered the South to the Republican Party for a long time to come."⁹⁵²

⁹⁴² See *id.* at 101–02; JOSEPH E. LOWNDES, FROM THE NEW DEAL TO THE NEW RIGHT: RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM 71 (2008).

⁹⁴³ 347 U.S. 483 (1954).

⁹⁴⁴ See BERMAN, *supra* note 7, at 146–47; see also KABASERVICE, *supra* note 939, at 101; LOWNDES, *supra* note 942, at 61, 74–75.

⁹⁴⁵ KABASERVICE, *supra* note 939, at 118.

⁹⁴⁶ See *id.* at 117–18, 124–25.

⁹⁴⁷ President Lyndon B. Johnson, Address Before a Joint Session of the Congress, 1 PUB. PAPERS 8, 9 (Nov. 27, 1963).

⁹⁴⁸ See KABASERVICE, *supra* note 939, at 124.

⁹⁴⁹ See ABRAMOWITZ, *supra* note 346, at 20–22, 24, 31.

⁹⁵⁰ See KABASERVICE, *supra* note 939, at 100–01; E.W. Kenworthy, *Senate Invokes Closure on Rights Bill, 71 to 29, Ending 75-Day Filibuster*, N.Y. TIMES, June 11, 1964, at 1.

⁹⁵¹ KABASERVICE, *supra* note 939, at 100–01; KLEIN, *supra* note 347, at 29–30.

⁹⁵² BERMAN, *supra* note 7, at 38.

The Voting Rights Act was enacted the following year, and it quickly turned the South into something resembling a formal democracy for the first time since Reconstruction.⁹⁵³ Thereafter, a Republican presidential candidate would rarely win much more than ten percent of the black vote.⁹⁵⁴ By contrast, southern whites, who before 1964 had been among the most loyal Democratic voting blocs in the nation, gradually but inexorably gravitated toward the Republican Party.⁹⁵⁵

The New Deal political coalition, which had combined white southerners, black northerners, and the ethnic working class of northern cities, was beginning to splinter in the North as well.⁹⁵⁶ Northern whites proved to be more supportive of dismantling southern Jim Crow than addressing their own racial hierarchies.⁹⁵⁷ Northern states did not mandate school segregation by law, so *Brown v. Board of Education* posed only a limited threat to the de facto segregation in their schools.⁹⁵⁸ However, northern whites were not much more supportive than southern whites were of desegregated housing, fair employment practices, or the actual integration of public schools.⁹⁵⁹ Governor George Wallace made strong showings in several Democratic primaries outside of the South in 1964, running primarily in opposition to progressive policies on such racial issues.⁹⁶⁰ In addition, as white workers benefited from the extraordinary economic growth that followed World War II, many embraced more conservative economic positions, which led some of them into the Republican Party.⁹⁶¹

Senator Thurmond — a politician who had run for President as a white supremacist Dixiecrat in 1948, conducted the longest solo filibuster in Senate history against a civil rights bill in 1957, and became in 1964 one of the first prominent southern Democrats to convert to the

⁹⁵³ See, e.g., ABRAMOWITZ, *supra* note 346, at 21–22; ANDERSON, *supra* note 6, at 22–25; EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 3 (2002).

⁹⁵⁴ See DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUD., *BLACKS & THE 2012 DEMOCRATIC NATIONAL CONVENTION* 9 tbl.1 (2012); Frank Newport, *Analyzing Black Support for President Trump*, GALLUP (Nov. 20, 2019), <https://news.gallup.com/opinion/polling-matters/268517/analyzing-black-support-president-trump.aspx> [<https://perma.cc/LS8J-ZXRS>].

⁹⁵⁵ See, e.g., ABRAMOWITZ, *supra* note 346, at 8–9, 25, 31, 33–34, 39.

⁹⁵⁶ See *id.* at 19–21, 39; KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* 69–71, 168–69, 178–79 (Princeton Univ. Press, The James Madison Library in American Politics ed. 2015) (1969).

⁹⁵⁷ See MICHAEL J. KLARMAN, *UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY* 6–7 (2007) [hereinafter KLARMAN, *UNFINISHED BUSINESS*].

⁹⁵⁸ See DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954*, at 219–20 (2005).

⁹⁵⁹ See KLARMAN, *JIM CROW*, *supra* note 233, at 264, 464; KLARMAN, *UNFINISHED BUSINESS*, *supra* note 957, at 141–42, 191, 217–18.

⁹⁶⁰ See DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 207–08, 211, 215 (La. State Univ. Press, 2d ed. 2000) (1995).

⁹⁶¹ See ABRAMOWITZ, *supra* note 346, at 21; KABASERVICE, *supra* note 939, at 152–53, 156.

Republican Party — took over much of the Republican Party’s southern apparatus after Senator Goldwater’s defeat.⁹⁶² In 1966, no blacks attended the South Carolina Republican convention, which featured a large Confederate flag.⁹⁶³ The *Los Angeles Times* wrote: “The party of Lincoln has become the party of the white man in much of Dixie.”⁹⁶⁴

As the Republican presidential candidate in 1968, Richard Nixon made a deal with Senator Thurmond to consummate the party’s hold on southern whites.⁹⁶⁵ To help ensure the South Carolinian’s support of his campaign, Nixon would oppose court-ordered busing to integrate schools and promise to name a “strict constructionist” to the Supreme Court.⁹⁶⁶ With the segregationist Wallace running on Nixon’s right flank as an independent, Nixon campaigned on thinly disguised racial themes⁹⁶⁷ such as the promotion of “law and order”⁹⁶⁸ and opposition to “forced busing.”⁹⁶⁹

Running as a very different sort of Republican than he had eight years earlier, Nixon won only twelve percent of the black vote, compared with thirty-two percent in 1960.⁹⁷⁰ Nixon and Wallace together won just under seventy percent of the votes in the states of the former Confederacy.⁹⁷¹ Soon after Nixon was elected President, his Administration went to battle with the more liberal career lawyers in his Justice Department to force a slowdown in the pace of southern school desegregation.⁹⁷² President Nixon also nominated conservative southerners to the Supreme Court seat vacated by Justice Fortas.⁹⁷³ For decades since President Nixon’s election, the Republican Party has made “subtle and not-so-subtle appeals to racial fears and prejudice”⁹⁷⁴ on issues such as crime, welfare programs, and race-based affirmative action.⁹⁷⁵

⁹⁶² See BERMAN, *supra* note 7, at 69–71; KLEIN, *supra* note 347, at 19–22, 30–31.

⁹⁶³ BERMAN, *supra* note 7, at 71.

⁹⁶⁴ *Id.*

⁹⁶⁵ See RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 284–85, 299–300 (2008).

⁹⁶⁶ LOWNDES, *supra* note 942, at 111–12; PERLSTEIN, *supra* note 965, at 284, 300.

⁹⁶⁷ See PERLSTEIN, *supra* note 965, at 285, 299–300, 331; JASON STANLEY, HOW PROPAGANDA WORKS 123, 153 (2015).

⁹⁶⁸ PERLSTEIN, *supra* note 965, at 331.

⁹⁶⁹ *Id.* at 300.

⁹⁷⁰ See BERMAN, *supra* note 7, at 71–72, 75.

⁹⁷¹ See *id.* at 75.

⁹⁷² See *id.* at 87–88.

⁹⁷³ See LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT 211, 227 (2017).

⁹⁷⁴ ABRAMOWITZ, *supra* note 346, at 49.

⁹⁷⁵ See, e.g., *id.* at 48–49, 125–26; JARDINA, *supra* note 787, at 3, 14, 188–89. For a fascinating mea culpa by a leading Republican political operative over the last four decades, see STUART STEVENS, IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP (2020).

Through the 1970s and 1980s, white voters across the nation, but especially in the South, began increasingly to identify as Republican.⁹⁷⁶ In 1972, southern whites who self-identified as conservative favored the Democratic Party by a margin of five percentage points.⁹⁷⁷ By 1988, they favored the Republican Party by a margin of forty-one points.⁹⁷⁸

Yet three factors limited the success of the Republican Party's "southern strategy" in the 1970s. First, the Watergate scandal and President Nixon's ensuing resignation badly tarnished the Republican brand.⁹⁷⁹ The 1974 off-year elections were a disaster for Republicans,⁹⁸⁰ and President Nixon's successor, President Gerald Ford, was narrowly defeated in the 1976 presidential election.⁹⁸¹ Second, Jimmy Carter, the former Governor of Georgia, proved an ideal presidential candidate to hold together the Democratic coalition in 1976.⁹⁸² Although Carter ran for President as a New South governor who whistled a different tune on race,⁹⁸³ he was also a Southern Baptist and Sunday School teacher, as well as the first born-again Christian to occupy the White House.⁹⁸⁴ Third, the combined advantages of incumbency and the ability of southern Democrats to nominate more ideologically conservative candidates for Congress than the national party would nominate for President enabled Democrats to hold onto the majority of southern seats in Congress even as they suffered landslide presidential defeats in every election but one between 1972 and 1988.⁹⁸⁵

Ronald Reagan, in alliance with southern evangelical leaders such as Jerry Falwell, accelerated the conversion of southern whites into ardent Republicans.⁹⁸⁶ Reagan had achieved national prominence when he gave a primetime speech endorsing Senator Goldwater's candidacy in 1964 and was then elected Governor of California in 1966.⁹⁸⁷ As the Republican Party's presidential nominee in 1980, Reagan opened his general election campaign at a fair in Neshoba County, Mississippi, where three civil rights workers had been murdered during Freedom Summer in 1964.⁹⁸⁸ Before an almost entirely white audience, Reagan,

⁹⁷⁶ ABRAMOWITZ, *supra* note 346, at 39–40, 42.

⁹⁷⁷ *Id.* at 40.

⁹⁷⁸ *Id.* at 40–41.

⁹⁷⁹ See KABASERVICE, *supra* note 939, at 341–43.

⁹⁸⁰ See *id.* at 343.

⁹⁸¹ *Id.* at 348.

⁹⁸² See *id.*

⁹⁸³ See BERMAN, *supra* note 7, at 116–19; BLACK & BLACK, *supra* note 953, at 211.

⁹⁸⁴ See BLACK & BLACK, *supra* note 953, at 213–14; DANIEL K. WILLIAMS, *GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 125–26, 129 (2010).

⁹⁸⁵ See ABRAMOWITZ, *supra* note 346, at 30, 32, 34–37; BLACK & BLACK, *supra* note 953, at 142.

⁹⁸⁶ See BERMAN, *supra* note 7, at 124–25; WILLIAMS, *supra* note 984, at 187–88.

⁹⁸⁷ BERMAN, *supra* note 7, at 58, 124.

⁹⁸⁸ *Id.* at 121–24; BLACK & BLACK, *supra* note 953, at 216.

an opponent of the 1960s civil rights legislation, defended “states’ rights,”⁹⁸⁹ a traditional rallying cry among southern segregationists.⁹⁹⁰

Following Reagan’s victory in the presidential election, his Administration challenged the constitutionality of race-based affirmative action; opposed busing to achieve school desegregation; resisted reauthorization of the Voting Rights Act, laxly enforced it, and fought for narrow judicial interpretations of it; and initially vowed to oppose the Internal Revenue Service’s (IRS) policy of abrogating tax exemptions for racially segregated colleges.⁹⁹¹ In 1986, President Reagan promoted to the Chief Justiceship William Rehnquist, a man who probably lied to Congress during his 1971 confirmation hearings as to whether he had harassed minority voters in Phoenix, Arizona, in 1962 and had very likely opposed the *Brown* decision as a law clerk to Justice Jackson in 1952–1953.⁹⁹² In 1987, President Reagan nominated to the Supreme Court Robert Bork, a court of appeals judge who had contemporaneously opposed the 1964 Civil Rights Act as representing “a principle of unsurpassed ugliness,” defended the constitutionality of poll taxes and literacy tests, and questioned the constitutionality of the 1965 Voting Rights Act.⁹⁹³

Yet, despite President Reagan’s success at converting southern whites into Republicans, as late as 1990, southern Democrats outnumbered southern Republicans by more than three to two in the House,⁹⁹⁴ and in 1988, Democrats still controlled every governorship and state legislative chamber in the former states of the Confederacy.⁹⁹⁵ One important development enabling Republicans to improve their performance in those fora was the majority-minority voting district.⁹⁹⁶ In 1986, the Supreme Court interpreted the 1982 amendments to section 2 of the Voting Rights Act⁹⁹⁷ to require the drawing of legislative districts that would maximize the ability of people of color to elect representatives of their own choice where: (1) racially polarized voting existed, and (2) the minority community was large enough that contiguous, compact districts could be drawn in which minority voters would constitute a

⁹⁸⁹ BLACK & BLACK, *supra* note 953, at 216.

⁹⁹⁰ BERMAN, *supra* note 7, at 123–24.

⁹⁹¹ See *id.* at 142–45, 149–52, 165–68; WILLIAMS, *supra* note 984, at 197.

⁹⁹² See BERMAN, *supra* note 7, at 176–77; RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 607–09, 609 n.9 (2d ed. 2004).

⁹⁹³ BERMAN, *supra* note 7, at 178; see *id.* at 178–79; ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 67–68, 224–25, 233–34 (1989).

⁹⁹⁴ See BERMAN, *supra* note 7, at 188.

⁹⁹⁵ See ABRAMOWITZ, *supra* note 346, at 42.

⁹⁹⁶ See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 48 (2016).

⁹⁹⁷ 52 U.S.C. § 10301 (Supp. V 2012).

majority of the district's population.⁹⁹⁸ Republicans quickly realized that maximizing the number of majority-minority districts in the South would benefit Republican candidates in the surrounding districts.⁹⁹⁹ Where black Democrats were unable to convince their fellow southern Democratic legislators to draw such districts, the Bush Justice Department intervened to force them to do so under the Voting Rights Act.¹⁰⁰⁰

The Republican strategy of maximizing majority-minority districts paid off handsomely.¹⁰⁰¹ In 1994, the twenty-six majority-minority congressional districts in the South elected twenty-four representatives of color, while all ninety-nine majority-white districts elected white representatives.¹⁰⁰²

In 1994, Republicans took control of the House for the first time in forty years and won a majority of southern House seats for the first time since Reconstruction.¹⁰⁰³ In that year's southern congressional elections, Democrats won ninety-one percent of black votes but only thirty-five percent of white votes.¹⁰⁰⁴ Southerners now formed the largest bloc of House Republicans, holding most of the chamber's leadership positions, including the Speakership, which went to Newt Gingrich.¹⁰⁰⁵ Over the following twenty years, Republicans seized control of all the legislatures in the former Confederate states.¹⁰⁰⁶

Another racial development of great political significance was taking place simultaneously. Higher birth rates among people of color and increased immigration, mostly from Latin America and Asia, increased the proportion of nonwhite people in the United States.¹⁰⁰⁷ Whites were nearly ninety percent of all Americans in the 1950s.¹⁰⁰⁸ By 1990, they were just over eighty percent.¹⁰⁰⁹ In 2020, they are estimated to be just under sixty percent.¹⁰¹⁰

⁹⁹⁸ See *Thornburg v. Gingles*, 478 U.S. 30, 47–51 (1986).

⁹⁹⁹ See BERMAN, *supra* note 7, at 187–88; BLACK & BLACK, *supra* note 953, at 332.

¹⁰⁰⁰ See BERMAN, *supra* note 7, at 188–89; BLACK & BLACK, *supra* note 953, at 332.

¹⁰⁰¹ See BLACK & BLACK, *supra* note 953, at 334–35.

¹⁰⁰² See BERMAN, *supra* note 7, at 205–06.

¹⁰⁰³ *Id.* at 203–04.

¹⁰⁰⁴ *Id.* at 206.

¹⁰⁰⁵ See *id.* at 203–05.

¹⁰⁰⁶ See Peter Hamby, *The Plight of the Southern Democrat*, CNN (Dec. 9, 2014, 1:26 PM), <https://www.cnn.com/2014/12/03/politics/southern-democrats> [<https://perma.cc/ZJ5A-SGSZ>].

¹⁰⁰⁷ See ABRAMOWITZ, *supra* note 346, at 8, 49–50.

¹⁰⁰⁸ See *1960 Census of the Population: Supplementary Reports: Race of the Population of the United States, by States: 1960*, U.S. CENSUS BUREAU (Sept. 7, 1961), <https://www.census.gov/library/publications/1961/dec/pc-s1-10.html> [<https://perma.cc/JK6A-BXQY>].

¹⁰⁰⁹ See U.S. CENSUS BUREAU, *THE WHITE POPULATION: 2000* (2001), <https://www.census.gov/prod/2001pubs/mso01-wp.pdf> [<https://perma.cc/JAQ5-8LJ5>].

¹⁰¹⁰ Dudley L. Poston, Jr., *3 Big Ways that the US Will Change over the Next Decade*, THE CONVERSATION (Jan. 2, 2020, 8:42 AM), <https://theconversation.com/3-big-ways-that-the-us-will-change-over-the-next-decade-126908> [<https://perma.cc/8DDA-6XZ9>].

People of color have also become a larger portion of the *electorate*, though at a slower rate than the rate of increase in the nonwhite share of the *population* due to lower rates of citizenship, voter registration, and voter turnout relative to white Americans.¹⁰¹¹ In the 1950s, nonwhites were just five percent of the national electorate, but in the mid-1980s, they comprised eighteen percent,¹⁰¹² mostly because the Voting Rights Act enfranchised millions of southern blacks.¹⁰¹³ People of color were seven percent of Democratic voters in the 1950s, but they were twenty-nine percent by the mid-1980s.¹⁰¹⁴

These demographic changes have only accelerated over the last two decades.¹⁰¹⁵ From 2000 to 2012, fourteen million immigrants entered the United States, raising the total number of immigrants in the country to over forty million.¹⁰¹⁶ As of 2016, immigrants comprised just under fourteen percent of the American population, which is the highest proportion since the early twentieth century, when a crescendo of anti-immigrant sentiment produced the racial and ethnic quotas of the Immigration Act of 1924.¹⁰¹⁷ Today, immigrants and their children are one in every four Americans, and they are mostly Latino and Asian.¹⁰¹⁸

Between 1990 and 2013, the share of the population that was nonwhite increased from roughly twenty-four percent to thirty-seven percent, and in 2019 the estimated figure was just under forty percent.¹⁰¹⁹ People's estimations of the size of the nonwhite share of the population are even higher, with a 2013 survey finding that the median participant believed forty-nine percent of the population was nonwhite.¹⁰²⁰ In 2004, the U.S. Census Bureau projected that the nation would no longer be majority white by 2050, a benchmark later advanced

¹⁰¹¹ See ABRAMOWITZ, *supra* note 346, at 8.

¹⁰¹² *Id.* at 38.

¹⁰¹³ See *id.* at 30, 126.

¹⁰¹⁴ *Id.* at 38.

¹⁰¹⁵ See MARISA ABRAJANO & ZOLTAN L. HAJNAL, WHITE BACKLASH: IMMIGRATION, RACE, AND AMERICAN POLITICS 1–2 (2015); ABRAMOWITZ, *supra* note 346, at 127–28.

¹⁰¹⁶ ABRAJANO & HAJNAL, *supra* note 1015, at 1.

¹⁰¹⁷ JARDINA, *supra* note 787, at 10, 158; see also Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

¹⁰¹⁸ ABRAJANO & HAJNAL, *supra* note 1015, at 1, 29.

¹⁰¹⁹ See U.S. CENSUS BUREAU, DIFFERENCE IN POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN, FOR THE UNITED STATES: 1990 TO 2000 (2001), <https://www2.census.gov/programs-surveys/decennial/2000/phc/phc-t-01/tab04.pdf> [<https://perma.cc/4VKT-JZAA>] (reporting that nonwhite people made up roughly twenty-four percent of the American population in 1990); KLEIN, *supra* note 347, at 106 (noting that nonwhite people made up thirty-seven percent of the American population in 2013); *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/IPE120218> [<https://perma.cc/ZN5G-N9TK>] (reporting that nonwhite people made up just under forty percent of the American population in 2019).

¹⁰²⁰ See KLEIN, *supra* note 347, at 106.

to 2042.¹⁰²¹ Whites will probably become a minority of the electorate a decade or two after that benchmark date.¹⁰²² As one demographer observed: “No other country has experienced such rapid racial and ethnic change.”¹⁰²³

Signs of these demographic shifts are everywhere — in the streets, at sporting events, on television, and in the form of a biracial President.¹⁰²⁴ Indeed, while demographic shifts take time to register fully in politics because of who tends to vote and various structural features of the American political system, cultural power reflects such shifts quickly because of who buys tennis shoes and other products pitched by advertisers.¹⁰²⁵

Demographic changes such as these and projections of even more dramatic ones to come are disturbing to many white Americans.¹⁰²⁶ Members of traditionally dominant social groups often normalize their group identities.¹⁰²⁷ White Americans may not even notice the privileges associated with whiteness until nonwhites begin to challenge those privileges, which whites then may seek to defend.¹⁰²⁸

Throughout American history, large-scale immigration that alters the ethnic or racial composition of the population has generated political and social backlash.¹⁰²⁹ When the United States fought an undeclared naval war with France in the late 1790s, Federalists enacted the Alien and Sedition Acts largely to target for incarceration and deportation immigrants deemed too sympathetic to the enemy, particularly the Irish.¹⁰³⁰ A wave of German and Irish Catholic immigration around 1850 birthed the anti-immigrant Know Nothing Party, which enjoyed some electoral success.¹⁰³¹ Large numbers of Chinese immigrants on the West Coast inspired electoral competition between Democrats and

¹⁰²¹ See Sam Roberts, *In a Generation, Minorities May Be the U.S. Majority*, N.Y. TIMES (Aug. 13, 2008), <https://www.nytimes.com/2008/08/14/washington/14census.html> [<https://perma.cc/9BNL-UMWL>].

¹⁰²² ABRAMOWITZ, *supra* note 346, at 50.

¹⁰²³ Roberts, *supra* note 1021; see also Yoni Appelbaum, *How America Ends*, THE ATLANTIC (Dec. 2019), <https://www.theatlantic.com/magazine/archive/2019/12/how-america-ends/600757> [<https://perma.cc/MK8Z-LZ99>].

¹⁰²⁴ See, e.g., ABRAJANO & HAJNAL, *supra* note 1015, at 4, 29–30.

¹⁰²⁵ See KLEIN, *supra* note 347, at 110–12; cf. Rachel L. Swarns, *Vaulting the Racial Divide, Obama Persuaded Americans to Follow*, N.Y. TIMES (Nov. 5, 2008), <https://www.nytimes.com/2008/11/05/us/politics/05race.html> [<https://perma.cc/2SHP-2VGU>] (stating that President Obama, in running for President in 2008, “had his finger on the pulse of a nation in transition”).

¹⁰²⁶ See ABRAJANO & HAJNAL, *supra* note 1015, at 121–22; JARDINA, *supra* note 787, at 2–3, 7, 23.

¹⁰²⁷ See JARDINA, *supra* note 787, at 35–36.

¹⁰²⁸ See *id.* at 21–22, 35–36, 142–43, 152, 184.

¹⁰²⁹ See, e.g., *id.* at 2, 9–12; see also ABRAJANO & HAJNAL, *supra* note 1015, at 45, 118.

¹⁰³⁰ See STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 589–92 (1993).

¹⁰³¹ See ABRAJANO & HAJNAL, *supra* note 1015, at 7; JARDINA, *supra* note 787, at 41.

Republicans for anti-immigrant voters, leading directly to the 1882 Chinese Exclusion Act.¹⁰³²

Over the last three decades, the two major political parties have become increasingly divided along lines of race and ethnicity and attitudes toward race and ethnicity.¹⁰³³ In the 1980s, white Democrats and white Republicans did not differ much in levels of racial resentment,¹⁰³⁴ and Democrats and Republicans did not hold notably different views toward immigration-related legislation.¹⁰³⁵

Since then, however, racially conservative whites have flocked to the Republican Party.¹⁰³⁶ Today, very negative views toward illegal immigration strongly predict support for the Republican Party.¹⁰³⁷ At the same time, people of color have become an increasingly large share of Democratic voters.¹⁰³⁸ Between 1992 and 2012, the nonwhite share of Democratic voters increased from twenty-one to forty-five percent.¹⁰³⁹ Moreover, the whites who remained in the Democratic Party have become even more liberal on racial issues,¹⁰⁴⁰ perhaps having been influenced by membership in a party in which people of color play a larger role in shaping policy. In 2010, not a single Democratic legislator in Arizona voted for the strict immigration enforcement law informally known as the “Show Me Your Papers” law, while every Republican but one voted for it.¹⁰⁴¹

This cycle of political change is self-reinforcing.¹⁰⁴² As people of color became a larger share of Democratic voters, they were elected to office in larger numbers, and the party embraced more of the policies they favored.¹⁰⁴³ By 2013, Latinos were thirty-eight percent of California’s population and nineteen percent of its state legislators, most of them Democrats.¹⁰⁴⁴ In recent years, the California legislature has adopted pro-immigrant measures, such as extending in-state college tuition to undocumented immigrants and allowing them to obtain driver’s licenses.¹⁰⁴⁵ More than forty percent of the current Democratic caucus in the U.S.

¹⁰³² DANIELS, *supra* note 928, at 35–36, 44–45, 54–56.

¹⁰³³ See ABRAMOWITZ, *supra* note 346, at xviii.

¹⁰³⁴ *Id.* at 130.

¹⁰³⁵ See ABRAJANO & HAJNAL, *supra* note 1015, at 39–40.

¹⁰³⁶ See ABRAMOWITZ, *supra* note 346, at 8–9; see also ABRAJANO & HAJNAL, *supra* note 1015, at 13–14.

¹⁰³⁷ See ABRAJANO & HAJNAL, *supra* note 1015, at 68, 70–71, 73–74, 110.

¹⁰³⁸ *Id.* at 6; ABRAMOWITZ, *supra* note 346, at 9.

¹⁰³⁹ ABRAMOWITZ, *supra* note 346, at 126.

¹⁰⁴⁰ See KLEIN, *supra* note 347, at 130.

¹⁰⁴¹ ABRAJANO & HAJNAL, *supra* note 1015, at 31, 40.

¹⁰⁴² See ABRAMOWITZ, *supra* note 346, at 9.

¹⁰⁴³ Cf. ABRAJANO & HAJNAL, *supra* note 1015, at 41–43, 153 (discussing how Latino population size is correlated with the election of Latinos to political office and increased focus by political campaigns on immigrant-related issues); KLEIN, *supra* note 347, at 128–29 (describing how the Democratic Party presidential platform changed due to the party’s dependence on the Latino vote).

¹⁰⁴⁴ See ABRAJANO & HAJNAL, *supra* note 1015, at 194.

¹⁰⁴⁵ See *id.*

House consists of people of color, while just over five percent of the Republican caucus is nonwhite.¹⁰⁴⁶

By 2012, fifty-five percent of white voters identified with or leaned Republican, compared with only thirty-nine percent who identified with or leaned Democratic.¹⁰⁴⁷ Among southern whites, sixty-six percent identified with or leaned toward the Republican Party and only twenty-nine percent identified with or leaned toward the Democratic Party.¹⁰⁴⁸ By contrast, in 2012, President Obama won seventy-one percent of the Latino vote, seventy-three percent of the Asian American vote, and ninety-three percent of the black vote.¹⁰⁴⁹

While some shift in voter identification across racial groups may be attributable to cultural and economic factors, scholars have shown that racial considerations have been predominant and that many whites feel increasingly resentful about their perceived loss in social status in a diversifying society.¹⁰⁵⁰ Social scientists distinguish between old-fashioned racism — beliefs in white supremacy — and racial resentment, which they measure by asking questions such as whether the failure of African Americans to achieve equality is more attributable to the nation's history of slavery and Jim Crow or to their own failures to work hard enough.¹⁰⁵¹ While white supremacist beliefs have hardly disappeared, racial resentment is the more prevalent phenomenon today.¹⁰⁵² Between 1980 and 2010, racial resentment among white voters increased significantly, but only among Republican identifiers, with the share of white Republicans who scored at the high end of the racial-resentment scale rising from forty-four percent to sixty-four percent.¹⁰⁵³

Changing racial demographics owing to large-scale immigration have compounded the racial resentment many whites felt as a result of the growing influence of African Americans within the Democratic Party.¹⁰⁵⁴ Scores on the racial-resentment scale, which measures views about African Americans, correlate highly with attitudes toward other people of color and recent immigrants.¹⁰⁵⁵

¹⁰⁴⁶ See JENNIFER E. MANNING, CONG. RSCH. SERV., R45583, MEMBERSHIP OF THE 116TH CONGRESS: A PROFILE 7–9 (2020), <https://fas.org/sgp/crs/misc/R45583.pdf> [<https://perma.cc/NYF5-MRRS>].

¹⁰⁴⁷ ABRAMOWITZ, *supra* note 346, at 128.

¹⁰⁴⁸ *Id.*

¹⁰⁴⁹ JARDINA, *supra* note 787, at 218.

¹⁰⁵⁰ ABRAMOWITZ, *supra* note 346, at 128–30; *see also* JARDINA, *supra* note 787, at 7–8, 214, 267.

¹⁰⁵¹ *See* ABRAMOWITZ, *supra* note 346, at 129; *see also* JARDINA, *supra* note 787, at 8, 13–15.

¹⁰⁵² *See* JARDINA, *supra* note 787, at 8, 14.

¹⁰⁵³ *See* ABRAMOWITZ, *supra* note 346, at 130–31.

¹⁰⁵⁴ *See* ABRAJANO & HAJNAL, *supra* note 1015, at 73, 200, 207; ABRAMOWITZ, *supra* note 346, at 130.

¹⁰⁵⁵ ABRAMOWITZ, *supra* note 346, at 129.

As demographic change and media narratives of the threat imposed by immigrants set the stage for white backlash against Latino immigration (and, less so, Asian immigration), ambitious politicians have capitalized on the opportunity for political gain, just as Alabama Governor George Wallace, Arkansas Governor Orval Faubus, and Birmingham, Alabama, police commissioner Bull Connor did during the era of southern white massive resistance to *Brown*.¹⁰⁵⁶ In the 1990s, former Nixon speechwriter Pat Buchanan ran twice for the Republican presidential nomination and won several primaries in 1996 on a platform very similar to that of Trump in 2016, including opposing the immigrant “invasion,” calling for “America first” policies, proposing a wall on the Mexican border, and criticizing free trade agreements.¹⁰⁵⁷ Whites who scored high on measures of white identity voted disproportionately for Buchanan.¹⁰⁵⁸ Yet the Democratic Party was also not a great champion of immigrant rights then. In 1996, the party platform criticized illegal immigration, and President Clinton bragged about restricting undocumented immigration and expanding the border patrol.¹⁰⁵⁹

Then-Senator Barack Obama would not have been nominated in 2008 by the Democratic Party as it was composed in 1992, and he could be elected President only because the nonwhite share of the electorate had doubled since then, from thirteen to twenty-six percent, and Latino and Asian Americans had switched in large numbers to the Democratic Party.¹⁰⁶⁰ Obama lost white voters to Senator John McCain by twelve percentage points, but he won the overall popular vote by seven percentage points by receiving seventy-five percent of the combined black, Latino, and Asian American vote.¹⁰⁶¹

While many pundits treated Obama’s election as the dawn of a post-racial era, in fact, racial resentment among white voters strongly correlated with candidate preferences in the 2008 Democratic primaries.¹⁰⁶² About three-quarters of white Democrats who scored very low on the racial-resentment scale voted for Obama, while only one-quarter of those scoring very high did so.¹⁰⁶³ In the general election, Obama would have

¹⁰⁵⁶ See, e.g., ABRAJANO & HAJNAL, *supra* note 1015, at 203–04; JARDINA, *supra* note 787, at 245–50; KLARMAN, JIM CROW, *supra* note 233, at 394–95, 398–99, 405.

¹⁰⁵⁷ James Bennet, *Patrick J. Buchanan; Candidate’s Speech Is Called Code for Controversy*, N.Y. TIMES (Feb. 25, 1996), <https://www.nytimes.com/1996/02/25/us/politics-patrick-j-buchanan-candidate-s-speech-is-called-code-for-controversy.html> [<https://perma.cc/99NA-7UZY>]; see also, e.g., JARDINA, *supra* note 787, at 177, 252–53; MOUNK, *supra* note 31, at 168.

¹⁰⁵⁸ See JARDINA, *supra* note 787, at 252–55.

¹⁰⁵⁹ KLEIN, *supra* note 347, at 128.

¹⁰⁶⁰ ABRAMOWITZ, *supra* note 346, at 50, 126; see ABRAJANO & HAJNAL, *supra* note 1015, at 209.

¹⁰⁶¹ BERMAN, *supra* note 7, at 247; FED. ELECTION COMM’N, *supra* note 451, at 5.

¹⁰⁶² See ABRAJANO & HAJNAL, *supra* note 1015, at 16, 99–101; ABRAMOWITZ, *supra* note 346, at 132–33.

¹⁰⁶³ ABRAMOWITZ, *supra* note 346, at 133.

won by a larger margin had many whites with high racial-resentment scores who typically voted Democratic not switched sides.¹⁰⁶⁴ Negative views toward undocumented immigrants also correlated with support for McCain, especially among white independent voters.¹⁰⁶⁵

Studies have shown that attitudes toward race increasingly shaped attitudes on most political questions during Obama's presidency.¹⁰⁶⁶ The difference between attitudes among black and white people toward the Obama Administration's Affordable Care Act was twenty percentage points larger than it had been over President Bill Clinton's healthcare proposal in the early 1990s.¹⁰⁶⁷ Perceptions of the state of the economy during the Obama presidency varied significantly based on race, as did views on the Obama family's dogs,¹⁰⁶⁸ even though, during his first term, President Obama explicitly discussed race less than any previous Democratic President since Franklin D. Roosevelt.¹⁰⁶⁹

President Obama would not have been reelected in 2012 without the strong support of nonwhite voters.¹⁰⁷⁰ Republican candidate Mitt Romney won among independents, which McCain had failed to do four years earlier.¹⁰⁷¹ Romney won by larger margins among older voters and white Catholic voters than McCain had and by an overwhelming margin among white evangelicals.¹⁰⁷² President Obama's share of the white vote declined from forty-three percent in 2008 to thirty-nine percent in 2012.¹⁰⁷³ Among white voters, Romney won by twenty percentage points, marking an unprecedented rejection among white voters of a successful Democratic presidential candidate.¹⁰⁷⁴

Yet President Obama won the national popular vote in 2012 by almost four percentage points.¹⁰⁷⁵ For the first time, blacks turned out to vote in a presidential election at a higher rate than whites turned out.¹⁰⁷⁶ One and a half million more Latinos voted in 2012 than in 2008, and President Obama's share of their vote increased from sixty-seven to seventy-one percent.¹⁰⁷⁷

¹⁰⁶⁴ See *id.*; MICHAEL TESLER, POST-RACIAL OR MOST-RACIAL?: RACE AND POLITICS IN THE OBAMA ERA 18 (2016).

¹⁰⁶⁵ ABRAJANO & HAJNAL, *supra* note 1015, at 101–02.

¹⁰⁶⁶ KLEIN, *supra* note 347, at 109; see *id.* at 107–09; SIDES ET AL., *supra* note 585, at 25–31.

¹⁰⁶⁷ KLEIN, *supra* note 347, at 109.

¹⁰⁶⁸ *Id.* at 109–10; SIDES ET AL., *supra* note 585, at 30–31.

¹⁰⁶⁹ KLEIN, *supra* note 347, at 110.

¹⁰⁷⁰ ABRAMOWITZ, *supra* note 346, at 50.

¹⁰⁷¹ ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA 100 (2016).

¹⁰⁷² *Id.*

¹⁰⁷³ JARDINA, *supra* note 787, at 218.

¹⁰⁷⁴ See ABRAMOWITZ, *supra* note 346, at 128.

¹⁰⁷⁵ *Id.*

¹⁰⁷⁶ BERMAN, *supra* note 7, at 11.

¹⁰⁷⁷ JONES, *supra* note 1071, at 101.

Partly because young people are more racially diverse and more racially tolerant than their elders, they have become increasingly Democratic in recent decades.¹⁰⁷⁸ President Obama defeated Romney by five million votes among voters under the age of thirty.¹⁰⁷⁹ This trend does not bode well for the Republican Party unless it changes its racial policies.

An election postmortem commissioned by the Republican National Committee after the 2012 election concluded that the party must improve its appeal to Latino voters, including by supporting comprehensive immigration reform.¹⁰⁸⁰ Even prominent conservatives such as Sean Hannity and Sheldon Adelson argued in favor of a path to citizenship for those brought into the country illegally as children.¹⁰⁸¹ Yet in 2013, Tea Party Republicans in the House blocked a bipartisan Senate bill on immigration reform, and the following year Republican candidates generally ignored the postmortem report and nonetheless scored huge victories.¹⁰⁸² Donald Trump may have taken notice.¹⁰⁸³

During his campaign for the presidency, Trump retweeted false assertions from white supremacists, including the allegation that a majority of white homicide victims were killed by blacks, and he only reluctantly repudiated an endorsement from white supremacist David Duke.¹⁰⁸⁴ Trump's campaign slogan, "Make America Great Again," signaled to supporters that he "would turn back the clock to a time when white people enjoyed a dominant position in American society" and, by extension, people of color knew their place.¹⁰⁸⁵ Trump eventually chose as campaign manager a leader of the white nationalist alt-right movement, Steve Bannon.¹⁰⁸⁶

High racial resentment among Republicans set the stage for Trump's emergence as the frontrunner during the primaries.¹⁰⁸⁷ Seventy-two percent of registered Republican voters still doubted President Obama's American citizenship in the summer of 2016,¹⁰⁸⁸ and Republicans and Republican-leaning independents supported a border wall with Mexico

¹⁰⁷⁸ See ABRAMOWITZ, *supra* note 346, at 8–9; KLEIN, *supra* note 347, at 104, 112.

¹⁰⁷⁹ JONES, *supra* note 1071, at 102.

¹⁰⁸⁰ See *id.* at 101–04; KLEIN, *supra* note 347, at 116.

¹⁰⁸¹ See FRUM, *supra* note 586, at 35.

¹⁰⁸² JONES, *supra* note 1071, at 104; SIDES ET AL., *supra* note 585, at 38.

¹⁰⁸³ See KLEIN, *supra* note 347, at 112–13.

¹⁰⁸⁴ ABRAMOWITZ, *supra* note 346, at 123; JARDINA, *supra* note 787, at 276; Sanneh, *supra* note 248.

¹⁰⁸⁵ ABRAMOWITZ, *supra* note 346, at 124; see also, e.g., KLEIN, *supra* note 347, at 103.

¹⁰⁸⁶ ABRAMOWITZ, *supra* note 346, at 124.

¹⁰⁸⁷ See *id.* at 124–25, 135–37; SIDES ET AL., *supra* note 585, at 88–89.

¹⁰⁸⁸ Josh Clinton & Carrie Roush, *Poll: Persistent Partisan Divide over "Birther" Question*, NBC NEWS (Aug. 10, 2016, 2:19 PM), <https://www.nbcnews.com/politics/2016-election/poll-persistent-partisan-divide-over-birther-question-n627446> [<https://perma.cc/AZ99-YVHP>].

by nearly a two-to-one margin.¹⁰⁸⁹ In the primaries, no other measured variable came close to racial resentment in predicting support for Trump.¹⁰⁹⁰ Exit polls showed that Republican primary voters who wished to deport undocumented immigrants and prohibit Muslim immigrants from entering the country supported Trump by a wide margin.¹⁰⁹¹

During the 2016 general election, of course, the strongest predictor of voting behavior was party identification.¹⁰⁹² Yet differences between the racial resentment scores of the two parties' white voters had never been greater.¹⁰⁹³ Among Democratic identifiers, fifty percent of white voters had low racial resentment scores, and just nineteen percent had high ones, while among Republican identifiers, only five percent of white voters had low racial resentment scores, and sixty-nine percent had high ones.¹⁰⁹⁴ The share of white voters with high racial resentment scores among Democrats had dropped significantly during Obama's presidency, while that of Republicans had increased.¹⁰⁹⁵ Probably as a result of this shift, Trump improved significantly on Romney's share of the vote in five midwestern and northeastern states that are less racially diverse and less well educated than the national average.¹⁰⁹⁶

White working-class voters proved critical to President Trump's victory.¹⁰⁹⁷ While Romney and Trump both won the white vote by roughly twenty percentage points, Trump performed much better among white working-class men and worse among college-educated whites and white women (probably because of his open misogyny).¹⁰⁹⁸ Trump defeated Hillary Clinton by thirty-seven percentage points among white voters without a college degree, improving on Romney's margin in that demographic by twelve points.¹⁰⁹⁹ Among white working-class *men*, Trump defeated Hillary Clinton by forty-eight percentage points.¹¹⁰⁰

Why did President Trump prove so appealing to these voters? In the election's aftermath, many pundits focused on voters' economic anxiety, Trump's opposition to free trade agreements, and his promises to bring back manufacturing and mining jobs.¹¹⁰¹ Yet the evidence better supports the hypothesis that racial resentment drove Trump's success with

¹⁰⁸⁹ ABRAMOWITZ, *supra* note 346, at 125.

¹⁰⁹⁰ *Id.* at 139.

¹⁰⁹¹ *Id.* at 124.

¹⁰⁹² *See id.* at 158; SIDES ET AL., *supra* note 585, at 157–59.

¹⁰⁹³ *See* ABRAMOWITZ, *supra* note 346, at 136, 155–56.

¹⁰⁹⁴ *Id.* at 136.

¹⁰⁹⁵ *Id.*

¹⁰⁹⁶ *Id.* at 148, 150.

¹⁰⁹⁷ *See id.* at 150, 152; SIDES ET AL., *supra* note 585, at 162–63.

¹⁰⁹⁸ ABRAMOWITZ, *supra* note 346, at 151.

¹⁰⁹⁹ *Id.*

¹¹⁰⁰ *Id.* at 151–52.

¹¹⁰¹ *See id.* at 152–53; JARDINA, *supra* note 787, at 91.

the white working class, though the two explanations are not mutually exclusive since Trump endeavored to link racial resentment to economic anxiety by arguing that (Latino) immigrants were taking jobs away from (white) Americans.¹¹⁰² Higher education correlates strongly with lower racial resentment and prejudice.¹¹⁰³ College exposes people to new ideas and different cultures, and better educated people are less likely to see different racial groups as engaged in a zero-sum competition with one another.¹¹⁰⁴

Eighty-one percent of Trump's supporters, but only nineteen percent of Hillary Clinton's, believed that in the last fifty years, "life for people like them" had worsened.¹¹⁰⁵ Much of that pessimism seems rooted in dissatisfaction with the nation's changing racial demographics.¹¹⁰⁶ The election of the nation's first nonwhite President, rapid demographic change through immigration and differential birth rates, and the cultural and political consequences of such changes have led roughly thirty to forty percent of white Americans to believe that their racial group and its traditional privileges are endangered.¹¹⁰⁷

With regard to race, President Trump has governed much the way he campaigned. His Cabinet includes a larger share of white men than that of any President since Reagan.¹¹⁰⁸ With regard to immigration, President Trump imposed a ban on travel from several Muslim-majority nations, used an emergency declaration as a pretext to secure funding for a wall on the Mexican border, separated parents from children to deter illegal immigration, imposed obstacles to asylum claims, and expelled hundreds of thousands of refugees who were in the United States under temporary protected status.¹¹⁰⁹ Heading into the 2018 midterms, he sought to mobilize his base by suggesting that he would revoke birth-right citizenship by executive order, which the Fourteenth Amendment plainly does not permit.¹¹¹⁰ President Trump's Justice Department essentially ended the pursuit of consent decrees against police departments

¹¹⁰² See ABRAMOWITZ, *supra* note 346, at 153, 156, 158–60; JARDINA, *supra* note 787, at 91; SIDES ET AL., *supra* note 585, at 172–76.

¹¹⁰³ See ABRAMOWITZ, *supra* note 346, at 157; JARDINA, *supra* note 787, at 94, 96.

¹¹⁰⁴ See DIAMOND, *supra* note 28, at 31; JARDINA, *supra* note 787, at 94, 140–41.

¹¹⁰⁵ ABRAMOWITZ, *supra* note 346, at 14.

¹¹⁰⁶ See *id.*; KLEIN, *supra* note 347, at 106, 114–15.

¹¹⁰⁷ See JARDINA, *supra* note 787, at 7–8, 42, 144.

¹¹⁰⁸ ABRAMOWITZ, *supra* note 346, at 171.

¹¹⁰⁹ *Trump Administration Civil and Human Rights Rollbacks*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (2020), <https://civilrights.org/trump-rollbacks> [<https://perma.cc/EG7R-VAYX>].

¹¹¹⁰ See Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), <https://nyti.ms/2CPJcGU> [<https://perma.cc/FXP3-FN82>].

shown to have engaged in patterns and practices of racially discriminatory policing.¹¹¹¹ President Trump seems focused on undoing everything linked to President Obama's legacy so that he can position himself, in the words of one political scientist, "as the antidote to any threat posed by the nation's first black president."¹¹¹²

President Trump's 2020 reelection campaign has stoked racial controversy at every turn.¹¹¹³ As the site for his first rally after the pandemic disrupted his campaign, he selected Tulsa, Oklahoma, where one of the nation's most deadly massacres of blacks by whites took place in 1921.¹¹¹⁴ He has called a Black Lives Matter sign a "symbol of hate,"¹¹¹⁵ labeled racial justice protestors "ANARCHISTS,"¹¹¹⁶ defended statues of Confederate war heroes,¹¹¹⁷ and told Americans "living their Suburban Lifestyle Dream" that he would protect them from "having low income housing built in [their] neighborhood."¹¹¹⁸

B. *The Disappearing Christian Majority*

Race is not the only aspect of recent demographic change causing distress to some Americans. In the last couple of decades, the idea of the United States as a Christian nation has come under increasing attack.¹¹¹⁹

Historically, religion has played an important role in American society, and Americans still tend to be more religious than residents of other Western nations.¹¹²⁰ Most conservative white evangelical Protestants believe that the United States was founded as a Christian nation, a position the Supreme Court embraced in 1892.¹¹²¹ At the Founding, the United States was an overwhelmingly Protestant nation, and around 1850, as the first big waves of Irish Catholic immigration began,

¹¹¹¹ See Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://nyti.ms/2yYKGvI> [<https://perma.cc/37DJ-CMKT>].

¹¹¹² JARDINA, *supra* note 787, at 258.

¹¹¹³ See Maggie Haberman, *Trump Adds to Playbook of Stoking White Fear and Resentment*, N.Y. TIMES (July 6, 2020), <https://nyti.ms/3iKs5cm> [<https://perma.cc/NGA6-B4HJ>].

¹¹¹⁴ See Astead W. Herndon, *Black Tulsans, with a Defiant Juneteenth Celebration, Send a Message to Trump*, N.Y. TIMES (June 20, 2020), <https://nyti.ms/2YgMvS4> [<https://perma.cc/S4K9-CMS3>].

¹¹¹⁵ Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2020, 9:48 AM), <https://twitter.com/realDonaldTrump/status/1278324681477689349> [<https://perma.cc/3MGU-MJL8>].

¹¹¹⁶ Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2020, 3:37 PM), <https://twitter.com/realDonaldTrump/status/1287472054527197190> [<https://perma.cc/M6AL-PP7G>].

¹¹¹⁷ See Haberman, *supra* note 1113.

¹¹¹⁸ Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 12:19 PM), <https://twitter.com/realDonaldTrump/status/128850956857877088> [<https://perma.cc/YZY8-M2JW>].

¹¹¹⁹ See JOHN FEA, BELIEVE ME: THE EVANGELICAL ROAD TO DONALD TRUMP 9 (2018).

¹¹²⁰ ABRAMOWITZ, *supra* note 346, at 52.

¹¹²¹ Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892); FEA, *supra* note 1119, at 155, 162–63.

Catholics still totaled only five percent of the American population.¹¹²² A majority of states had Protestant establishments at the Founding, and one purpose of the Establishment Clause was to prevent the federal government from interfering with those established churches.¹¹²³ Catholics and Jews were generally tolerated but not accommodated.¹¹²⁴

Large-scale immigration from southern and eastern Europe in the decades around 1900 made the United States much more religiously diverse, as the Catholic share of the population rose to about twenty-five percent and the Jewish share to three percent.¹¹²⁵ Jews and Catholics gradually assimilated, but the Protestant establishment remained hegemonic well into the twentieth century.¹¹²⁶

In the 1920s, the Protestant establishment divided in response to challenges posed by modernity to religious fundamentalism.¹¹²⁷ Modernist Protestants rejected the doctrine of original sin and regarded the core of Christianity as service to others, not the experience of being born again.¹¹²⁸ Fundamentalists emphasized a literal reading of the Bible and protested the teaching of evolution in public schools.¹¹²⁹ Both groups assumed the United States was a Christian nation.¹¹³⁰

Religiosity in general, and Christianity in particular, appeared to thrive in the post–World War II years.¹¹³¹ Many Americans seemed to derive great comfort from the thought that God was on their side in the Cold War against atheistic communism.¹¹³² President Eisenhower declared: “Without God there could be no American form of government, nor an American way of life.”¹¹³³ Congress added “under God” to the Pledge of Allegiance and put “In God We Trust” onto currency.¹¹³⁴ In 1960, sixty-nine percent of Americans were affiliated with a church or synagogue, and Democrats and Republicans attended religious services in similar numbers.¹¹³⁵ Around this time, nearly eighty percent of all

¹¹²² Julie Byrne, *Roman Catholics and Immigration in Nineteenth-Century America*, NAT’L HUMANS. CTR. (Nov. 2000), <http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/nromcath.htm> [<https://perma.cc/X4RV-3BSL>]; see also Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 45 (1996) [hereinafter Klarman, *Rethinking*].

¹¹²³ See Klarman, *Rethinking*, *supra* note 1122, at 47.

¹¹²⁴ See, e.g., *id.* at 49–50.

¹¹²⁵ *Id.*

¹¹²⁶ See *id.* at 49–57.

¹¹²⁷ See JONES, *supra* note 1071, at 12, 31–32; WILLIAMS, *supra* note 984, at 2, 12–14.

¹¹²⁸ FEA, *supra* note 1119, at 105.

¹¹²⁹ *Id.* at 105–07.

¹¹³⁰ *Id.* at 106.

¹¹³¹ *Id.* at 47–48.

¹¹³² *Id.* at 46–48; WILLIAMS, *supra* note 984, at 18–28.

¹¹³³ FEA, *supra* note 1119, at 47–48.

¹¹³⁴ *Id.* at 48.

¹¹³⁵ ABRAMOWITZ, *supra* note 346, at 27; FEA, *supra* note 1119, at 48.

voters were married white Christians, split evenly between the parties.¹¹³⁶ Abortion and gay rights were not yet major subjects of political debate.¹¹³⁷

As American religiosity thrived, the Christian establishment began to face challenges from the Supreme Court. In 1947, the Justices invoked the metaphor of a high “wall of separation” between church and state,¹¹³⁸ and they used it the following year to invalidate time-release programs, which permitted public school students to receive religious instruction during the school day.¹¹³⁹ In 1962, the Court invalidated even voluntary nondenominational prayer if organized by public school officials, a decision that newspapers misleadingly characterized as banning God from public schools.¹¹⁴⁰ The following year, the Court struck down laws that mandated Bible reading in public schools.¹¹⁴¹ Later rulings protected pornography under the First Amendment and invalidated most schemes to provide public financial assistance to private religious schools.¹¹⁴² Such decisions have led some conservative evangelicals to blame what they perceive as the erasure of religion from public life, as partly enabled by the Court, for most of America’s ills, whether high rates of sexually transmitted diseases or low SAT scores.¹¹⁴³

Of course, the Court was not the only, or even the most important, force challenging religion and religious values in the 1960s. The development of the birth control pill facilitated more permissive beliefs about premarital and extramarital sex.¹¹⁴⁴ Divorce rates skyrocketed.¹¹⁴⁵ Legislatures and then courts liberalized abortion access.¹¹⁴⁶ Second-wave feminism challenged traditional gender roles.¹¹⁴⁷ The civil rights movement and the women’s rights movement spawned a gay rights movement.¹¹⁴⁸

¹¹³⁶ LEVITSKY & ZIBLATT, *supra* note 35, at 171.

¹¹³⁷ *Id.* at 171–72.

¹¹³⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

¹¹³⁹ See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948) (quoting *Everson*, 330 U.S. at 16).

¹¹⁴⁰ *Engel v. Vitale*, 370 U.S. 421, 430–36 (1962); see FEA, *supra* note 1119, at 51; WILLIAMS, *supra* note 984, at 62–64.

¹¹⁴¹ *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963); WILLIAMS, *supra* note 984, at 64–67.

¹¹⁴² See, e.g., FEA, *supra* note 1119, at 55; WILLIAMS, *supra* note 984, at 81–82.

¹¹⁴³ FEA, *supra* note 1119, at 57.

¹¹⁴⁴ See WILLIAMS, *supra* note 984, at 81.

¹¹⁴⁵ See Robert T. Michael, *The Rise in Divorce Rates, 1960–1974: Age-Specific Components*, 15 DEMOGRAPHY 177, 177 (1978).

¹¹⁴⁶ MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 16, 19–22 (2020).

¹¹⁴⁷ See, e.g., WILLIAMS, *supra* note 984, at 107–10; ZIEGLER, *supra* note 1146, at 19–21.

¹¹⁴⁸ See KLARMAN, FROM THE CLOSET, *supra* note 520, at 17.

Historically, Protestants had generally embraced a strong separation of church and state, which to them meant preventing Catholics from securing public assistance for parochial schools.¹¹⁴⁹ Beginning in the 1960s and 1970s, however, evangelical Protestants criticized strong separationists as advocates of “secular humanism” who were undermining Christian values.¹¹⁵⁰

In the mid-1970s, Christian evangelicals and Catholic conservatives mobilized a right-to-life movement in response to *Roe v. Wade*.¹¹⁵¹ Previously, the Catholic Church had been the most vocal opponent of abortion liberalization, and most evangelicals had not taken a strong position.¹¹⁵² But *Roe*, in combination with a growing feminist movement that challenged traditional gender roles and supported the Equal Rights Amendment, hardened evangelical opposition to abortion, which many evangelicals came to regard as murder.¹¹⁵³

The 1970s was the decade of evangelical Christian political mobilization. During the civil rights movement of the preceding decade, Jerry Falwell, an evangelical pastor who defended racial segregation, had argued against ministers’ engaging in politics.¹¹⁵⁴ In the 1970s, however, he argued that evangelical political participation was necessary to prevent secular humanism from destroying America’s Christian identity.¹¹⁵⁵ Starting in 1976, with the support of conservative politicians, Falwell began a nationwide crusade to link religious faith with a political agenda of opposition to abortion, homosexuality, and pornography.¹¹⁵⁶ In 1979, Falwell established a fundraising organization, the Moral Majority, to encourage people of faith to pursue political power for those same ends.¹¹⁵⁷ Likewise, in 1977, psychologist James Dobson founded Focus on the Family, a fundamentalist Christian organization that promoted socially conservative policies through, among other means, a national radio broadcast.¹¹⁵⁸

The political mobilization of conservative Christians did not occur entirely apart from racial considerations.¹¹⁵⁹ In the 1950s, about ninety

¹¹⁴⁹ Klarman, *Rethinking*, *supra* note 1122, at 47–48.

¹¹⁵⁰ FEA, *supra* note 1119, at 59; *see also id.* at 58–59; WILLIAMS, *supra* note 984, at 133–34.

¹¹⁵¹ 410 U.S. 113 (1973); *see* FEA, *supra* note 1119, at 55–56; WILLIAMS, *supra* note 984, at 117–20.

¹¹⁵² STEVEN P. MILLER, *THE AGE OF EVANGELICALISM: AMERICA’S BORN-AGAIN YEARS* 54 (2014); WILLIAMS, *supra* note 984, at 114–16; ZIEGLER, *supra* note 1146, at 11–17.

¹¹⁵³ FEA, *supra* note 1119, at 56; *see also* MILLER, *supra* note 1152, at 53; WILLIAMS, *supra* note 984, at 106–20.

¹¹⁵⁴ WILLIAMS, *supra* note 984, at 33–34, 46, 86.

¹¹⁵⁵ FEA, *supra* note 1119, at 58–59; MILLER, *supra* note 1152, at 50–51.

¹¹⁵⁶ FEA, *supra* note 1119, at 58–60; WILLIAMS, *supra* note 984, at 171–72.

¹¹⁵⁷ MILLER, *supra* note 1152, at 60; *see also* WILLIAMS, *supra* note 984, at 171–79.

¹¹⁵⁸ MILLER, *supra* note 1152, at 26; WILLIAMS, *supra* note 984, at 235–37.

¹¹⁵⁹ *See generally* Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAG. (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133>

percent of private school students attended Catholic parochial schools, and Protestants had long opposed public funding for such institutions.¹¹⁶⁰ However, in the wake of *Brown*, hundreds of private Protestant segregationist academies opened in the South.¹¹⁶¹ As non-profit organizations, they enjoyed tax-exempt status.¹¹⁶² In the early 1970s, however, in response to lawsuits filed by African Americans, the IRS began denying tax-exempt status to these schools because of their racial exclusivity, and the Supreme Court affirmed that decision.¹¹⁶³ In 1976, the IRS rescinded the tax-exempt status of Bob Jones University in South Carolina, which initially excluded African Americans and later extended admission only to black students who were married, while barring interracial dating.¹¹⁶⁴ In 1983, the Court sustained the IRS's policy against a First Amendment challenge.¹¹⁶⁵

Between 1972 and 2012, the percentage of white religious conservatives who identified with or leaned Republican increased from fifty-eight percent to ninety-three percent.¹¹⁶⁶ Over that same time period, political divisions among whites increasingly reflected religiosity.¹¹⁶⁷ In 2016, seventy-eight percent of voters supporting very strict limits or a complete ban on abortion favored Trump over Hillary Clinton, while sixty-one percent of voters viewing abortion as a woman's personal choice preferred Hillary Clinton over Trump.¹¹⁶⁸

President Carter had disappointed many evangelicals, and Falwell and other conservative Christian leaders made former California Governor Ronald Reagan the focal point of their political revolution.¹¹⁶⁹ Reagan was an unlikely champion of evangelicals, given his divorce and remarriage, and his support as governor for an abortion liberalization

[<https://perma.cc/32LB-KTFX>] (arguing that preserving school segregation, rather than prohibiting abortion, constituted the "real motive" of the conservative evangelicals and fundamentalists who formed a political movement in the 1970s).

¹¹⁶⁰ See Klarman, *Rethinking*, *supra* note 1122, at 48, 57; William Sander, *The Effects of Catholic Schools on Religiosity, Education, and Competition* 5 (Nat'l Ctr. for the Study of Privatization in Educ., Occasional Paper No. 32, 2001).

¹¹⁶¹ See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282–83, 330–33 (2001); see also FEA, *supra* note 1119, at 55.

¹¹⁶² See Jeffries & Ryan, *supra* note 1161, at 340.

¹¹⁶³ See *Green v. Connally*, 330 F. Supp. 1150, 1179–80 (D.D.C.), *aff'd mem. sub nom.* *Coit v. Green*, 404 U.S. 997 (1971); see also FEA, *supra* note 1119, at 55; MILLER, *supra* note 1152, at 53–54; Balmer, *supra* note 1159.

¹¹⁶⁴ Balmer, *supra* note 1159.

¹¹⁶⁵ *Bob Jones Univ. v. United States*, 461 U.S. 574, 604–05 (1983); Balmer, *supra* note 1159.

¹¹⁶⁶ ABRAMOWITZ, *supra* note 346, at 56–57.

¹¹⁶⁷ See *id.* at 55–57.

¹¹⁶⁸ *Id.* at 12.

¹¹⁶⁹ JONES, *supra* note 1071, at 90; MILLER, *supra* note 1152, at 40–41, 48–51, 56–59; WILLIAMS, *supra* note 984, at 171–79, 188–89.

law.¹¹⁷⁰ Nonetheless, Falwell backed him, and during the 1980 presidential campaign, Reagan told a huge conference of evangelical ministers that while they were not permitted by law to endorse him, he endorsed them.¹¹⁷¹ Falwell and other evangelical leaders shaped the Republican Party's 1980 platform, which supported a constitutional amendment to protect the lives of "unborn children,"¹¹⁷² championed women as homemakers, and opposed the rescission of tax exemptions enjoyed by racially discriminatory educational institutions.¹¹⁷³

Falwell's Moral Majority helped revolutionize American politics by organizing conservative Christians to vote and lobby for legislation reflecting their worldview and to secure the appointment of Justices who would defend religious liberty, overturn *Roe*, and resist the expansion of gay rights.¹¹⁷⁴ The Moral Majority registered millions of new voters, and white evangelical Christians became a vital Republican constituency, shifting the party's language and its policy agenda.¹¹⁷⁵ The Reagan Administration supported constitutional amendments to allow organized prayer in public schools and to ban abortion, and the Administration initially announced that it would support Bob Jones University in the Supreme Court.¹¹⁷⁶

The Moral Majority elected Republicans to national office, and the Christian Coalition, another conservative Christian organization, focused on local elections, especially for school boards.¹¹⁷⁷ Evangelical Protestants also began forming interfaith alliances with conservative white Catholics and Mormons in opposition to same-sex marriage and abortion — an unprecedented display of ecumenism for groups that had battled for centuries over the nature of Christianity.¹¹⁷⁸ Historically, many Protestants had not regarded Mormonism as a form of Christianity at all, yet in 2012, Mormon Republican presidential candidate Mitt Romney won seventy-nine percent of the white evangelical vote.¹¹⁷⁹

In 2000, white evangelicals were critical to George W. Bush's winning the Republican presidential nomination over John McCain, who had called conservative evangelical leaders "agents of intolerance."¹¹⁸⁰

¹¹⁷⁰ WILLIAMS, *supra* note 984, at 123–24, 188.

¹¹⁷¹ *Id.* at 187.

¹¹⁷² *Id.* at 131; *see id.* at 189.

¹¹⁷³ *See id.* at 189–90; *see also* FEA, *supra* note 1119, at 60; MILLER, *supra* note 1152, at 61.

¹¹⁷⁴ FEA, *supra* note 1119, at 60–61.

¹¹⁷⁵ *See* WILLIAMS, *supra* note 984, at 6–7, 178–79, 193–94, 205–07; *see also* MILLER, *supra* note 1152, at 62, 65–66.

¹¹⁷⁶ WILLIAMS, *supra* note 984, at 197, 200.

¹¹⁷⁷ MILLER, *supra* note 1152, at 110–11; WILLIAMS, *supra* note 984, at 227–32.

¹¹⁷⁸ JONES, *supra* note 1071, at 37, 60, 65–66.

¹¹⁷⁹ *Id.* at 70.

¹¹⁸⁰ *Id.* at 92; *see* MILLER, *supra* note 1152, at 119–21, 124–25; WILLIAMS, *supra* note 984, at 246–51.

Promising to “uphold the honor and integrity” of the presidency,¹¹⁸¹ Bush won roughly seventy percent of the votes of white evangelicals in the general election.¹¹⁸² In 2004, they turned out in record numbers to vote against gay marriage in state referenda and to reelect President Bush, who had endorsed a federal constitutional amendment to ban gay marriage.¹¹⁸³

While conservative white evangelicals have influenced the Republican political agenda and helped the party win elections, they have achieved few lasting victories in the culture wars.¹¹⁸⁴ Nearing its fiftieth anniversary, *Roe* is still the law of the land, and American women have a total of over 800,000 legal abortions a year.¹¹⁸⁵ Officially sanctioned prayer in public school is still unconstitutional, and pornography is omnipresent on the internet.¹¹⁸⁶ Homosexuality has been normalized to a great extent in American culture, and gay marriage is a constitutional right.¹¹⁸⁷

By the 1990s, the same demographic changes altering American racial politics and culture were also impacting those religious spheres: the image and reality of the United States as a Christian nation were gradually disappearing.¹¹⁸⁸ Many new immigrants were Muslims, Hindus, Buddhists, or adherents of other religions.¹¹⁸⁹ Muslims especially provoked fear among white evangelicals, and even though Muslims make up only about one percent of the nation’s population, Americans believe they are closer to seventeen percent.¹¹⁹⁰

Due in part to declining birth rates and decisions to abandon the church, white mainline Protestants’ share of the population fell from twenty-four percent in the late 1980s to fourteen percent in 2012.¹¹⁹¹ A similar decline among white evangelicals came a generation later, as they fell from twenty-one percent of the population in 2008 to fifteen

¹¹⁸¹ Frank Bruni, *The 2000 Campaign: The Texas Governor; Bush Calls on Gore to Denounce Clinton Affair*, N.Y. TIMES (Aug. 12, 2000), <https://www.nytimes.com/2000/08/12/us/2000-campaign-texas-governor-bush-calls-gore-denounce-clinton-affair.html> [https://perma.cc/Y862-RAZH].

¹¹⁸² *Religion and the Presidential Vote*, PEW RSCH. CTR. (Dec. 6, 2004), <http://pewrsr.ch/1oPiIpK> [https://perma.cc/CB39-KLV5].

¹¹⁸³ See KLARMAN, FROM THE CLOSET, *supra* note 520, at 97–113; WILLIAMS, *supra* note 984, at 256–62.

¹¹⁸⁴ See, e.g., FEA, *supra* note 1119, at 64–65, 148; WILLIAMS, *supra* note 984, at 210–11, 245–46, 263.

¹¹⁸⁵ *Induced Abortion in the United States*, GUTTMACHER INST. (Sept. 2019), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [https://perma.cc/MU8X-4XX3].

¹¹⁸⁶ FEA, *supra* note 1119, at 64, 148.

¹¹⁸⁷ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596–97, 2607–08 (2015); KLARMAN, FROM THE CLOSET, *supra* note 520, at 70–74.

¹¹⁸⁸ See, e.g., JONES, *supra* note 1071, at 40–42; cf. ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 148–51 (2010) (noting increasing rates of interfaith marriage).

¹¹⁸⁹ FEA, *supra* note 1119, at 53–54.

¹¹⁹⁰ See *id.* at 39–40; MOUNK, *supra* note 31, at 176.

¹¹⁹¹ JONES, *supra* note 1071, at 40, 52–55.

percent in 2018.¹¹⁹² Protestants of all denominations and races fell from sixty-three percent of the population in 1974 to forty-seven percent in 2014.¹¹⁹³

Likewise, the share of the population occupied by white Catholics fell from twenty-two percent in 1990 to thirteen percent in 2014.¹¹⁹⁴ By contrast, Americans claiming no religious affiliation increased from seven percent in 1974 to ten percent in the mid-1990s to twenty-two percent in 2014.¹¹⁹⁵ Should such trends continue, by 2051 religiously unaffiliated Americans could equal Protestants as a share of the overall population, a stunning development in a nation long dominated by an unofficial Protestant establishment.¹¹⁹⁶

The generational breakdown of these numbers is cause for even greater alarm among Christian conservatives.¹¹⁹⁷ As of 2014, white evangelicals were twenty-seven percent of the population aged sixty-five and above but only ten percent of adults under the age of thirty.¹¹⁹⁸ Roughly sixty-seven percent of Americans aged sixty-five and above are white Christians, but only twenty-nine percent of those aged eighteen to twenty-nine are.¹¹⁹⁹

Many young evangelicals are repudiating their elders' culture-war agenda (more than they are abandoning their belief in God).¹²⁰⁰ Evangelical leaders, such as Jerry Falwell and Pat Robertson, have blamed gay people, feminists, abortionists, the American Civil Liberties Union (ACLU), and, as expressed by Falwell, all those "who have tried to secularize America" for the September 11 attacks because "God will not be mocked."¹²⁰¹ A generation of young evangelicals grew up in a religious community deeply opposed to gay equality and a broader culture strongly

¹¹⁹² Robert P. Jones, *The Electoral Time Machine that Could Reelect Trump*, THE ATLANTIC (June 25, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/how-trump-could-win-2020/592354> [https://perma.cc/6ZAU-6CL3]; see JONES, *supra* note 1071, at 201–02.

¹¹⁹³ JONES, *supra* note 1071, at 49–51; see Robert P. Jones, *The Eclipse of White Christian America*, THE ATLANTIC (July 12, 2016), <https://www.theatlantic.com/politics/archive/2016/07/the-eclipse-of-white-christian-america/490724> [https://perma.cc/LEU5-GXTT].

¹¹⁹⁴ JONES, *supra* note 1071, at 69.

¹¹⁹⁵ *Id.* at 47, 49–50.

¹¹⁹⁶ *Id.* at 51.

¹¹⁹⁷ See *id.* at 48.

¹¹⁹⁸ *Id.* at 54.

¹¹⁹⁹ *Id.* at 48.

¹²⁰⁰ See FEA, *supra* note 1119, at 180–81; Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOCIO. REV. 165, 168, 173–75, 178–79, 181, 188 (2002).

¹²⁰¹ Laurie Goodstein, *After the Attacks: Finding Fault; Falwell's Finger-Pointing Inappropriate, Bush Says*, N.Y. TIMES (Sept. 15, 2001), <https://www.nytimes.com/2001/09/15/us/after-attacks-finding-fault-falwell-s-finger-pointing-inappropriate-bush-says.html> [https://perma.cc/7DGE-7SKU]. Falwell later said that his remarks "were taken out of their context" and that he held "no one other than the terrorists and the people and nations who have enabled and harbored them responsible for [the 9/11] attacks," a sentiment echoed by Robertson. *Id.*

supportive of it.¹²⁰² Fifty-three percent of white evangelicals aged eighteen to twenty-nine now support gay marriage.¹²⁰³ Thirty-one percent of millennials attribute their disaffiliation with their childhood religion partly to church teachings regarding homosexuality.¹²⁰⁴

These demographic changes have impacted the composition of the electorate and will do so even more in the future. Between 1992 and 2012, the share of American voters who were white Christians fell from seventy-three percent to fifty-seven percent.¹²⁰⁵ The election of 2024 will probably be the first in American history in which white Christians are not a majority of voters.¹²⁰⁶

Obergefell v. Hodges,¹²⁰⁷ which held that same-sex marriage was constitutionally protected,¹²⁰⁸ was decided in the penultimate year of the presidency of Barack Hussein Obama, who was himself “an exotic figure” to many conservative white evangelicals.¹²⁰⁹ The biracial President had spent years of his youth in a predominantly Muslim country, and many Americans associated his middle name with a brutal Muslim dictator.¹²¹⁰ During the 2008 election campaign, Obama drew negative attention for his relationship with a black Christian pastor who had been critical of America for its racial sins — declaring “God damn America” — and Obama’s liberal views on abortion and gay rights alienated most white evangelicals.¹²¹¹

After *Obergefell*, the Obama Administration opposed efforts by conservative Christians to carve out religious exemptions to antidiscrimination laws for opponents of gay marriage.¹²¹² The Administration also required public schools to permit transgender students to use bathrooms based on the gender with which they identified and the military to accommodate transgender soldiers.¹²¹³ President Obama issued an executive order barring federal contractors from employment discrimination

¹²⁰² See JONES, *supra* note 1071, at 123–24; PUTNAM & CAMPBELL, *supra* note 1188, at 130.

¹²⁰³ Alex Vandermaas-Peeler, Daniel Cox, Molly Fisch-Friedman, Rob Griffin & Robert P. Jones, *Emerging Consensus on LGBT Issues: Findings from the 2017 American Values Atlas*, PRRI (May 1, 2018), <https://www.prrri.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas> [https://perma.cc/7YML-MN35].

¹²⁰⁴ JONES, *supra* note 1071, at 132.

¹²⁰⁵ *Id.* at 105.

¹²⁰⁶ *Id.*

¹²⁰⁷ 135 S. Ct. 2584 (2015).

¹²⁰⁸ See *id.* at 2604–05, 2608.

¹²⁰⁹ FEA, *supra* note 1119, at 18; see also JONES, *supra* note 1071, at 40–41.

¹²¹⁰ FEA, *supra* note 1119, at 18.

¹²¹¹ JONES, *supra* note 1071, at 79; see also FEA, *supra* note 1119, at 18, 23–25.

¹²¹² See FEA, *supra* note 1119, at 27–28.

¹²¹³ *Id.* at 28; Dan Lamothe, *The Pentagon’s Ban on Transgender Service Just Fell — But the Details Are Complicated*, WASH. POST (June 30, 2016, 1:58 PM), <https://www.washingtonpost.com/news/checkpoint/wp/2016/06/30/the-pentagons-ban-on-transgender-service-just-fell-but-the-details-are-complicated> [https://perma.cc/YKU9-ZPH6].

based on sexual orientation.¹²¹⁴ Such developments, incomprehensible to most white evangelical Christians, help explain why seventy-two percent of them believe that the “American culture and way of life” has changed mostly for the worse since the 1950s, while sixty-three percent of the religiously unaffiliated believe the opposite.¹²¹⁵

In 2015–2016, in a Republican presidential field that included several conservative Christians, Donald Trump seemed unlikely to win the support of most white evangelicals given his irreligiosity and paucity of traditional Christian virtues.¹²¹⁶ Trump did not speak like a religious person and had never been a regular churchgoer.¹²¹⁷ He had been married three times and was widely believed to have cheated on each of his wives.¹²¹⁸ He rarely admitted error or assumed responsibility, and he had stated publicly that he had never asked for God’s forgiveness.¹²¹⁹

In the fall of 2015, Trump briefly lost his lead among evangelical voters to Ben Carson, an African American neurosurgeon who criticized President Obama’s welcoming of Syrian refugees and declared that Muslims should be disqualified from serving as President.¹²²⁰ Trump then questioned whether Seventh-day Adventists like Carson qualified as Christians.¹²²¹ After a Muslim couple mounted a terrorist attack in California, Trump called for banning all Muslim travel to the United States and proposed killing terrorists’ families.¹²²² Trump never again lost the lead among white evangelical primary voters, seventy-two percent of whom believe that Islam is incompatible with democracy.¹²²³

After securing the Republican nomination, Trump cultivated support among many initially skeptical conservative white evangelicals.¹²²⁴ He selected as his running mate Governor Mike Pence of Indiana, who had a sterling evangelical background.¹²²⁵ He created an advisory board of

¹²¹⁴ Jennifer Epstein, *Obama Signs LGBT Executive Order*, POLITICO (July 21, 2014, 11:04 AM), <https://www.politico.com/story/2014/07/obama-signs-lgbt-protection-federal-workers-contractors-109174> [https://perma.cc/S9BJ-EHCY].

¹²¹⁵ JONES, *supra* note 1071, at 86; *see also id.* at 85–87.

¹²¹⁶ *See* FEA, *supra* note 1119, at 13–14, 30.

¹²¹⁷ *See id.* at 3–4, 14; Trip Gabriel & Michael Luo, *A Born-Again Donald Trump? Believe It, Evangelical Leader Says*, N.Y. TIMES (June 25, 2016), <https://nyti.ms/294uH2j> [https://perma.cc/JLA9-YMLR].

¹²¹⁸ *See* Caitlin Flanagan, *The First Porn President*, THE ATLANTIC (May 3, 2018), <https://www.theatlantic.com/politics/archive/2018/05/the-porn-president/559523> [https://perma.cc/G33L-RU4X]; Jonathan Merritt, *Trump-Loving Christians Owe Bill Clinton an Apology*, THE ATLANTIC (Aug. 10, 2016), <https://www.theatlantic.com/politics/archive/2016/08/evangelical-christians-trump-bill-clinton-apology/495224> [https://perma.cc/6Z8X-XF5L].

¹²¹⁹ FEA, *supra* note 1119, at 66; *see id.* at 4, 14.

¹²²⁰ *Id.* at 31.

¹²²¹ *Id.* at 31–32.

¹²²² *Id.* at 32.

¹²²³ *Id.* at 32, 39–40.

¹²²⁴ *See id.* at 65.

¹²²⁵ *Id.*

evangelical Christian leaders, including James Dobson, Jerry Falwell Jr., and Ralph Reed.¹²²⁶ Trump also released a list of socially conservative judges whom he would consider nominating to the Court vacancy that Majority Leader McConnell was preventing President Obama from filling.¹²²⁷

On October 7, 2016, *The Washington Post* published the *Access Hollywood* video, in which Trump bragged that he was so famous he could grab women “by the pussy” without repercussion.¹²²⁸ His polling numbers fell, and many Republicans demanded that Governor Pence replace him at the top of the ticket.¹²²⁹ Conservative Christian leaders intervened to help save Trump’s candidacy.¹²³⁰ They overlooked Trump’s character defects and irreligiosity in exchange for his commitments to appoint anti-abortion judges, support religious exemptions from antidiscrimination laws, and relocate the American embassy in Israel to Jerusalem.¹²³¹ Trump won eighty-one percent of white evangelical voters in the general election, the largest such margin in the past two decades.¹²³²

President Trump’s performance in office has not disappointed his religious supporters. He has appointed two hundred federal judges, including two Supreme Court Justices (with a third probably about to be confirmed), all of them with strong conservative credentials.¹²³³ He has barred transgender people from the military and repealed Obama Administration guidance that allowed transgender students in public schools to use the bathrooms of the gender with which they identify.¹²³⁴ The Trump Administration has defended Christian employers and public service providers seeking exemptions from laws forbidding various types of discrimination in employment and public accommodations,¹²³⁵ and urged the Court to hold that the 1964 Civil Rights Act permits

¹²²⁶ *Id.*

¹²²⁷ ABRAMOWITZ, *supra* note 346, at 170; FEA, *supra* note 1119, at 66.

¹²²⁸ FEA, *supra* note 1119, at 67.

¹²²⁹ MICHAEL WOLFF, FIRE AND FURY: INSIDE THE TRUMP WHITE HOUSE 10–11 (2018); McKay Coppins, *God’s Plan for Mike Pence*, THE ATLANTIC (Jan./Feb. 2018), <https://www.theatlantic.com/magazine/archive/2018/01/gods-plan-for-mike-pence/546569> [https://perma.cc/7658-WKN9].

¹²³⁰ See FEA, *supra* note 1119, at 67–68.

¹²³¹ See *id.* at 5, 138, 140.

¹²³² *Id.* at 5–6.

¹²³³ See Carl Hulse, *With Wilson Confirmation, Trump and Senate Republicans Achieve a Milestone*, N.Y. TIMES (June 24, 2020), <https://nyti.ms/3g6e5Yn> [https://perma.cc/L5HC-LAAH]; Ruiz et al., *supra* note 335.

¹²³⁴ See Lola Fadulu, *Trump’s Rollback of Transgender Rights Extends Through Entire Government*, N.Y. TIMES (Aug. 26, 2020), <https://nyti.ms/2RpkZPd> [https://perma.cc/G4NF-RE4W].

¹²³⁵ See Ian Millhiser, *Trump’s DOJ Just Escalated the Fight over Whether Religion Is a License to Discriminate*, VOX (Sept. 30, 2019, 1:20 PM), <https://www.vox.com/policy-and-politics/2019/9/30/20890045/trump-justice-department-constitution-discrimination-lgbtq-catholic-church> [https://perma.cc/89LG-YA3Z]; see also FEA, *supra* note 1119, at 140–41.

employment discrimination based on sexual orientation or gender identity.¹²³⁶ President Trump also moved the U.S. embassy in Israel to Jerusalem.¹²³⁷

One Republican Senate candidate in Alabama recently declared: “God sent us Donald Trump because God knew we were in trouble.”¹²³⁸ Falwell Jr. calls Trump the evangelicals’ “dream president” and affirms that nothing President Trump might do would jeopardize his support among them.¹²³⁹

C. *The Rise of the Neo-Ayn Randians*

The Constitution’s Framers wrestled with a perennial problem of representative government: how to prevent democratic majorities from redistributing property in their favor. The Framers believed the purpose of government was to protect property, and states were doing a lousy job of it.¹²⁴⁰ Their project in the summer of 1787 was to design a system of government that would retain its representative character while “refin[ing] and enlarg[ing]” the popular will to ensure the security of property rights.¹²⁴¹

American history has featured a continuing struggle between majority will and property rights. During the Jacksonian era, state courts invented the doctrine of substantive due process to constrain the redistributive tendencies of legislatures in an era of broad-based democracy for white men.¹²⁴² Soon thereafter, Senator John C. Calhoun of South Carolina developed sophisticated theoretical mechanisms for protecting the “property” rights of southern slave owners against efforts by national majorities to undermine slavery.¹²⁴³ In *Dred Scott v. Sandford*,¹²⁴⁴ the Supreme Court sided with Senator Calhoun’s view of the property rights

¹²³⁶ Brent Kendall, *Trump Administration Argues Law Doesn’t Protect Gays from Workplace Bias*, WALL ST. J. (Aug. 23, 2019, 7:45 PM), <https://www.wsj.com/articles/trump-administration-argues-law-doesnt-protect-gays-from-workplace-bias-11566603943> [<https://perma.cc/94BR-H5QA>].

¹²³⁷ David M. Halbfinger, *Israel Feels Pride but Senses Peril as U.S. Moves Embassy*, N.Y. TIMES (May 13, 2018), <https://nyti.ms/2KWZrnv> [<https://perma.cc/8TVP-XE37>].

¹²³⁸ Tommy Tuberville (@TTuberville), TWITTER (Feb. 3, 2020, 10:18 AM), <https://twitter.com/TTuberville/status/1224351387661807617> [<https://perma.cc/H3ZK-T64C>] (stating in a campaign advertisement that “God sent us Donald Trump”); see also Jeremy W. Peters, *Jeff Sessions Forced into Runoff in Fight to Reclaim Senate Seat in Alabama*, N.Y. TIMES (Mar. 3, 2020), <https://nyti.ms/2VJbc8E> [<https://perma.cc/CF4S-D76H>].

¹²³⁹ FEA, *supra* note 1119, at 124; see also *id.* at 120.

¹²⁴⁰ See KLARMAN, FRAMERS’ COUP, *supra* note 340, at 83–86, 162–63, 178–80.

¹²⁴¹ THE FEDERALIST NO. 10, *supra* note 717, at 76 (James Madison); see also KLARMAN, FRAMERS’ COUP, *supra* note 340, at 171–72, 176.

¹²⁴² See CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865, at 115–21 (2001).

¹²⁴³ See RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 84–91 (1948); see also MACLEAN, *supra* note 65, at 2–5.

¹²⁴⁴ 60 U.S. (19 How.) 393 (1857).

of southern slaveholders, barring Congress from denying them equal access to the federal territories with their slave “property.”¹²⁴⁵ During the *Lochner*¹²⁴⁶ era of the early twentieth century, the Supreme Court episodically protected property and contract rights from redistribution, invalidating a progressive income tax and protective labor legislation.¹²⁴⁷

The Great Depression and the New Deal ended the *Lochner* era.¹²⁴⁸ The laissez-faire views of academic economists and businessmen were marginalized as politicians, journalists, and members of the public at large began regarding such views as inadequate to the task of rescuing the nation from the worst depression in American history.¹²⁴⁹ Building on Progressive Era reform legislation, New Dealers inaugurated an era of activist government, which in turn improved the lives of the poor, protected the health and safety of American workers, created jobs for the unemployed, established Social Security for the elderly and the disabled, protected investors from fraud in securities markets, put an end to bank runs and mitigated the downturns of the business cycle, brought electricity to rural areas, won World War II, enacted a G.I. Bill to educate soldiers, constructed hospitals, built a federal highway system, improved educational opportunities, enacted civil rights legislation, protected the environment, and put a man on the moon.¹²⁵⁰ Big business opposed many of these policies, as did many Republicans, but both groups had been discredited by the Great Depression.¹²⁵¹

By the postwar decades, even some Republicans supported activist government. President Eisenhower expanded Social Security and pushed Congress to build an interstate highway system that both parties supported.¹²⁵² Richard Nixon took more conservative positions than most national Democrats did on issues of race and crime in 1968, but he governed as a moderate on economic issues, supporting a guaranteed

¹²⁴⁵ DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 363 (1978); see also *id.* at 364.

¹²⁴⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

¹²⁴⁷ See generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (analyzing court decisions during the *Lochner* era); cf. *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601, 637 (1895) (striking down a federal tax on income derived from personal property because the tax was not apportioned among states based on population, as the Constitution requires for “direct” taxes).

¹²⁴⁸ See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (analyzing shifts in the Supreme Court’s constitutional jurisprudence during the New Deal era).

¹²⁴⁹ See ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* 12–14 (2012).

¹²⁵⁰ See, e.g., HACKER & PIERSON, *supra* note 352, at 44, 55, 67–69, 79–80, 83, 100–02, 116–17, 124, 151, 290.

¹²⁵¹ See, e.g., *id.* at 134–37, 140–43; see also BURGIN, *supra* note 1249, at 4, 13–14, 27–29.

¹²⁵² See HACKER & PIERSON, *supra* note 352, at 69, 120–21.

annual income, an expansion of Social Security, and major environmental and consumer protection laws.¹²⁵³ The Chamber of Commerce, which had bitterly fought the New Deal, adjusted to the new postwar reality and accepted labor unions and Keynesian economics.¹²⁵⁴

Naturally, there were dissenters from the new conventional wisdom supporting activist government, but they were relatively marginalized in the postwar years of extraordinary economic growth and prosperity.¹²⁵⁵ These dissenters, led by libertarian economists such as Milton Friedman and James Buchanan, agreed with the Framers' view that government redistribution of wealth was officially sanctioned theft.¹²⁵⁶ They criticized government regulation as inefficient, and some portrayed politicians and bureaucrats as pursuing self-serving agendas rather than some ethereal "common good," resulting in ever-expanding government spending financed by discriminatory taxation on the most productive citizens.¹²⁵⁷ They generally despised labor unions, the political backbone of the Democratic Party, regarding them as threats to the liberty of individual workers and even analogizing them to "bank robber[s]."¹²⁵⁸

The libertarians' views were represented politically by Senator Barry Goldwater, the Republican nominee for President in 1964, who opposed the Johnson Administration's Medicare bill as socialized medicine, proposed making Social Security voluntary, and opposed the pending civil rights bill for coercing employers and business owners not to discriminate based on race.¹²⁵⁹ Yet Senator Goldwater's nomination was an aberration for a party usually controlled by moderates, and his landslide defeat suggested that most Americans rejected libertarian ideas.¹²⁶⁰ However, just sixteen years later, Reagan won the presidency on a similar platform, and over the following three decades, those views became sufficiently hegemonic that they even influenced many Democrats.¹²⁶¹

Because many of the leading libertarian thinkers sympathized with southern whites' massive resistance to *Brown*,¹²⁶² this section's explanation for the degradation of American democracy cannot be neatly separated from the racial explanation already discussed. Libertarians were

¹²⁵³ See *id.* at 152–54.

¹²⁵⁴ See *id.* at 133–36.

¹²⁵⁵ See BURGIN, *supra* note 1249, at 120.

¹²⁵⁶ See *id.* at 173–75, 191; KLARMAN, FRAMERS' COUP, *supra* note 340, at 606–09; MACLEAN, *supra* note 65, at xxiii–xxxii.

¹²⁵⁷ See MACLEAN, *supra* note 65, at xxxii, 76–77.

¹²⁵⁸ *Id.* at 130; see *id.* at xxiv, 130–33.

¹²⁵⁹ See BURGIN, *supra* note 1249, at 200–02; MACLEAN, *supra* note 65, at 89–92.

¹²⁶⁰ See MACLEAN, *supra* note 65, at 91–92.

¹²⁶¹ See HACKER & PIERSON, *supra* note 352, at 163–64, 186–87, 196.

¹²⁶² See, e.g., William F. Buckley, *Why the South Must Prevail*, NAT'L REV. (Aug. 24, 1957); see also MACLEAN, *supra* note 65, at xv–xvii.

unlikely critics of *Brown*, which barred coercive government segregation.¹²⁶³ Yet for Buchanan, a young economics scholar at the University of Virginia, *Brown* conjured thoughts of federal coercion of the states, especially after President Eisenhower sent federal troops to Little Rock in 1957 to enforce a judicial desegregation order.¹²⁶⁴ *Brown* also facilitated libertarian alliances with racist white southerners, who enthusiastically embraced “freedom of choice” plans to curtail school desegregation.¹²⁶⁵

Libertarians such as Buchanan and Friedman had already been trying to retire government from the business of public education, so when Virginia enacted tuition grants and property tax exemptions to fund private segregationist academies in the wake of *Brown*, these scholars made common cause with white southerners.¹²⁶⁶ When leading Virginia segregationist James J. Kilpatrick proposed amending the state constitution in 1959 to permit counties to abandon public education and switch instead to a scholarship or voucher program, Buchanan championed the idea.¹²⁶⁷ In 1964, the Republican Party platform supported state subsidies for private schools, and eighty-seven percent of Mississippi voters, who were almost entirely white and ran the most rigid racial caste system in the country, voted for Senator Goldwater.¹²⁶⁸

Lewis Powell was a Virginia lawyer, a former president of the American Bar Association, and a former member of the Richmond and Virginia school boards who had opposed *Brown* but nonetheless shepherded his state through the era of massive resistance with less violence and disorder than much of the South experienced.¹²⁶⁹ In the summer of 1971, Powell wrote a confidential memorandum for the Chamber of Commerce describing a broad-based assault on the American “free enterprise system” and proposing a strategy to counteract it.¹²⁷⁰ Powell was outraged that universities funded by tax dollars and endowments underwritten by businesses should teach students to despise the American political and economic system while warmly welcoming to campus leftist speakers who incited students to revolution.¹²⁷¹

¹²⁶³ See MACLEAN, *supra* note 65, at 50–52.

¹²⁶⁴ See *id.* at xvi, 54–56, 69.

¹²⁶⁵ See *id.* at 65–71.

¹²⁶⁶ See BURGIN, *supra* note 1249, at 183; MACLEAN, *supra* note 65, at 66–68.

¹²⁶⁷ See MACLEAN, *supra* note 65, at 70–71.

¹²⁶⁸ *Id.* at 90–92; see also KLARMAN, JIM CROW, *supra* note 233, at 412–13. On the Mississippi caste system, see generally JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY (1964).

¹²⁶⁹ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 282–331 (1994).

¹²⁷⁰ Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com. 1 (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [https://perma.cc/4QXL-PF55] [hereinafter Powell Memorandum].

¹²⁷¹ See *id.* at 3, 12–13, 18; see also MACLEAN, *supra* note 65, at 103–04.

With the survival of the free enterprise system at stake, Powell urged businessmen to join the battle.¹²⁷² Balance had to be restored to college campuses, which were the “single most dynamic source”¹²⁷³ of the threat, as they taught millions of students to despise capitalism.¹²⁷⁴ Powell urged the Chamber to establish a staff of scholars supportive of free enterprise to defend it in college debates, publish scholarly works celebrating it, and vet school textbooks to ensure fair treatment of it.¹²⁷⁵ The Chamber should also pursue greater political balance on faculties and in the media, including by monitoring television networks, demanding equal time, and advertising in support of free enterprise.¹²⁷⁶ The judiciary “may be the most important instrument for social, economic and political change,”¹²⁷⁷ and the Chamber should hire a staff of lawyers to counter the ACLU’s influence in pushing courts to the left.¹²⁷⁸ Two months after Powell wrote this memorandum, President Nixon nominated him to the Supreme Court.¹²⁷⁹

The Powell memorandum proved influential with conservative businessmen such as the brothers Charles and David Koch, Joseph Coors, and Richard Mellon Scaife.¹²⁸⁰ The Kochs’ father, Fred, made millions of dollars in oil refining before World War II and admired Nazi Germany, which he compared favorably to New Deal America.¹²⁸¹ In 1958, Fred Koch became a founding member of the John Birch Society, which regarded President Eisenhower and the civil rights movement as agents of a communist conspiracy.¹²⁸² In the 1960s, Charles joined that organization and began reading widely in libertarian literature.¹²⁸³

The Koch brothers were true believers in free market capitalism and harnessed their wealth to promote this cause.¹²⁸⁴ Running a company focused on resource extraction, which generates enormous negative externalities that only government can counteract, made them natural

¹²⁷² Powell Memorandum, *supra* note 1270, at 10–11.

¹²⁷³ *Id.* at 12.

¹²⁷⁴ *Id.* at 12–14.

¹²⁷⁵ *Id.* at 15–16.

¹²⁷⁶ *Id.* at 17–19, 21–22.

¹²⁷⁷ *Id.* at 26.

¹²⁷⁸ *Id.* at 26–27.

¹²⁷⁹ Jack Anderson, *Powell’s Lesson to Business Aired*, WASH. POST, Sept. 28, 1972, at F7.

¹²⁸⁰ HACKER & PIERSON, *supra* note 352, at 214–15, 220; DAN KAUFMAN, *THE FALL OF WISCONSIN: THE CONSERVATIVE CONQUEST OF A PROGRESSIVE BASTION AND THE FUTURE OF AMERICAN POLITICS* 129–33 (2018); MAYER, *supra* note 354, at 88–89, 94–95, 105–06.

¹²⁸¹ MACLEAN, *supra* note 65, at 127–29; MAYER, *supra* note 354, at 35–38.

¹²⁸² MAYER, *supra* note 354, at 47.

¹²⁸³ MACLEAN, *supra* note 65, at 129; MAYER, *supra* note 354, at 50–52.

¹²⁸⁴ HACKER & PIERSON, *supra* note 352, at 230–31.

libertarians.¹²⁸⁵ Their goal was to eliminate government as much as possible, not to make it more efficient.¹²⁸⁶

In the 1970s, the Kochs and like-minded wealthy conservative industrialists paid relatively little attention to mainstream politics because they saw little difference between Republicans and Democrats.¹²⁸⁷ During these years, the Kochs, Scaife, and their allies focused on the “multiplier effect” generated by investment in ideas, funding new or expanded libertarian think tanks that promoted free market principles, such as Cato, the Heritage Foundation, and the American Enterprise Institute.¹²⁸⁸ They also invested heavily in universities, creating fellowships and professorships at a time when few academics shared their philosophy.¹²⁸⁹

John Olin, a Cornell alumnus who made a fortune as a chemical engineer and inventor, was another wealthy libertarian, unhappy with what he regarded as his university’s capitulation to armed black activists in the late 1960s, and committed to using his fortune to subsidize university hiring of pro-capitalist faculty.¹²⁹⁰ The Olin Foundation and the Bradley Foundation, which was dedicated to promoting “American exceptionalism,” also funded the Federalist Society, a conservative legal organization founded in 1982 in reaction against the “liberal judicial activism” of the Warren Court, and “public interest” law firms such as the Pacific Legal Foundation that brought cases to defend property rights.¹²⁹¹

The libertarian businessmen’s political agenda consisted largely of reducing taxes, cutting social welfare programs, privatizing education and other traditional government functions, undermining labor unions, eviscerating environmental regulations, and reducing budget deficits without raising taxes.¹²⁹² Such policies were not popular with most Americans, whose economic views had not shifted significantly to the right.¹²⁹³ The political success of the neo-Ayn Randians would depend on two important developments. First, the wealthy gained political influence, largely as a result of Supreme Court decisions unleashing money

¹²⁸⁵ *Id.* at 231.

¹²⁸⁶ *Id.* at 230–31; MAYER, *supra* note 354, at 65–66.

¹²⁸⁷ HACKER & PIERSON, *supra* note 352, at 231; MAYER, *supra* note 354, at 69–72.

¹²⁸⁸ MAYER, *supra* note 354, at 93–96, 100–01, 106–07, 181, 184; *see* HACKER & PIERSON, *supra* note 352, at 231–32.

¹²⁸⁹ HACKER & PIERSON, *supra* note 352, at 231–32; MAYER, *supra* note 354, at 189.

¹²⁹⁰ MACLEAN, *supra* note 65, at 111; MAYER, *supra* note 354, at 112–15.

¹²⁹¹ MACLEAN, *supra* note 65, at 126; MAYER, *supra* note 354, at 130–35.

¹²⁹² *See* HACKER & PIERSON, *supra* note 352, at 194–95; MAYER, *supra* note 354, at 148–50, 195–97; GANESH SITARAMAN, *THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY, AND UNITE AMERICA* 16–18 (2019).

¹²⁹³ HACKER & PIERSON, *supra* note 352, at 196–97; MAYER, *supra* note 354, at 196.

in politics.¹²⁹⁴ Second, the libertarians found willing foot soldiers, whose motivations differed from those of their wealthy backers.¹²⁹⁵

At this point, the story of the rise of the neo-Ayn Randians intersects with developments described in the two preceding sections. Many racially resentful whites could be persuaded to support a political party that promoted the neo-Ayn Randian agenda, not because they were genuinely libertarian but because they had become convinced that the primary beneficiaries of government assistance were African Americans, whom President Reagan denigrated as “welfare queens.”¹²⁹⁶

Similarly, in exchange for Republican opposition to abortion and gay rights, leaders of the religious right promoted libertarian economics to their followers, even though many of the neo-Ayn Randians were themselves irreligious and often disparaging of people of faith.¹²⁹⁷ Opposition to public education came naturally to southern white evangelicals, who often paid tuition to send their children to segregated private academies.¹²⁹⁸ Calls to end government antipoverty programs resonated with those who preferred Christian charity to government “handouts.”¹²⁹⁹ Moreover, the Christian “gospel of success” fit well with a libertarian economic message that resonated with the white, prosperous, suburban Christians who packed megachurches in the 1970s and 1980s.¹³⁰⁰

The severe economic recession of the early 1970s followed by stagflation — high unemployment combined with high inflation and slow growth — helped delegitimize Keynesian economics and bolster the standing of libertarians such as Friedman and George Stigler, who favored tax cuts, restrictive monetary policy, and economic deregulation.¹³⁰¹ Through the funding of Scaife, the Institute for Contemporary Studies in California linked some of these libertarian theorists with conservative political activists, such as then-Governor Reagan’s advisor Edwin Meese.¹³⁰² Anthony Kennedy, later President Reagan’s third appointment to the Supreme Court, was the Institute’s vice president.¹³⁰³

¹²⁹⁴ See *infra* section III.E, pp. 195–211.

¹²⁹⁵ See HACKER & PIERSON, *supra* note 352, at 249–50.

¹²⁹⁶ ABRAJANO & HAJNAL, *supra* note 1015, at 37–38, 131–33, 158; Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html [https://perma.cc/Y2Z2-S9EL].

¹²⁹⁷ See MACLEAN, *supra* note 65, at xxix; WILLIAMS, *supra* note 984, at 171–74.

¹²⁹⁸ JONES, *supra* note 1071, at 162–63.

¹²⁹⁹ *Id.* at 26.

¹³⁰⁰ See *id.*

¹³⁰¹ See BURGIN, *supra* note 1249, at 203–04; HACKER & PIERSON, *supra* note 352, at 167–68, 173–74, 192; MACLEAN, *supra* note 65, at 136.

¹³⁰² MACLEAN, *supra* note 65, at 120–22.

¹³⁰³ *Id.* at 121.

In his 1981 inaugural address, President Reagan declared: “[G]overnment is not the solution to our problem, government is the problem.”¹³⁰⁴ Five years later, he quipped: “The nine most terrifying words in the English language are, ‘I’m from the government, and I’m here to help.’”¹³⁰⁵ Beginning around 1980, media began frequently using the pejorative term “big government.”¹³⁰⁶ Capitalists became “entrepreneurs” and then “job creators.”¹³⁰⁷

The neo-Ayn Randians helped convince tens of millions of Americans to distrust and even disdain their government.¹³⁰⁸ During Eisenhower’s presidency, more than seventy percent of Americans said they trusted the federal government to do the right thing most of the time.¹³⁰⁹ By 1980, that number was down to twenty-five percent, and it has fallen further since then.¹³¹⁰ Vietnam and Watergate contributed to Americans’ declining trust in government, but so did the neo-Ayn Randians.¹³¹¹

The Reagan Administration enacted massive tax cuts, including reducing income tax rates on top earners, which had been as high as 90% after World War II, from 70% to 50% in 1981 and then to 38.5% in 1986.¹³¹² President Reagan also cut funding for rent subsidies and public housing in half and forced a million Americans off of food stamps.¹³¹³ He tried to privatize Social Security, before backpedaling under enormous political pressure.¹³¹⁴ His first treasury secretary, Donald Regan, eliminated many regulations that had restrained finance since the New Deal, permitting the pooling of mortgages into mortgage-backed securities and company stock buybacks.¹³¹⁵

Tax increases became anathema to Republican politicians, even in the face of enormous budget deficits.¹³¹⁶ Beginning in 1986, Americans

¹³⁰⁴ David Lazarus, *Reagan Was Wrong. Government Isn’t the Problem, as the Pandemic Makes Clear*, L.A. TIMES (Apr. 28, 2020, 5:00 AM), <https://www.latimes.com/business/story/2020-04-28/coronavirus-role-of-government> [<https://perma.cc/78AR-VK5U>].

¹³⁰⁵ E.J. Dionne Jr., Opinion, *Hating the Government Won’t Improve It*, WASH. POST (Jan. 20, 2019, 6:36 PM), https://www.washingtonpost.com/opinions/hating-the-government-wont-improve-it/2019/01/20/ff80944c-1b66-11e9-8813-cb9dec761e73_story.html [<https://perma.cc/5QLU-2X72>].

¹³⁰⁶ HACKER & PIERSON, *supra* note 352, at 169.

¹³⁰⁷ *Id.* at 170–71.

¹³⁰⁸ *See id.* at 196–97.

¹³⁰⁹ *Id.* at 197.

¹³¹⁰ *Id.*; Sabrina Tavernise, *Will the Coronavirus Kill What’s Left of Americans’ Faith in Washington?*, N.Y. TIMES (May 23, 2020), <https://nyti.ms/3cXJk6E> [<https://perma.cc/RM45-DKAC>].

¹³¹¹ *See* HACKER & PIERSON, *supra* note 352, at 197–98.

¹³¹² MOUNK, *supra* note 31, at 218.

¹³¹³ *Id.*

¹³¹⁴ *See* Paul C. Light, Opinion, *The Crisis Last Time: Social Security Reform*, BROOKINGS INST. (Mar. 5, 2005), <https://www.brookings.edu/opinions/the-crisis-last-time-social-security-reform> [<https://perma.cc/WJ8Q-3T6G>]; *see also* MACLEAN, *supra* note 65, at 177–82.

¹³¹⁵ HACKER & PIERSON, *supra* note 352, at 177.

¹³¹⁶ *Id.* at 243; KLEIN, *supra* note 347, at 13–14.

for Tax Reform exacted pledges from Republican candidates not to raise taxes under any circumstances.¹³¹⁷ Running for President in 1988, Vice President George H.W. Bush promised “no new taxes.”¹³¹⁸ The neo-Ayn Randians never forgave him for reneging on that pledge.¹³¹⁹ Learning a lesson from his father’s experience, President George W. Bush pushed through two enormous tax cuts during his first term in office.¹³²⁰ Moreover, Republicans increasingly abandoned the idea of progressivity in the tax system, cutting taxes on the wealthiest Americans, including estate taxes and capital gains taxes.¹³²¹

In the 1990s and early 2000s, the Republican Party and business organizations such as the Chamber of Commerce and the Business Roundtable came increasingly under the sway of neo-Ayn Randians.¹³²² In 1994, the party embraced the Contract with America — drafted mainly by libertarian Representative Dick Armey with assistance from the Cato Institute — which promised tax cuts, a balanced budget, and reform of Social Security, welfare, and tort law.¹³²³ Elected Speaker of the House after that year’s election, Newt Gingrich sought to paralyze the federal government, hoping that Americans would blame both parties equally, to the benefit of the programmatically antigovernment Republicans.¹³²⁴ In 1997, House Republican leaders pressured the formerly nonpartisan Business Roundtable to cease donations to Democrats or else be denied access to congressional Republicans.¹³²⁵ The Chamber of Commerce also shifted to the right, increasingly funding only Republican candidates.¹³²⁶

The Democratic Party was not impervious to the seduction of neo-Ayn Randian ideas and oligarchic money.¹³²⁷ After the Republicans’ landslide victory in the 1994 congressional elections, President Clinton declared that “[t]he era of big government is over.”¹³²⁸ In 1996, he supported drastic cuts to welfare.¹³²⁹ His Administration supported financial deregulation that contributed to the economic collapse of 2008 and

¹³¹⁷ MANN & ORNSTEIN, *supra* note 996, at 55–56.

¹³¹⁸ KABASERVICE, *supra* note 939, at 371.

¹³¹⁹ *See id.* at 373.

¹³²⁰ MANN & ORNSTEIN, *supra* note 996, at 122.

¹³²¹ HACKER & PIERSON, *supra* note 352, at 243–44.

¹³²² *See id.* at 202–20, 243–45.

¹³²³ *See* MACLEAN, *supra* note 65, at 190–93.

¹³²⁴ MANN & ORNSTEIN, *supra* note 996, at 39–40.

¹³²⁵ HACKER & PIERSON, *supra* note 352, at 207–08.

¹³²⁶ *See id.* at 213, 220–21.

¹³²⁷ *Id.* at 191; PAGE & GILENS, *supra* note 533, at 103–04, 107–10.

¹³²⁸ David Weigel, *The Era of Big Government*, SLATE (July 19, 2012, 9:53 AM), <https://slate.com/news-and-politics/2012/07/the-era-of-big-government.html> [<https://perma.cc/6NQQ-N35Y>].

¹³²⁹ *See* Jordan Weissmann, *The Failure of Welfare Reform*, SLATE (June 1, 2016, 5:30 AM), <https://slate.com/news-and-politics/2016/06/how-welfare-reform-failed.html> [<https://perma.cc/2JCA-2327>].

free trade agreements that contributed to the loss of hundreds of thousands of American jobs.¹³³⁰ Even President Clinton's appointments to the Supreme Court, Justices Ginsburg and Breyer, compiled voting records on business issues that are more conservative than those of most Democratic appointees in the preceding decades.¹³³¹

The Koch brothers, owners of the nation's second-largest private corporation, which has annual revenues of more than \$115 billion, began systematically investing in politics in 2010, the year the Supreme Court invalidated limits on corporate political spending.¹³³² The Kochs have held biannual summits, each of which raises tens of millions of dollars and is attended by other wealthy conservative donors, Republican Party leaders, conservative Supreme Court Justices, and right-wing media personalities.¹³³³ The entire Koch political network raised about \$400 million for conservative Republican candidates in the 2012 election cycle and reportedly planned to spend around \$900 million in 2016.¹³³⁴ The Koch political network employs three times as many people as the Republican Party.¹³³⁵

The political influence of Koch money has been most apparent in Republican environmental policies.¹³³⁶ The number of Americans believing in human-caused climate change dropped dramatically between 2007 and 2011,¹³³⁷ coinciding precisely with the Kochs' first big political investments.¹³³⁸ The Koch-funded Club for Growth financed primary challengers to any Republican who dared to treat climate change as a serious problem; today, almost none of them remain.¹³³⁹ Koch-funded state attorneys general litigated against Obama Administration environmental policies, and climate change deniers dominate the Trump Administration's political appointees to the EPA and the Interior Department.¹³⁴⁰

¹³³⁰ SITARAMAN, *supra* note 1292, at 17; Jeff Faux, *NAFTA's Impact on U.S. Workers*, ECON. POL'Y INST. (Dec. 9, 2013, 4:00 PM), <https://www.epi.org/blog/naftas-impact-workers> [<https://perma.cc/C7AV-7UHP>].

¹³³¹ See ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA* 244 (2020).

¹³³² See HACKER & PIERSON, *supra* note 352, at 228–29, 234; MAYER, *supra* note 354, at 293–96.

¹³³³ HACKER & PIERSON, *supra* note 352, at 235–36; MAYER, *supra* note 354, at 16–24.

¹³³⁴ MAYER, *supra* note 354, at 384–87, 405, 451–55; PAGE & GILENS, *supra* note 533, at 99.

¹³³⁵ MACLEAN, *supra* note 65, at xxxiii.

¹³³⁶ See HACKER & PIERSON, *supra* note 352, at 291–95; MAYER, *supra* note 354, at 386–87.

¹³³⁷ Earl J. Ritchie, *Fact Checking the Claim of a Major Shift in Climate Change Opinion*, FORBES (Jan. 30, 2019, 4:35 PM), <https://www.forbes.com/sites/uhenergy/2019/01/30/fact-checking-the-claim-of-a-major-shift-in-climate-change-opinion/#6349ed3a342e> [<https://perma.cc/K3VS-6LVC>].

¹³³⁸ See MAYER, *supra* note 354, at 293–96.

¹³³⁹ MACLEAN, *supra* note 65, at 216–17; MAYER, *supra* note 354, at 341–42.

¹³⁴⁰ MACLEAN, *supra* note 65, at 217; Emily Holden, *Climate Change Skeptics Run the Trump Administration*, POLITICO (Mar. 7, 2018, 5:07 AM), <https://www.politico.com/story/2018/03/07/trump-climate-change-deniers-443533> [<https://perma.cc/Z9UY-USPD>].

The neo-Ayn Randians have also undermined faith in public education and mobilized support for the privatization of other public services, such as prisons.¹³⁴¹ Think tanks such as Cato and Heritage have conducted relentless campaigns to privatize Social Security.¹³⁴²

The neo-Ayn Randians have also undermined the power of labor unions.¹³⁴³ The unionized share of the American labor force declined from thirty-three percent in 1955 to eleven percent in 2015.¹³⁴⁴ Some of that decline is attributable to automation and global wage competition, but comparative international analysis suggests that antiunion public policies promoted by Koch-funded conservative think tanks and enacted by Republican legislatures have played a large role.¹³⁴⁵

Since 2010, the neo-Ayn Randians have also achieved great success at the state level.¹³⁴⁶ After Republicans took control of the North Carolina legislature in 2010, they rejected Medicaid expansion, eliminated the earned income tax credit for poor workers, dramatically reduced unemployment benefits, cut pre-kindergarten education, shifted money from public education to voucher schools, cut taxes on the wealthy, and imposed some of the nation's toughest restrictions on voting.¹³⁴⁷ In Wisconsin, where Republicans enacted similar policies, voters sought to recall Governor Scott Walker, leading wealthy conservative donors to spend tens of millions of dollars defending him.¹³⁴⁸ In Kansas and Louisiana, radical neo-Ayn Randian experiments in tax cutting led to massive budget deficits and emaciated public education systems.¹³⁴⁹

Ayn Randian economic philosophy has always entailed at best a tentative commitment to democracy: the large number of “takers” were likely to vote for public policies that burdened society’s “makers.”¹³⁵⁰ By the end of their careers, the postwar generation of libertarian economists

¹³⁴¹ See KAUFMAN, *supra* note 1280, at 119–20; Michelle Chen, *Beware of Big Philanthropy's New Enthusiasm for Criminal Justice Reform*, THE NATION (Mar. 16, 2018), <https://www.thenation.com/article/archive/beware-of-big-philanthropys-new-enthusiasm-for-criminal-justice-reform> [<https://perma.cc/FX9B-X399>].

¹³⁴² See PAGE & GILENS, *supra* note 533, at 87, 127.

¹³⁴³ See COHEN, *supra* note 1331, at 214–15, 222–23.

¹³⁴⁴ PAGE & GILENS, *supra* note 533, at 133.

¹³⁴⁵ See COHEN, *supra* note 1331, at 215, 222–23; PAGE & GILENS, *supra* note 533, at 133–34.

¹³⁴⁶ See, e.g., MACLEAN, *supra* note 65, at 103, 220.

¹³⁴⁷ BERMAN, *supra* note 7, at 294–95; MAYER, *supra* note 354, at 414–21.

¹³⁴⁸ See KAUFMAN, *supra* note 1280, at 114, 125, 174–75, 235; PAGE & GILENS, *supra* note 533, at 93–94.

¹³⁴⁹ See Russell Berman, *The Death of Kansas's Conservative Experiment*, THE ATLANTIC (June 7, 2017), <https://www.theatlantic.com/politics/archive/2017/06/kansas-conservative-tax-experiment-is-dead/529551> [<https://perma.cc/R6NZ-6AZM>]; Melinda Deslatte, “Out of Tricks:” How Louisiana Gov. Bobby Jindal Has Driven State to \$1.6B Budget Deficit, THE ADVOCATE (Jan. 8, 2018, 5:50 PM), https://www.theadvocate.com/baton_rouge/news/politics/article_748fd66c-3a79-56be-9bd7-8fc8df954c8e.html [<https://perma.cc/AVB2-HHKR>].

¹³⁵⁰ See BURGIN, *supra* note 1249, at 118–19; MACLEAN, *supra* note 65, at 151, 154–55.

had concluded that democratic politics was insufficiently protective of property rights.¹³⁵¹ One proposed solution was a constitutional mechanism to constrain majoritarian redistribution, such as a balanced-budget amendment, which the neo-Ayn Randians began advocating in the 1980s to cap federal government spending at pre-New Deal levels.¹³⁵² Another solution was to limit voting rights, much as the Framers had envisioned.¹³⁵³ Thus, James Buchanan and Dean Henry Manne, another libertarian scholar from the field of law and economics, opposed the National Voter Registration Act of 1993 because they feared it would abet socialism by facilitating the registration of less affluent voters.¹³⁵⁴

Beginning in the 1980s, Republicans had succeeded in enacting neo-Ayn Randian policies that most Americans did not support because white Christians were more focused on racially and religiously inflected issues, such as abortion, gay rights, welfare, affirmative action, and crime.¹³⁵⁵ Yet the political “coalition of the ascendant” enabled by demographic change and ignited by the candidacy of Barack Obama set off alarm bells in those circles.¹³⁵⁶ Rather than modulating their extreme libertarian agenda to appeal to more voters, however, Republicans turned instead to voter suppression: if Americans declined to embrace libertarian economics, they must “be forced to be free.”¹³⁵⁷

As a result of the neo-Ayn Randians’ relentless assault on government, the United States, still the wealthiest nation in the world, no longer ranks near the top in terms of health and education.¹³⁵⁸ The United States led the world in expanding access to high school education in the early 1900s and to college education after World War II, but today it falls in the middle of the pack in those areas and near the bottom in early childhood education.¹³⁵⁹ Much larger socioeconomic disparities in educational quality, funding, and outcomes exist in the United States than in other wealthy nations.¹³⁶⁰ Most Americans would like their government to make higher education more affordable, but Congress has failed to act.¹³⁶¹

¹³⁵¹ See MACLEAN, *supra* note 65, at 151.

¹³⁵² See MANN & ORNSTEIN, *supra* note 996, at 118.

¹³⁵³ See BURGIN, *supra* note 1249, at 118–19; KLARMAN, FRAMERS’ COUP, *supra* note 340, at 178.

¹³⁵⁴ See MACLEAN, *supra* note 65, at 197.

¹³⁵⁵ See HACKER & PIERSON, *supra* note 352, at 252, 257–59.

¹³⁵⁶ See Ari Berman, *The GOP’s Voter Suppression Strategy*, THE NATION (Nov. 20, 2012), <https://www.thenation.com/article/archive/gops-voter-suppression-strategy> [<https://perma.cc/JD5N-SDY5>].

¹³⁵⁷ MACLEAN, *supra* note 65, at 207.

¹³⁵⁸ See HACKER & PIERSON, *supra* note 352, at 14–15.

¹³⁵⁹ See *id.* at 32–33, 35.

¹³⁶⁰ See *id.* at 34–35.

¹³⁶¹ See PAGE & GILENS, *supra* note 533, at 77–78.

In the postwar decades, the United States dominated the rest of the world in government funding of basic science, which eventually produced innovations such as radar, the Global Positioning System (GPS), advanced medical technology, robotics, and computer systems.¹³⁶² However, from the mid-1960s to the late 1990s, such spending fell from 2% of GDP to about 0.7%, placing the United States ninth in the world.¹³⁶³ Infrastructure modernization, such as high-speed rail travel, which would accelerate economic growth and be very popular among Americans, has not happened because Republicans will not raise the taxes necessary to fund it.¹³⁶⁴ More generally, Republicans have dramatically cut the size of the federal workforce relative to the nation's population, disabling Congress and administrative agencies from doing their jobs effectively.¹³⁶⁵

Deliberate sabotaging of government cost people's lives even before the coronavirus pandemic hit. Americans pay roughly twice as much per person for healthcare as the rest of the world, yet nonetheless experience higher infant mortality rates, shorter life expectancies, and more suffering from preventable diseases, mainly because the neo-Ayn Randians resist government provision of healthcare or even government bargaining with private industry over prescription drug prices.¹³⁶⁶ Reducing the budgets of the Food and Drug Administration and the Federal Aviation Administration translates into fewer inspections of food plants than are necessary to protect citizen health and less oversight of airplane manufacturers than is necessary to ensure citizen safety.¹³⁶⁷

Part of the nation's catastrophic response to the coronavirus pandemic is attributable to the neo-Ayn Randians' success in eviscerating government capacity, undermining Americans' confidence in government, and denigrating science and expertise.¹³⁶⁸ The neo-Ayn Randians have long regarded science as an enemy because it demonstrates the need

¹³⁶² See HACKER & PIERSON, *supra* note 352, at 39, 100–01.

¹³⁶³ *Id.* at 39.

¹³⁶⁴ See *id.* at 318–19; PAGE & GILENS, *supra* note 533, at 74–75.

¹³⁶⁵ See HACKER & PIERSON, *supra* note 352, at 322, 343–44.

¹³⁶⁶ See PAGE & GILENS, *supra* note 533, at 83–84.

¹³⁶⁷ See HACKER & PIERSON, *supra* note 352, at 320–21; Michael Laris, Ian Duncan & Lori Aratani, *FAA's Lax Oversight Played Part in Boeing 737 Max Crashes, but Agency Is Pushing to Become More Industry-Friendly*, WASH. POST (Oct. 28, 2019, 6:00 AM), https://www.washingtonpost.com/local/trafficandcommuting/faas-lax-oversight-played-part-in-boeing-737-max-crashes-but-agency-is-pushing-to-become-more-industry-friendly/2019/10/27/bc0bf184-f4e1-11e9-ad8b-85e2aa0b5ce_story.html [<https://perma.cc/SM7K-V6ZU>].

¹³⁶⁸ See Stuart Stevens, *Opinion, Republicans Like Me Built This Moment. Then We Looked the Other Way.*, WASH. POST (Mar. 18, 2020, 8:00 AM), <https://www.washingtonpost.com/opinions/2020/03/18/elections-have-consequences-slow-response-virus-is-one-them> [<https://perma.cc/NJT8-GBWA>].

to regulate industries such as tobacco, food, pharmaceuticals, and oil and gas.¹³⁶⁹

By May 2020, despite a consensus among public health experts to maintain social distancing requirements, the neo-Ayn Randians had urged President Trump to reopen the economy because getting sick was better than “kill[ing] the country” and mass shutdowns were a liberal plot to impose socialism on the nation.¹³⁷⁰ Majority Leader McConnell declared his opposition to another coronavirus relief package unless it included liability protection for employers and businesses sued by people sickened by the coronavirus on their premises.¹³⁷¹ Republicans labeled Dr. Anthony Fauci, the nation’s top infectious disease expert, an “agent of the ‘deep state’” who deliberately undermined President Trump.¹³⁷² Conservative religious leaders attributed church shutdowns to a “perverse, even demonic atmosphere” that prevented people from practicing their faith.¹³⁷³ Many of President Trump’s supporters disbelieved the prognoses and prescriptions of scientists, which Democrats tended to trust.¹³⁷⁴ By early July, daily records of coronavirus cases were being set in the states that had reopened their economies first.¹³⁷⁵

D. Economic Inequality

To say that racial resentment enabled Trump’s election is not to deny that conditions of economic inequality also contributed significantly to his victory,¹³⁷⁶ and, in turn, to the degradation of American democracy. Scholars have shown that democracy fares best when the working class

¹³⁶⁹ See David Robert Grimes, *Libertarian Ideology Is the Natural Enemy of Science*, THE GUARDIAN (Aug. 29, 2014, 2:00 AM), <https://www.theguardian.com/science/blog/2014/aug/29/libertarian-ideology-natural-enemy-science> [https://perma.cc/FLS6-FDAZ].

¹³⁷⁰ Shepherd, *supra* note 901; see Paul Farhi & Sarah Ellison, *The Fox News Whipsaw on Coronavirus: In Another Swerve, Hosts Push Trump to Abandon Shutdown*, WASH. POST (Mar. 24, 2020, 9:42 PM), https://www.washingtonpost.com/lifestyle/media/the-fox-news-whipsaw-on-coronavirus-in-another-swerve-hosts-push-trump-to-abandon-shutdown/2020/03/24/b684cbce-6dee-11ea-aa80-c2470c6b2034_story.html [https://perma.cc/X3GD-BJFX].

¹³⁷¹ See Erica Werner, Jeff Stein & Rachael Bade, *McConnell Calls for Five-Year Lawsuit Shield for Businesses as Part of Next Coronavirus Bill*, WASH. POST (July 6, 2020, 3:41 PM), <https://www.washingtonpost.com/us-policy/2020/07/06/congress-departed-two-week-recess-without-addressing-coronavirus-spikes-economic-strains> [https://perma.cc/ZH84-CACZ].

¹³⁷² See, e.g., Isaac Stanley-Becker, *As Trump Signals Readiness to Break with Experts, His Online Base Assails Fauci*, WASH. POST (Mar. 26, 2020, 7:04 PM), https://www.washingtonpost.com/politics/as-trump-signals-readiness-to-break-with-experts-his-online-base-assails-fauci/2020/03/26/3802de14-6df6-11ea-aa80-c2470c6b2034_story.html [https://perma.cc/KX44-GFXN].

¹³⁷³ Shepherd, *supra* note 901.

¹³⁷⁴ Margot Sanger-Katz, *On Coronavirus, Americans Still Trust the Experts*, N.Y. TIMES (Sept. 18, 2020), <https://nyti.ms/386f3AN> [https://perma.cc/UC9W-8NLF].

¹³⁷⁵ Lazaro Gamio, *How Coronavirus Cases Have Risen Since States Reopened*, N.Y. TIMES (July 9, 2020), <https://nyti.ms/3ebrvRf> [https://perma.cc/53VZ-8SPJ].

¹³⁷⁶ See, e.g., ABRAMOWITZ, *supra* note 346, at 152–53; PIPPA NORRIS & RONALD INGLEHART, CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM 354 (2019).

enjoys economic prosperity and that deteriorating economic conditions render such voters vulnerable to the appeal of autocratic demagogues.¹³⁷⁷ Voters who in an earlier day might have conceived of themselves primarily as factory workers or miners now mainly see themselves as victimized whites, resentful of immigrants and liberal elites who support free trade and open borders.¹³⁷⁸

The golden age of economic equality in the United States was roughly the half century beginning with the Great Depression.¹³⁷⁹ From approximately 1935 to 1960, the income of the median American household doubled and then doubled again by 1985.¹³⁸⁰ Income inequality, as measured by the share of income held by the wealthiest one percent of the country, shrank roughly by half.¹³⁸¹ During those years, blue-collar workers without college degrees could buy homes and send children to college on a single income, and their offspring were likely to fare even better economically.¹³⁸²

However, over the following decades, even though the productivity of American workers nearly doubled, worker incomes in inflation-adjusted dollars barely rose at all.¹³⁸³ Technological innovations that reduced demand for relatively low-skill labor and growing competition from low-wage workers in other nations explain some of that stagnation.¹³⁸⁴ In addition, a larger share of gross national product went to managers and stockholders.¹³⁸⁵ The result of such developments is that working-class families have been squeezed economically, and their children are less likely than those of previous generations to achieve upward mobility.¹³⁸⁶

As incomes of the working class have stagnated while those of the affluent have skyrocketed, economic inequality in the United States has exploded.¹³⁸⁷ The share of income accruing to the richest Americans today matches that of the late 1920s.¹³⁸⁸ In 2007, the top one percent of earners received nearly twenty-five percent of all national income, and

¹³⁷⁷ See DIAMOND, *supra* note 28, at 26–27, 31–32, 154–55; MOUNK, *supra* note 31, at 15, 156; Huq & Ginsburg, *supra* note 36, at 81, 102.

¹³⁷⁸ See MOUNK, *supra* note 31, at 232–34.

¹³⁷⁹ See PAGE & GILENS, *supra* note 533, at 27, 246–47.

¹³⁸⁰ MOUNK, *supra* note 31, at 15, 154; see also PAGE & GILENS, *supra* note 533, at 41.

¹³⁸¹ See MOUNK, *supra* note 31, at 152–53.

¹³⁸² Cf. PAGE & GILENS, *supra* note 533, at 27, 247 (noting that “[a]verage workers could expect ever-increasing prosperity for themselves and their children” in the 1950s and 1960s, *id.* at 27).

¹³⁸³ *Id.* at 28–29; see HACKER & PIERSON, *supra* note 352, at 35.

¹³⁸⁴ See PAGE & GILENS, *supra* note 533, at 43–44.

¹³⁸⁵ See *id.* at 29.

¹³⁸⁶ See *id.* at 28–30.

¹³⁸⁷ *Id.* at 30 (noting economist Thomas Piketty’s characterization of the recent increase in income inequality as an “explosion”).

¹³⁸⁸ *Id.*

half of that went to the top 0.1%.¹³⁸⁹ Top earners today enjoy salaries on average 320 times that of ordinary workers, as compared with a 21-to-1 ratio in 1965.¹³⁹⁰

Wealth is distributed even more unequally. Since 1986, the total wealth of the United States has increased by ninety percent, but only one percent of that went to the least affluent ninety percent of Americans, while forty-two percent accrued to the top 0.1%.¹³⁹¹ The United States is by far the most unequal wealthy nation in the world today.¹³⁹² In 2019, the Federal Reserve Board reported that thirty-nine percent of Americans said they would not be able to come up with \$400 in an emergency.¹³⁹³

The declining economic status of America's working class has had adverse health consequences. The life expectancy of white working-class Americans has fallen as a result of increasing "deaths of despair" — suicides, drug overdoses, and alcohol-related deaths.¹³⁹⁴ Members of the white working class aged forty-five to fifty-four are four times as likely to die as those in the same age group with a college degree.¹³⁹⁵ The United States ranked last in a study of life expectancy across seventeen wealthy nations.¹³⁹⁶ Some working-class Americans suffer constant pain, probably due at least in part to the lack of universal healthcare that prevents them from ameliorating their pain with drugs or medical treatment.¹³⁹⁷

Economic dislocation can also mean lives lacking in "structure, status[,] and meaning."¹³⁹⁸ Those who remain employed may have jobs in which they are given little advance notice of which days or hours they

¹³⁸⁹ HACKER & PIERSON, *supra* note 352, at 183.

¹³⁹⁰ Lawrence Mishel & Jori Kandra, *CEO Compensation Surged 14% in 2019 to \$21.3 Million*, ECON. POL'Y INST. (Aug. 18, 2020), <https://epi.org/204513> [<https://perma.cc/78HQ-G9QN>] (studying ratios of compensation of chief executive officers to that of average workers); *see also* PAGE & GILENS, *supra* note 533, at 31.

¹³⁹¹ MOUNK, *supra* note 31, at 218.

¹³⁹² *See* HACKER & PIERSON, *supra* note 352, at 36 (comparing inequality in the United States to that of "other rich countries").

¹³⁹³ BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 (2019), <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm> [<https://perma.cc/AVD8-PD3M>].

¹³⁹⁴ ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM 37 (2020); *see* Paul Krugman, Opinion, *America's Red State Death Trip*, N.Y. TIMES (Dec. 2, 2019), <https://nyti.ms/2DFoNDK> [<https://perma.cc/JS4Z-CM6E>] [hereinafter Krugman, *Red State Death Trip*].

¹³⁹⁵ HACKER & PIERSON, *supra* note 352, at 31; *see also* David Leonhardt & Stuart A. Thompson, Opinion, *How Working-Class Life Is Killing Americans*, in *Charts*, N.Y. TIMES (Mar. 6, 2020), <https://nyti.ms/2VO7oEP> [<https://perma.cc/VR94-95QN>].

¹³⁹⁶ HACKER & PIERSON, *supra* note 352, at 30.

¹³⁹⁷ *See* Nicholas Kristof, Opinion, *The Hidden Depression Trump Isn't Helping*, N.Y. TIMES (Feb. 8, 2020), <https://nyti.ms/2H5HH8z> [<https://perma.cc/R6VQ-TLNF>].

¹³⁹⁸ Leonhardt & Thompson, *supra* note 1395.

will work.¹³⁹⁹ Those who are not officially employed by the companies for which they work are deprived not only of benefits such as health insurance but also of the sense of identity and connection that can be derived from being part of a shared enterprise, as miners and factory workers once were.¹⁴⁰⁰

America is increasingly a country of two different economies, rapidly growing farther apart and correlated strongly with political affiliation.¹⁴⁰¹ Voters living in Democratic-leaning counties tend to be wealthier, better educated, and more productive.¹⁴⁰² In 1990, people in red and blue states had nearly the same life expectancies.¹⁴⁰³ In 2016, however, people living in blue states had life expectancies similar to those in more advanced countries, while the life expectancies of red-state inhabitants were roughly four years lower.¹⁴⁰⁴

Other nations facing the same forces of international trade and labor-saving technology as those confronting the United States have used public policies to mitigate economic hardship.¹⁴⁰⁵ Government interventions can occur before or after market allocations of income.¹⁴⁰⁶ More aggressive antitrust enforcement, support for labor unions, and prohibitions on noncompete and forced arbitration contract provisions influence income distribution before the market allocates it.¹⁴⁰⁷ Higher taxes on top incomes, more expansive healthcare coverage, and wage supplements redistribute income after the market has allocated it.¹⁴⁰⁸

The main reasons for these differences between the United States and other nations are the influence of the neo-Ayn Randians on American public policy and the Supreme Court's campaign finance rulings that enable that influence.¹⁴⁰⁹ Most Americans favor policies to reduce income and wealth inequality,¹⁴¹⁰ but the Republican Party blocks them. This is a self-perpetuating cycle, in which extreme economic inequality translates into political inequality, which in turn

¹³⁹⁹ See *id.*

¹⁴⁰⁰ See *id.*

¹⁴⁰¹ Krugman, *Red State Death Trip*, *supra* note 1394; Mark Muro & Jacob Whiton, *America Has Two Economies — And They're Diverging Fast*, BROOKINGS INST. (Sept. 19, 2019), <https://brook.gs/2QQCaH7> [<https://perma.cc/4RYL-XFJH>].

¹⁴⁰² Krugman, *Red State Death Trip*, *supra* note 1394.

¹⁴⁰³ *Id.*; see also Ali H. Mokdad et al., *The State of US Health, 1990–2016: Burden of Diseases, Injuries, and Risk Factors Among US States*, 319 J. AM. MED. ASS'N 1444, 1452 tbl.3 (2018).

¹⁴⁰⁴ See Mokdad et al., *supra* note 1403, at 1449–50; Krugman, *Red State Death Trip*, *supra* note 1394.

¹⁴⁰⁵ See MOUNK, *supra* note 31, at 220; PAGE & GILENS, *supra* note 533, at 45.

¹⁴⁰⁶ See PAGE & GILENS, *supra* note 533, at 36–38.

¹⁴⁰⁷ See *id.* at 36–37, 47–48.

¹⁴⁰⁸ See *id.* at 37, 45.

¹⁴⁰⁹ See *supra* section II.C, pp. 135–48; *infra* section III.E, pp. 195–211.

¹⁴¹⁰ PAGE & GILENS, *supra* note 533, at 48–49.

weakens the democratic processes typically used by citizens to address economic inequalities.¹⁴¹¹

Such an arrangement may not be indefinitely sustainable because ordinary citizens will eventually revolt against a political system that produces vast and worsening economic inequality. If that political system is ostensibly democratic, then they may turn instead to authoritarianism.¹⁴¹²

The peculiarity of President Trump's political coalition, which does not differ much from that of the Republican Party in recent decades, is that it combines economic plutocrats with the white working class, two groups whose economic interests seem fundamentally at odds with one another's. One recent study found that the real incomes of middle-class and working-poor families have risen significantly faster under Democratic Presidents than under Republican ones since the 1940s.¹⁴¹³ So why has the white working class become so Republican?

Trump won the Republican nomination and the general election by appealing to the resentment and fears of the white working class and conservative Christians and by endorsing populist economic policies that distinguished him from traditional Republican candidates.¹⁴¹⁴ The neo-Ayn Randians did not generally support him in the Republican primaries, but they did not desert him for Hillary Clinton in the general election.¹⁴¹⁵

In terms of race and religion, President Trump has mostly governed as he campaigned. As we have seen, he has stoked racial resentment at every turn and given conservative Christians most of what he promised them.¹⁴¹⁶ Yet with just a few possible exceptions, such as his trade war with China, his economic agenda has been that of the neo-Ayn Randians, not of economic populists.¹⁴¹⁷

President Trump's Cabinet contains more plutocrats than any in history.¹⁴¹⁸ One of his Administration's first major domestic initiatives was the repeal of the ACA, which would have cost over thirty million

¹⁴¹¹ See *id.* at 49–50.

¹⁴¹² See DIAMOND, *supra* note 28, at 26–27; MOUNK, *supra* note 31, at 130–31, 156, 261.

¹⁴¹³ LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 36–37 (2d ed. 2016); see also *id.* at 71–72.

¹⁴¹⁴ See PAGE & GILENS, *supra* note 533, at 103–04; SIDES ET AL., *supra* note 585, at 77–79.

¹⁴¹⁵ See, e.g., Louis Nelson, *Ryan: I Have to Support Trump*, POLITICO (June 19, 2016, 9:02 AM), <https://www.politico.com/story/2016/06/ryan-trump-responsibility-paul-donald-224521> [https://perma.cc/8GER-3TQ8].

¹⁴¹⁶ See *supra* pp. 123–24, 134–35; Marc A. Thiessen, Opinion, *Why Conservative Christians Stick with Trump*, WASH. POST (Mar. 23, 2018, 9:21 AM), https://www.washingtonpost.com/opinions/why-conservative-christians-stick-with-trump/2018/03/23/2766309a-2def-11e8-8688-e053ba58f1e4_story.html [https://perma.cc/4N26-B6BS].

¹⁴¹⁷ See, e.g., KLEIN, *supra* note 347, at 190; SIDES ET AL., *supra* note 585, at 205.

¹⁴¹⁸ ABRAMOWITZ, *supra* note 346, at 171.

Americans, including many who voted for Trump, their health insurance.¹⁴¹⁹ His tax bill was essentially a \$1.5 trillion giveaway to corporations, their shareholders, and other wealthy individuals.¹⁴²⁰ President Trump's ballyhooed infrastructure bill never got off the ground and became a standing joke in Washington, D.C.¹⁴²¹ His trade war with China is not bringing back the manufacturing jobs he promised, and coal has made no comeback under his presidency.¹⁴²² The Administration's proposed budgets include devastating cuts to the social safety net as well as assaults on programs that disproportionately benefit red-state residents who voted for the President.¹⁴²³

Why President Trump has chosen to govern mostly as a plutocrat is an interesting question. The answer may be simply that he does not care about policy, so he was willing to allow neo-Ayn Randian Republican leaders such as former Speaker Ryan and Majority Leader McConnell to set the policy agenda.¹⁴²⁴ In turn, they overlooked President Trump's personal corruption, white nationalism, and incompetence in exchange for tax cuts for the wealthy, environmental deregulation, and conservative judges.¹⁴²⁵

E. Asymmetric Political Polarization, the Right-Wing Media Ecosystem, Asymmetric Hardball, and Negative Partisanship

Sections A through D of this Part explained how various factions of the Republican political coalition have lost their enthusiasm for democracy as they came to doubt their continuing ability to win elections and secure favored policies democratically. This section examines how specific features of the American political system have advantaged

¹⁴¹⁹ See Krugman, *Trickled Down*, *supra* note 810; Jeff Guo, *The GOP's Obamacare Replacement Is a Disaster for Some of Its Most Loyal Voters*, WASH. POST (Mar. 13, 2017, 2:00 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/03/10/the-gops-obamacare-replacement-is-a-disaster-for-some-of-its-most-loyal-voters> [https://perma.cc/7Y4P-NN9G].

¹⁴²⁰ SITARAMAN, *supra* note 1292, at 78.

¹⁴²¹ See, e.g., Krugman, *Trickled Down*, *supra* note 810.

¹⁴²² See *id.*; David Von Drehle, Opinion, *Trump Pledged to Bring Back Coal. Like Everything Under Him, It Collapsed Instead.*, WASH. POST (June 12, 2020, 3:21 PM), https://www.washingtonpost.com/opinions/trump-pledged-to-bring-back-coal-like-everything-under-him-it-collapsed-instead/2020/06/12/1fa8bed6-accd-11ea-9063-e69bd6520940_story.html [https://perma.cc/8JTC-MF27].

¹⁴²³ See Andrew Restuccia, Matthew Nussbaum & Sarah Ferris, *Trump Releases Budget Hitting His Own Voters Hardest*, POLITICO (May 23, 2017, 1:45 PM), <https://www.politico.com/story/2017/05/22/trump-budget-cut-social-programs-238696> [https://perma.cc/HS9K-ZKBD].

¹⁴²⁴ Krugman, *Trickled Down*, *supra* note 810; see also WOLFF, *supra* note 1229, at 118, 163, 166–67.

¹⁴²⁵ See, e.g., Applebaum, *supra* note 810; Hook, *supra* note 335; Krugman, *Trickled Down*, *supra* note 810.

Republicans and inclined them to accommodate President Trump despite the threat he poses to basic democratic norms and his obvious unfitness for office.

I. Political Polarization. — How did such an unqualified demagogue with an authoritarian bent get so close to the presidency in the first place?

The most striking feature of the voting patterns in 2016 is how similar they were to those of 2012 despite Trump's being such an unorthodox candidate.¹⁴²⁶ Trump won fifty-two percent of male voters, the same as Romney did four years earlier, and his share of the female vote was only three percentage points lower than Romney's share.¹⁴²⁷ Trump won fifty-seven percent of white voters while Romney had won fifty-nine percent.¹⁴²⁸ Romney won twenty-seven percent of Latino voters while Trump won twenty-eight percent, despite his statements that many Mexican immigrants were criminals and rapists.¹⁴²⁹ Trump won eighty-one percent of white evangelical voters, as compared with Romney's seventy-eight percent.¹⁴³⁰ Trump won eighty-eight percent of self-identified Republicans, down from Romney's ninety-three percent, despite Trump's having been a Democrat not long ago and possessing none of the traditional ties to the Republican Party.¹⁴³¹

Only because of the extent to which American politics has become polarized was it possible for most Republican voters to treat Trump as just another Republican candidate. How did this happen?

In the 1950s, the parties were barely ideologically polarized at all.¹⁴³² The Republican Party had conservative and liberal wings, and so did the Democratic Party, mostly due to the historical accident that southern white conservatives remained overwhelmingly Democratic because of remembered grievances from the Civil War and Reconstruction.¹⁴³³

The parties of this era were also not sorted demographically; they closely resembled one another in terms of race, sex, and marital status.¹⁴³⁴ The primary exceptions were that white southerners were strongly Democratic, Protestants leaned Republican, and liberals were slightly more likely to be Democrats.¹⁴³⁵

The Republican Party's nomination of Senator Goldwater for President in 1964 and his commitment to offering the country "a choice"

¹⁴²⁶ See ABRAMOWITZ, *supra* note 346, at 145.

¹⁴²⁷ KLEIN, *supra* note 347, at xii.

¹⁴²⁸ *Id.*

¹⁴²⁹ *Id.*

¹⁴³⁰ See ABRAMOWITZ, *supra* note 346, at 11–12; FEA, *supra* note 1119, at 5.

¹⁴³¹ KLEIN, *supra* note 347, at xiii.

¹⁴³² See ABRAMOWITZ, *supra* note 346, at 27; KLEIN, *supra* note 347, at 2.

¹⁴³³ See ABRAMOWITZ, *supra* note 346, at 27; KLEIN, *supra* note 347, at 30–31, 135–36.

¹⁴³⁴ See ABRAMOWITZ, *supra* note 346, at 26–27; KLEIN, *supra* note 347, at 37.

¹⁴³⁵ See ABRAMOWITZ, *supra* note 346, at 25–26; KLEIN, *supra* note 347, at 36–37.

rather than “an echo” marked the beginning of the journey toward ideological polarization of the parties.¹⁴³⁶ Yet Senator Goldwater’s massive defeat reinforced, in the short term, the notion that parties had to be ideologically moderate to be electorally competitive.¹⁴³⁷

The parties’ ideological polarization that began in 1964 took decades to complete. As late as 1976, only fifty-four percent of voters believed that the Republican Party was more conservative than the Democratic Party, and almost thirty percent saw no ideological difference.¹⁴³⁸ The heyday of ticket-splitting was the 1970s, and Democrats voted for the opposing party in presidential elections at about three times the rate of Republicans, with many white southerners voting Republican for president and Democratic in other elections.¹⁴³⁹

The correlation between political ideology and party identification increased significantly in 1994, when Republicans gained fifty-four seats in the House and took control of that branch for the first time since 1954.¹⁴⁴⁰ The strategy of Republican Minority Whip Gingrich to “nationalize” congressional elections had worked.¹⁴⁴¹

By 2012, the relationship between political ideology and party identification among white Democrats and white Republicans had strengthened considerably since the 1970s.¹⁴⁴² White liberals had been ten percent of the Republican Party’s coalition in 1972 but were only two percent in 2012, while white moderates fell from forty-two percent to eighteen percent of Republican voters.¹⁴⁴³ White conservatives had become two-thirds of the party.¹⁴⁴⁴ By contrast, self-identified conservatives were twenty-two percent of white Democratic voters in 1972 but only six percent forty years later.¹⁴⁴⁵

Today’s congressional parties are almost perfectly sorted ideologically: the most conservative Democrat is more liberal than the most liberal Republican.¹⁴⁴⁶ Such extreme ideological polarization can also produce personal polarization as congressional representatives whose ideologies are so different from one another’s may choose to spend less time together socially, leaving fewer opportunities to lay the groundwork for partnership and compromise in the legislative process.¹⁴⁴⁷

¹⁴³⁶ KLEIN, *supra* note 347, at 6; *see also id.* at 6–10.

¹⁴³⁷ *See id.* at 7.

¹⁴³⁸ *See id.*

¹⁴³⁹ *See* ABRAMOWITZ, *supra* note 346, at 32–34.

¹⁴⁴⁰ *See id.* at 45–46.

¹⁴⁴¹ *Id.* at 46; KABASERVICE, *supra* note 939, at 375–76.

¹⁴⁴² ABRAMOWITZ, *supra* note 346, at 52.

¹⁴⁴³ *Id.* at 15.

¹⁴⁴⁴ *Id.*

¹⁴⁴⁵ *Id.* at 52.

¹⁴⁴⁶ *See* MANN & ORNSTEIN, *supra* note 996, at 45; *see also* KLEIN, *supra* note 347, at 36, 136.

¹⁴⁴⁷ *See* PAGE & GILENS, *supra* note 533, at 156–57.

As the parties became ideologically sorted, voters became more partisan — loyal to a party — and the amount of ticket-splitting and crossover voting naturally declined.¹⁴⁴⁸ Over the past half century, the correlation between the share of voters who selected Democrats in House elections and those who selected Democrats in the presidential election has increased from only 0.54 in the 1970s to 0.78 in the 1990s and to 0.94 in 2012.¹⁴⁴⁹ The partisanship effect now dominates any incumbency advantage.¹⁴⁵⁰ In 2016, the same party that won each state's Senate election also won that state's presidential electoral votes for the first time since voters began directly electing senators in 1914.¹⁴⁵¹ Straight-ticket voting has also become dominant at the state legislative level.¹⁴⁵²

That party *identification* is at an all-time low does not contradict the conclusion that voter *partisanship* is at an all-time modern high.¹⁴⁵³ In 2012, only sixty-three percent of voters self-identified as Democratic or Republican.¹⁴⁵⁴ Yet, when pushed to identify their party *preferences*, the vast majority of independents acknowledge that they lean toward one party or the other.¹⁴⁵⁵ As little as five to ten percent of today's electorate is genuinely open to persuasion.¹⁴⁵⁶

Not only are the parties ideologically sorted and Americans more partisan, but also citizens have become increasingly extreme in their views. In other words, not only are conservatives now overwhelmingly Republican and liberals overwhelmingly Democratic, but in addition, conservative Republicans on average are more conservative than they used to be, and liberal Democrats more liberal.¹⁴⁵⁷

On the American National Election Studies (ANES) survey, the percentage of voters reporting themselves in the middle of the ideological spectrum or reporting no ideology at all dropped from forty-nine percent in 1972 to thirty-five percent in 2012, while the percentage placing themselves at either of the ideological poles increased from twenty-three percent to thirty-nine percent.¹⁴⁵⁸ A related phenomenon is what political scientists call “issue constraint”: people's views on a series of seemingly unrelated policy issues gradually converge with those of the political

¹⁴⁴⁸ ABRAMOWITZ, *supra* note 346, at 2–3.

¹⁴⁴⁹ *See id.* at 62.

¹⁴⁵⁰ *See id.* at 67.

¹⁴⁵¹ Harry Enten, *There Were No Purple* States on Tuesday*, FIVETHIRTYEIGHT (Nov. 10, 2016, 6:06 PM), <https://fivethirtyeight.com/features/there-were-no-purple-states-on-tuesday> [<https://perma.cc/T245-79WX>].

¹⁴⁵² *See* ABRAMOWITZ, *supra* note 346, at 69–71.

¹⁴⁵³ *See id.* at 4; KLEIN, *supra* note 347, at 8–9.

¹⁴⁵⁴ *See* ABRAMOWITZ, *supra* note 346, at 4.

¹⁴⁵⁵ *See id.*; KLEIN, *supra* note 347, at 12.

¹⁴⁵⁶ *See* MANN & ORNSTEIN, *supra* note 996, at 218.

¹⁴⁵⁷ *See* ABRAMOWITZ, *supra* note 346, at 104, 117; KLEIN, *supra* note 347, at 31–32.

¹⁴⁵⁸ *See* ABRAMOWITZ, *supra* note 346, at 103.

party with which they identify.¹⁴⁵⁹ For example, it is not obvious why a voter's views on issues such as gun control, abortion, race-based affirmative action, and welfare would all align with those of a particular political party, but today they increasingly do. About eighty-five percent of voters who identify as either liberal or conservative on social welfare issues now fall into the same camp on cultural issues.¹⁴⁶⁰

Issue constraint is an illustration of how voters came to have political identities.¹⁴⁶¹ First, parties became ideologically sorted as voters gravitated toward the parties with which they were ideologically aligned.¹⁴⁶² Then, parties began to influence their members' views, especially on issues with little ideological resonance.¹⁴⁶³ For example, in 2012, most Republicans accepted presidential candidate Romney's view that Russia was America's most dangerous international foe.¹⁴⁶⁴ After Trump praised President Putin in 2016, however, favorable views of the Russian President among Republicans rose from ten percent to thirty-seven percent, and after two years with President Trump in office, more than half of them deemed Russia an ally.¹⁴⁶⁵ Partisan identity played a critical role in this shift.¹⁴⁶⁶

Party identities become more polarizing as they overlap with characteristics that can be even more divisive than ideology, such as race and religion.¹⁴⁶⁷ As we have seen, over the last few decades, the American electorate has become much more racially diverse, and most of that diversity is concentrated within the Democratic Party.¹⁴⁶⁸ With regard to religion, the Republican Party remains overwhelmingly Christian while the religious affiliation with which the most Democrats

¹⁴⁵⁹ Cf. *id.* at 104–06 (defining issue constraint as the extent to which one's opinions on various policy issues are related because those opinions are shaped by the same underlying ideology).

¹⁴⁶⁰ See *id.* at 117–18.

¹⁴⁶¹ See KLEIN, *supra* note 347, at 69–74.

¹⁴⁶² See *id.* at 135–36.

¹⁴⁶³ See LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 74 (2018); Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 691 (2015).

¹⁴⁶⁴ Cf. KLEIN, *supra* note 347, at 84 (noting that Democrats mocked Romney's view of Russia in 2012 and that Republicans came to view President Putin favorably after Trump did so).

¹⁴⁶⁵ Andrew Prokop, *The Change in Republican Voters' Views of Putin Since Trump's Rise Is Remarkable*, VOX (Dec. 14, 2016, 11:49 AM), <https://www.vox.com/2016/9/9/12865678/trump-putin-polls-republican> [<https://perma.cc/2AWD-YVEX>]; Eugene Scott, *The Majority of Republicans Approve of How Trump Handled the Putin Summit*, WASH. POST (July 19, 2018, 9:32 AM), <https://wapo.st/2Lnx6JS> [<https://perma.cc/75R3-V56S>].

¹⁴⁶⁶ See KLEIN, *supra* note 347, at 84.

¹⁴⁶⁷ See *id.* at 68, 73–74, 136; see also LEVITSKY & ZIBLATT, *supra* note 35, at 220; MASON, *supra* note 1463, at 14.

¹⁴⁶⁸ KLEIN, *supra* note 347, at 37; MANN & ORNSTEIN, *supra* note 996, at 219.

identify today is “none.”¹⁴⁶⁹ The fusing of racial and religious identities with political polarization produces political “mega-identities.”¹⁴⁷⁰

This dynamic is self-reinforcing.¹⁴⁷¹ For example, as Latinos became a more important part of the Democratic coalition, President Obama adopted Deferred Action for Childhood Arrivals, which protected “Dreamers” — undocumented individuals who came to the country when they were children — from deportation.¹⁴⁷² This move angered anti-immigrant Republicans, which helped Trump win the party’s presidential nomination by proposing a wall on the Mexican border and the expulsion of undocumented immigrants.¹⁴⁷³ President Trump’s anti-immigration policies outraged increasingly immigrant-friendly Democrats and incentivized the party to expand its appeals to Latino voters, who are a fast-growing percentage of the electorate.¹⁴⁷⁴ In 2019–2020, many Democratic presidential candidates competing for support in a disproportionately liberal primary electorate endorsed policies such as decriminalizing the border and providing undocumented immigrants with access to health insurance that would have been unimaginable for a Democratic candidate only a few years ago.¹⁴⁷⁵

Once political polarization becomes this extreme, facts may no longer provide a common ground upon which to build political consensus.¹⁴⁷⁶ Deeply held commitments, whether political or not, can engender biased perceptions of facts and motivated reasoning to defend those commitments regardless of facts.¹⁴⁷⁷ The deeper the commitment, the less likely additional factual information will undermine it.¹⁴⁷⁸ Better education and higher intelligence simply enhance one’s ability to construct arguments to defend prior commitments.¹⁴⁷⁹ And abandoning fundamental commitments that define personal identity can be socially alienating and psychologically devastating.¹⁴⁸⁰

¹⁴⁶⁹ KLEIN, *supra* note 347, at 38; *see also id.* at 230.

¹⁴⁷⁰ *Id.* at 70; *see id.* at 68–70; MASON, *supra* note 1463, at 14, 63.

¹⁴⁷¹ KLEIN, *supra* note 347, at 78–79.

¹⁴⁷² *Id.* at 78.

¹⁴⁷³ *See id.* at 78–79.

¹⁴⁷⁴ *Id.* at 79.

¹⁴⁷⁵ *Id.*; Alexander Burns & Jonathan Martin, *Liberal Democrats Ruled the Debates. Will Moderates Regain Their Voices?*, N.Y. TIMES (June 29, 2019), <https://nyti.ms/2KOtGA6> [<https://perma.cc/D2AS-STX5>].

¹⁴⁷⁶ *See* KLEIN, *supra* note 347, at 85–86; Jonathan Rauch, *Rethinking Polarization*, 41 NAT’L AFFS. 86, 91 (2019).

¹⁴⁷⁷ JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 106–07 (2012); *see* Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19–22 (2011).

¹⁴⁷⁸ *See* KLEIN, *supra* note 347, at 102; *see also id.* at 158–60 (discussing study that found exposure to opinion leaders from opposing political parties actually increased issue-based polarization).

¹⁴⁷⁹ *See id.* at 91–93; Rauch, *supra* note 1476, at 91.

¹⁴⁸⁰ *See* KLEIN, *supra* note 347, at 97.

2. *Asymmetric Polarization.* — Political scientists generally agree that the polarization of the parties has been asymmetrical: while Democrats, on average, have moved to the left, Republicans have moved even further to the right.¹⁴⁸¹ On the ANES survey question on ideology, which uses a scale with 4.0 as the center, from 1972 to 2012, the average Democrat moved from 3.8 to 3.4, while the average Republican moved from 4.6 to 5.3.¹⁴⁸² In other words, the average Republican has moved nearly twice as far to the right as the average Democrat has to the left. In fact, in 2018, Democrats, by a margin of fifty-four to forty-one percent, preferred that their party become more moderate, while Republicans, by a margin of fifty-seven to thirty-seven percent, preferred that their party become more conservative.¹⁴⁸³ That Democrats preferred former Vice President Joe Biden to Senator Bernie Sanders by about twenty percentage points once the 2020 Democratic presidential field had narrowed to two principal candidates confirms this point.¹⁴⁸⁴

The Democratic Party's demographic diversity has tempered its shift to the left.¹⁴⁸⁵ The sorting that pushed the two parties in opposite ideological directions has also made the Republicans' political coalition more demographically homogeneous and that of the Democrats more heterogeneous.¹⁴⁸⁶ Contrary to popular belief, Republicans are no less identity-oriented than Democrats: they are overwhelmingly white, Christian, and — especially with regard to activists and leaders — male.¹⁴⁸⁷ The Democratic Party is much more diverse along those dimensions.¹⁴⁸⁸ In addition, on a psychological dimension, Republicans tend to exhibit an aversion to change and lower levels of openness to new experiences, which are traits more conducive to authoritarianism,¹⁴⁸⁹ while Democrats exhibit this psychological sorting only among whites: white Democrats overwhelmingly display a “fluid,” rather than

¹⁴⁸¹ See, e.g., ABRAMOWITZ, *supra* note 346, at 102, 106; HACKER & PIERSON, *supra* note 352, at 240–41; MANN & ORNSTEIN, *supra* note 996, at 51–57.

¹⁴⁸² ABRAMOWITZ, *supra* note 346, at 102.

¹⁴⁸³ KLEIN, *supra* note 347, at 247–48.

¹⁴⁸⁴ See Nate Cohn, *Sanders's Big Problem Isn't the Delegate Math. It's the Voters.*, N.Y. TIMES (Mar. 11, 2020), <https://nyti.ms/336L350> [<https://perma.cc/8DD5-PFV4>].

¹⁴⁸⁵ See KLEIN, *supra* note 347, at 230; MANN & ORNSTEIN, *supra* note 996, at 52.

¹⁴⁸⁶ See KLEIN, *supra* note 347, at 230; MANN & ORNSTEIN, *supra* note 996, at 48–49, 52.

¹⁴⁸⁷ See, e.g., KLEIN, *supra* note 347, at 247; Christopher Ingraham, *The Stark Racial and Religious Divide Between Democrats and Republicans, in One Chart*, WASH. POST (Sept. 6, 2017, 11:14 AM), <https://www.washingtonpost.com/news/wonk/wp/2017/09/06/the-stark-racial-and-religious-divide-between-democrats-and-republicans-in-one-chart> [<https://perma.cc/SFJ6-55P9>]; Paul Waldman, *The Republican Party Is Getting Even Whiter*, AM. PROSPECT (Aug. 4, 2019), <https://prospect.org/civil-rights/republican-party-getting-even-whiter> [<https://perma.cc/3MHC-93HN>]; *Trends in Party Affiliation Among Demographic Groups*, PEW RSCH. CTR. (Mar. 20, 2018), <http://pewrsr.ch/2FVWtww> [<https://perma.cc/C2AE-BBNN>].

¹⁴⁸⁸ See KLEIN, *supra* note 347, at 230; LEVITSKY & ZIBLATT, *supra* note 35, at 171.

¹⁴⁸⁹ See Thomas B. Edsall, Opinion, *The Contract with Authoritarianism*, N.Y. TIMES (Apr. 5, 2018), <https://nyti.ms/2GwDhcW> [<https://perma.cc/52XT-3674>].

“fixed,” personality.¹⁴⁹⁰ Communities of color, which lean heavily Democratic, include many people who value traditional family hierarchies and deference to authority in the same way that most Republicans do.¹⁴⁹¹

Uniting this diverse Democratic coalition requires more compromise than fusing the Republican coalition does.¹⁴⁹² Thus, unsurprisingly, more Democrats prefer politicians who compromise, while more Republicans prefer politicians who do not.¹⁴⁹³ This asymmetry also limits Democrats’ ability to run the same kind of campaigns and use the same sort of hardball tactics as Republicans do.¹⁴⁹⁴

Several features of the American political system also propel Democrats toward greater ideological moderation and Republicans toward greater extremism. Geographic sorting and partisan gerrymandering in the House, vast malapportionment in the Senate, and the combination of malapportionment and contingent vagaries in the Electoral College leave national political control in the hands of voters who are right of center.¹⁴⁹⁵ The Democratic Party is forced to moderate itself ideologically to maximize its chances of political success.¹⁴⁹⁶

One final factor constraining an ideological shift to the left by the Democratic Party is its dependence, beginning especially in the 1990s, on the same sort of big-money donors that support the Republican Party.¹⁴⁹⁷ Although Democratic big donors are not neo-Ayn Randians, their economic views are more conservative than those of the average Democratic voter.¹⁴⁹⁸

In 2016, although both parties had moved away from the ideological center, Democrats nominated a traditional member of the party elite for President while Republicans nominated a political novice who stoked racial and religious grievance, displayed an openly authoritarian bent, and was temperamentally and intellectually unfit for office.¹⁴⁹⁹ That year, almost all Republican presidential candidates denied that climate change is a substantial problem, supported massive tax cuts, and opposed comprehensive immigration reform.¹⁵⁰⁰ The Tea Party and

¹⁴⁹⁰ See KLEIN, *supra* note 347, at 47, 230–31.

¹⁴⁹¹ See *id.* at 231; see also Edsall, *supra* note 1489.

¹⁴⁹² See KLEIN, *supra* note 347, at 231.

¹⁴⁹³ See MANN & ORNSTEIN, *supra* note 996, at 56, 212.

¹⁴⁹⁴ See KLEIN, *supra* note 347, at 247.

¹⁴⁹⁵ See *id.* at 240–41; *infra* section IV.A, pp. 231–42.

¹⁴⁹⁶ See KLEIN, *supra* note 347, at 241, 247.

¹⁴⁹⁷ See HACKER & PIERSON, *supra* note 352, at 284; PAGE & GILENS, *supra* note 533, at 103–04, 163; see also MANN & ORNSTEIN, *supra* note 996, at 75, 78.

¹⁴⁹⁸ See PAGE & GILENS, *supra* note 533, at 108, 163.

¹⁴⁹⁹ See, e.g., KLEIN, *supra* note 347, at 228.

¹⁵⁰⁰ See MANN & ORNSTEIN, *supra* note 996, at 212; Wilson Andrews & Thomas Kaplan, *Where the Candidates Stand on 2016's Biggest Issues*, N.Y. TIMES (Dec. 15, 2015), <https://nyti.ms/2k1gjh9> [<https://perma.cc/93S9-LVCC>]; Philip Elliott & Alex Altman, *The Republican 2016 Field Takes a Hard*

Freedom Caucus dominated the decisionmaking of House Republicans in a way that progressives never did within the Democratic Party.¹⁵⁰¹

One insidious aspect of the parties' asymmetric polarization is that American journalists have been inculcated by traditional professional norms not to acknowledge or criticize it for fear of being accused of partisan bias.¹⁵⁰² If Republicans deny climate change and Democrats acknowledge it, mainstream journalists, until quite recently, have been inclined to report that the "parties disagree about climate change," which is true but not very informative.¹⁵⁰³ Such a commitment to "balanced" reporting confers an enormous advantage on the party with a more tenuous commitment to facts and truth.¹⁵⁰⁴

3. *The Right-Wing Media Ecosystem.* — One mechanism feeding political polarization and its asymmetry is the "Fox News effect."¹⁵⁰⁵ Beginning with the proliferation of cable television channels in the 1980s and later expanding with websites, blogs, and social media, Americans have enjoyed access to more information and the ability to choose the information they consume.¹⁵⁰⁶ In an earlier media environment dominated by three television networks competing for a mass audience and local newspapers seeking market dominance, content producers were incentivized to avoid offending potential consumers and to adhere to "objective" news reporting.¹⁵⁰⁷

A different incentive structure applies in a media environment characterized by an enormous proliferation of content providers. By 2010, there were six hundred cable television channels and millions of websites and blogs.¹⁵⁰⁸ Fragmented audiences incentivize content providers to offer an appealing product to *some* people rather than a blander product to everyone.¹⁵⁰⁹ Moreover, in a world of extreme political polarization, most people seeking political news root for a side, just as most sports fans

Right on Immigration, TIME (Aug. 20, 2015, 4:42 PM), <https://time.com/4005245/republican-president-immigration> [<https://perma.cc/K932-PgAP>].

¹⁵⁰¹ See KLEIN, *supra* note 347, at 228–29; SIDES ET AL., *supra* note 585, at 37–39.

¹⁵⁰² See MANN & ORNSTEIN, *supra* note 996, at xv–xvi, 216–17.

¹⁵⁰³ See YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 356 (2018).

¹⁵⁰⁴ See *id.* at 196; see also *id.* at 97–98.

¹⁵⁰⁵ See KLEIN, *supra* note 347, at 234–36; see also LEVITSKY & ZIBLATT, *supra* note 35, at 172.

¹⁵⁰⁶ See, e.g., BENKLER ET AL., *supra* note 1503, at 319; MANN & ORNSTEIN, *supra* note 996, at 58–59.

¹⁵⁰⁷ See MANN & ORNSTEIN, *supra* note 996, at 58; see also JAMES PONIEWOZIK, AUDIENCE OF ONE: DONALD TRUMP, TELEVISION, AND THE FRACTURING OF AMERICA 24–25, 149 (2019).

¹⁵⁰⁸ See MANN & ORNSTEIN, *supra* note 996, at 59.

¹⁵⁰⁹ See KLEIN, *supra* note 347, at 146; MANN & ORNSTEIN, *supra* note 996, at 59–61; PONIEWOZIK, *supra* note 1507, at 30–32, 149.

root for a team.¹⁵¹⁰ The sort of news that appeals to such partisan consumers — a repetitious message of political Manichaeism — simply hardens political identities and exacerbates polarization.¹⁵¹¹

Such programming choices lead audiences to exaggerate the representativeness of what they see. Majorities of the supporters of both major political parties today are white, middle class, and heterosexual.¹⁵¹² Yet most viewers do not perceive the world that way. Asked to describe the other party, Republicans guessed that thirty-eight percent of Democrats are gay, lesbian, or bisexual, while the actual number is about six percent.¹⁵¹³ They estimated that forty-six percent of Democrats are African American, when the real number is about twenty-four percent.¹⁵¹⁴ Democrats estimated that forty-four percent of Republicans earn over \$250,000 a year, when the actual number is two percent.¹⁵¹⁵ The more partisan political media a viewer consumed, the more mistaken their views of the other party became.¹⁵¹⁶

However, Fox News goes beyond politicizing its programming to distorting facts and confirming viewers' biases regardless of the underlying facts.¹⁵¹⁷ Many of its journalists make no pretense of objectivity or political neutrality.¹⁵¹⁸ The network does not consistently practice fact-checking or source stories as an ordinary news organization would,¹⁵¹⁹ and it promotes conspiracy theories, such as the ones alleging the existence of Hillary Clinton's pizzeria-based pedophilia ring (known as "Pizzagate") and Joe Biden's corrupt intervention in Ukrainian politics, with the latter leading to President Trump's impeachment.¹⁵²⁰ Fox News defends its objectivity by pointing to a handful of its genuine journalists, such as Chris Wallace, whose presence lends legitimacy to the network.¹⁵²¹

At the invitation of then-Fox News chief executive Roger Ailes, Trump began appearing on the program *Fox & Friends* on a weekly basis in 2011, soon becoming the leading exponent of the racist "birther"

¹⁵¹⁰ KLEIN, *supra* note 347, at 146–47.

¹⁵¹¹ See ABRAMOWITZ, *supra* note 346, at 5; KLEIN, *supra* note 347, at 148–49, 156–60; MANN & ORNSTEIN, *supra* note 996, at 60–61.

¹⁵¹² See KLEIN, *supra* note 347, at 148.

¹⁵¹³ See *id.* at 148–49.

¹⁵¹⁴ See *id.* at 149.

¹⁵¹⁵ See *id.* at 148.

¹⁵¹⁶ See *id.* at 149.

¹⁵¹⁷ See BENKLER ET AL., *supra* note 1503, at 83–84; Mayer, *supra* note 281.

¹⁵¹⁸ See PONIEWOZIK, *supra* note 1507, at 152–56, 159–60; *cf.* Mayer, *supra* note 281 (discussing the close relationship between Fox News and President Trump's White House).

¹⁵¹⁹ See Mayer, *supra* note 281.

¹⁵²⁰ See BENKLER ET AL., *supra* note 1503, at 92–97, 159, 177–81; Jane Mayer, *The Invention of the Conspiracy Theory on Biden and Ukraine*, NEW YORKER (Oct. 4, 2019), <https://www.newyorker.com/news/news-desk/the-invention-of-the-conspiracy-theory-on-biden-and-ukraine> [https://perma.cc/GZ39-U8HJ]; Mayer, *supra* note 281.

¹⁵²¹ See Mayer, *supra* note 281.

conspiracy.¹⁵²² While many Fox executives were initially “uneasy” about Trump’s presidential candidacy and Fox Corporation chairman Rupert Murdoch criticized the candidate’s xenophobia, coverage of Trump proved a godsend for Fox’s ratings.¹⁵²³ Near the end of the campaign, the network suppressed a story by one of its reporters that Trump had paid hush money to silence adult-film star Stormy Daniels with regard to an affair she claimed to have had with him a decade earlier.¹⁵²⁴

Fox News has a financial incentive to provide positive coverage of President Trump because its ratings fall when the news is bad for him, just as fans of a sports team may tune out when their team loses too much.¹⁵²⁵ President Trump probably could not have survived the release of the Mueller Report or the Ukraine debacle without Fox’s constant counterprogramming, which denounced the Russia investigation as a “deep state” conspiracy¹⁵²⁶ and a “hoax”¹⁵²⁷ and diverted attention to the alleged criminality of Hillary Clinton and Joe Biden.¹⁵²⁸ Much of Fox’s programming gradually abandoned any pretense of objectivity and became “state TV” for President Trump.¹⁵²⁹

In terms of its influence on viewers, Fox News has no equivalent counterpart on the political left, perhaps partly because left-wing media remains closely connected with institutions committed to traditional journalistic practices of fact-checking and truth-seeking.¹⁵³⁰ While far-left websites post as many bogus stories as far-right ones, *The New York Times* does not republish stories from the former, while Fox may promote stories from the latter.¹⁵³¹

In addition, liberals tend to glean their news from a variety of sources, including mainstream, truth-seeking outlets such as *The New York Times*, more partisan liberal media such as MSNBC, and some center-right sources with strong journalistic reputations such as *The Economist*.¹⁵³² Most Republicans’ information ecosystems lack such diversity.¹⁵³³ Because many Republicans regard traditional media as biased, they have sought alternative sources of information featuring

¹⁵²² See *id.*

¹⁵²³ See *id.*

¹⁵²⁴ See *id.*

¹⁵²⁵ See *id.* (citing sports team analogy invoked by former Fox host Greta Van Susteren).

¹⁵²⁶ BENKLER ET AL., *supra* note 1503, at 153.

¹⁵²⁷ *Id.* at 179.

¹⁵²⁸ See *id.* at 153–55, 158, 179–80; KLEIN, *supra* note 347, at 163; Mayer, *supra* note 281.

¹⁵²⁹ See Mayer, *supra* note 281 (quoting political historian Nicole Hemmer).

¹⁵³⁰ See BENKLER ET AL., *supra* note 1503, at 14–15; HACKER & PIERSON, *supra* note 352, at 252.

¹⁵³¹ See BENKLER ET AL., *supra* note 1503, at 15, 73–74; Mayer, *supra* note 281.

¹⁵³² See BENKLER ET AL., *supra* note 1503, at 56, 60–62, 324; KLEIN, *supra* note 347, at 234–36.

¹⁵³³ BENKLER ET AL., *supra* note 1503, at 60–62, 324; KLEIN, *supra* note 347, at 234–36.

almost entirely conservative voices, some of which are simply propagandistic.¹⁵³⁴ A recent survey found that sixty percent of Republicans got news from Fox over the past week.¹⁵³⁵ No media outlet on the political left commands that amount of attention.¹⁵³⁶

4. *Other Mechanisms of Political Polarization.* —

(a) *Geographic Clustering.* — For much of the twentieth century, the United States was not easily divisible into blue states and red states.¹⁵³⁷ As late as the 1980s, there was little continuity in how particular states voted in consecutive presidential elections.¹⁵³⁸ Today, the states are so thoroughly sorted politically that at most eight to ten of them are seriously contested in any given presidential election.¹⁵³⁹

The geographic sorting of political and ideological identity exists down to the county level.¹⁵⁴⁰ The share of voters living in counties in which one presidential candidate secured at least sixty percent of the vote rose from thirty-nine percent in 1992 to sixty-one percent in 2016.¹⁵⁴¹ The share of voters living in counties in which one presidential candidate won by over fifty percentage points more than quintupled between 1992 and 2016.¹⁵⁴² There are no longer any big cities regularly won by Republican candidates, and there are few rural areas carried by Democratic ones.¹⁵⁴³ The overlap between partisan and geographic sorting is significant because geography plays a powerful role in constructing identity.¹⁵⁴⁴

(b) *Gerrymandering and Partisan Primaries.* — As we have seen, Republicans gerrymandered legislative districts more aggressively after the 2010 census than has ever been done before in American history.¹⁵⁴⁵

¹⁵³⁴ See KLEIN, *supra* note 347, at 236–38.

¹⁵³⁵ Mark Jurkowitz, Amy Mitchell, Elisa Shearer & Mason Walker, *Americans Are Divided by Party in the Sources They Turn to for Political News*, PEW RSCH. CTR. (Jan. 24, 2020), <https://pewrsr.ch/2R234GI> [<https://perma.cc/7U3W-MESW>] (reporting results of 2019 survey).

¹⁵³⁶ See KLEIN, *supra* note 347, at 235.

¹⁵³⁷ *Id.* at 38–39.

¹⁵³⁸ See ABRAMOWITZ, *supra* note 346, at 72–73; KLEIN, *supra* note 347, at 38–39.

¹⁵³⁹ See ABRAMOWITZ, *supra* note 346, at 73–74, 145; KLEIN, *supra* note 347, at 39; *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/HY5G-N62S>].

¹⁵⁴⁰ See KLEIN, *supra* note 347, at 39; PAGE & GILENS, *supra* note 533, at 161.

¹⁵⁴¹ See KLEIN, *supra* note 347, at 39. The 1992 results might have been partially skewed by the presence on the presidential ballot of Independent Party candidate Ross Perot, who won nineteen percent of the vote nationally. See FED. ELECTION COMM’N, FEDERAL ELECTIONS 92: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 9 (1993), <https://www.fec.gov/resources/cms-content/documents/federaelections92.pdf> [<https://perma.cc/9T9C-UP7G>].

¹⁵⁴² See KLEIN, *supra* note 347, at 39.

¹⁵⁴³ See *id.*

¹⁵⁴⁴ See *id.* at 39–42; Iyengar & Westwood, *supra* note 1463, at 691; cf. Rauch, *supra* note 1476, at 88 (arguing that geographic sorting “amplifies the effects of party sorting”).

¹⁵⁴⁵ See *supra* section I.C.1, pp. 46–47.

Partisan gerrymandering creates “safe” legislative seats, reducing legislators’ incentives to cater to the views of their median constituents.¹⁵⁴⁶ Legislators holding safe seats face little risk of losing general elections and instead worry mainly about primary challenges.¹⁵⁴⁷ By definition, the median voter in a primary is situated closer to the poles of the ideological spectrum than the median voter is situated in a general election.¹⁵⁴⁸ In addition, voter turnout is much lower in primaries.¹⁵⁴⁹ Because participants in primaries tend to be intensely interested in politics and ideologically extreme, median primary voters tend to be even further toward the poles of the ideological spectrum.¹⁵⁵⁰

Partly because of gerrymandering but mostly because of geographic sorting, the number of safe congressional seats has dramatically increased in recent decades.¹⁵⁵¹ Between 1976 and 2012, the number of congressional districts in which the margin of victory in the presidential race was less than five percentage points fell from 187 to 47.¹⁵⁵² By contrast, during the same time period, the number of districts in which one presidential candidate won by at least twenty percentage points increased from 26 to 232.¹⁵⁵³

The risk of being “primaried” now exercises significant disciplining influence over officeholders, especially Republicans.¹⁵⁵⁴ Even if serious primary challenges are relatively rare, those that succeed are salient and have significant incentive effects.¹⁵⁵⁵ In 2014, for example, Republican House Majority Leader Eric Cantor suffered a shocking primary loss to a little-known economics professor whose underfunded campaign attacked the Majority Leader for being a “compromiser.”¹⁵⁵⁶ Only fourteen percent of eligible voters participated, and conservative radio talk-show host Laura Ingraham and Tea Party activists mobilized enough voters to defeat Representative Cantor,¹⁵⁵⁷ whom they accused of favoring “amnesty” for undocumented immigrants.¹⁵⁵⁸ Likewise, in March

¹⁵⁴⁶ PAGE & GILENS, *supra* note 533, at 160; *see id.* at 160–61, 220; *see also* DIAMOND, *supra* note 28, at 266.

¹⁵⁴⁷ *See* DIAMOND, *supra* note 28, at 263, 266; KLEIN, *supra* note 347, at 180–81; PAGE & GILENS, *supra* note 533, at 159–60.

¹⁵⁴⁸ *See, e.g.*, PAGE & GILENS, *supra* note 533, at 58, 159.

¹⁵⁴⁹ *See* KLEIN, *supra* note 347, at 178; PAGE & GILENS, *supra* note 533, at 58, 159–60.

¹⁵⁵⁰ *See* KLEIN, *supra* note 347, at 178–79; PAGE & GILENS, *supra* note 533, at 58.

¹⁵⁵¹ *See* PAGE & GILENS, *supra* note 533, at 160–61; *see also* ABRAMOWITZ, *supra* note 346, at 95–96.

¹⁵⁵² *See* ABRAMOWITZ, *supra* note 346, at 95.

¹⁵⁵³ *See id.*

¹⁵⁵⁴ *See* KLEIN, *supra* note 347, at 180–81; PAGE & GILENS, *supra* note 533, at 159–60.

¹⁵⁵⁵ *See* KLEIN, *supra* note 347, at 181; *see also* HACKER & PIERSON, *supra* note 352, at 240.

¹⁵⁵⁶ PAGE & GILENS, *supra* note 533, at 160; *see* Jonathan Martin, *Eric Cantor Defeated by David Brat, Tea Party Challenger*, in *G.O.P. Primary Upset*, N.Y. TIMES (June 10, 2014), <https://nyti.ms/1kko58y> [https://perma.cc/KN5H-9L7U].

¹⁵⁵⁷ *See* PAGE & GILENS, *supra* note 533, at 160.

¹⁵⁵⁸ Martin, *supra* note 1556.

2016, Republican Senator Jerry Moran of Kansas announced support for holding hearings on the nomination of Judge Garland to the Supreme Court, while stating that he could not imagine voting for his confirmation.¹⁵⁵⁹ Within a week, he faced threats of a primary challenge, and in a move that some believed was motivated by pressure from the Koch brothers, Senator Moran rescinded his support for hearings.¹⁵⁶⁰

(c) *Money in Politics.* — Vast increases in the amount of money in politics, largely attributable to Supreme Court decisions described in the next Part, also have contributed to political polarization.¹⁵⁶¹ Large political donors generally seek to advance a particular policy agenda that may be inconsistent with the policies favored by most Americans.¹⁵⁶² Two-thirds of the billionaires who made publicly reported political donations in 2011–2012 contributed primarily or exclusively to Republicans.¹⁵⁶³ Particularly in low-salience and low-turnout elections like primaries and state legislative contests, such contributions can shift election results to the right.¹⁵⁶⁴ In 2010, the Koch political network played a huge role in the rise of the Tea Party in Congress and the Republican takeover of numerous state governments.¹⁵⁶⁵

At the other end of the donor spectrum, small contributors tend to be ideologically extreme rather than pragmatic, and usually are motivated either by inspiring candidates promising dramatic change or by outrage directed at political opponents.¹⁵⁶⁶ While forty-five percent of nondonors describe themselves as moderates, only sixteen percent of donors do so.¹⁵⁶⁷ In 2018, the successful congressional candidates raising the highest percentage of their funds from small donors included Representatives Devin Nunes and Alexandria Ocasio-Cortez.¹⁵⁶⁸ —

¹⁵⁵⁹ See Emmarie Huetteman, *Backlash as Senator Breaks Ranks on Supreme Court Hearings*, N.Y. TIMES (Mar. 25, 2016), <https://nyti.ms/1Rr4VCq> [<https://perma.cc/WN2P-SGP3>].

¹⁵⁶⁰ See *id.*; see also Mike DeBonis, *GOP Senator “More Convinced than Ever” that Garland Should Get Hearing*, WASH. POST (Apr. 5, 2016, 5:12 PM), <http://wapo.st/1V78K5B> [<https://perma.cc/472Q-HRSE>].

¹⁵⁶¹ See PAGE & GILENS, *supra* note 533, at 165; *infra* section III.E, pp. 195–211.

¹⁵⁶² See RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 43 (2016); PAGE & GILENS, *supra* note 533, at 7, 159, 217–18.

¹⁵⁶³ PAGE & GILENS, *supra* note 533, at 107.

¹⁵⁶⁴ See *id.*

¹⁵⁶⁵ See *id.* at 99, 107; cf. Jeremy W. Peters, *The Tea Party Didn’t Get What It Wanted, but It Did Unleash the Politics of Anger*, N.Y. TIMES (Aug. 30, 2019), <https://nyti.ms/2PgduE> [<https://perma.cc/H3CP-BWRL>] (describing the rise of the Tea Party and noting that “its attitude lives on” in today’s politics).

¹⁵⁶⁶ See KLEIN, *supra* note 347, at 183–85, 189–90; Richard H. Pildes, *Small Dollars, Big Changes*, WASH. POST (Feb. 6, 2020), <https://www.washingtonpost.com/outlook/2020/02/06/small-dollars-big-changes/> [<https://perma.cc/W3F7-4DA3>].

¹⁵⁶⁷ Pildes, *supra* note 1566.

¹⁵⁶⁸ See *id.*

hardly the most ideologically representative of House members.¹⁵⁶⁹ The internet has vastly expanded the potential for small-donor fundraising.¹⁵⁷⁰ When Representative Joe Wilson of South Carolina shouted “You lie!” during President Obama’s 2009 speech to a joint session of Congress on the ACA — in response to President Obama’s truthful statement that the bill did not provide health insurance for undocumented immigrants — he quickly raised almost \$2 million from small conservative donors across the country.¹⁵⁷¹ His Democratic opponent raised \$1.5 million from outraged supporters of the President.¹⁵⁷²

In addition, as donors have become more influential in selecting candidates and parties less influential, legislatures have become more polarized.¹⁵⁷³ Political parties, which care mostly about winning elections, are likely to promote more moderate candidates while donors often contribute to politicians for ideological reasons.¹⁵⁷⁴ In 2002, the Bipartisan Campaign Reform Act¹⁵⁷⁵ sharply curtailed the fundraising of parties, making candidates more dependent on donors.¹⁵⁷⁶

5. *Asymmetric Hardball*. — Political or constitutional “hardball” refers to political behavior that challenges traditional norms without violating clearly established legal rules.¹⁵⁷⁷ As political theorists have observed, the success of democracy depends on norms of mutual toleration and forbearance.¹⁵⁷⁸ “Mutual toleration” means acknowledging the legitimacy of one’s political opponents.¹⁵⁷⁹ “Forbearance” means refraining from pushing one’s political power to its legal limits.¹⁵⁸⁰

Extreme political polarization undermines the inclination and capacity of politicians to compromise and makes hardball tempting.¹⁵⁸¹ President George W. Bush never referred to Democrats as “traitors,” while some leading Republicans relentlessly attacked President Obama as “anti-

¹⁵⁶⁹ See *id.*; cf. MANN & ORNSTEIN, *supra* note 996, at 62–63 (recognizing that lawmakers’ “extreme and outrageous” behavior brings fundraising advantages that “[m]ild behavior or political centrism” does not).

¹⁵⁷⁰ See KLEIN, *supra* note 347, at 186–87; Pildes, *supra* note 1566.

¹⁵⁷¹ See KLEIN, *supra* note 347, at 181–83; Holly Bailey, *Joe Wilson Raised (and Spent) Big Money After “You Lie!”*, NEWSWEEK (Oct. 20, 2009, 3:23 PM), <https://www.newsweek.com/joe-wilson-raised-and-spent-big-money-after-you-lie-212224> [<https://perma.cc/2LL6-MDKF>].

¹⁵⁷² See KLEIN, *supra* note 347, at 182–83.

¹⁵⁷³ See *id.* at 183–84.

¹⁵⁷⁴ See *id.* at 184.

¹⁵⁷⁵ Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2, 8, 18, 28, 36, 47, and 52 U.S.C.).

¹⁵⁷⁶ See *id.*

¹⁵⁷⁷ See, e.g., Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920–26 (2018); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004); see also HACKER & PIERSON, *supra* note 352, at 247–48.

¹⁵⁷⁸ See, e.g., LEVITSKY & ZIBLATT, *supra* note 35, at 8, 102, 212.

¹⁵⁷⁹ See *id.* at 102.

¹⁵⁸⁰ See *id.* at 106.

¹⁵⁸¹ See *id.* at 109, 115–16.

American”¹⁵⁸² and even questioned his legitimacy as President by contesting his birthplace.¹⁵⁸³ Republican Representative Louie Gohmert called President Obama a tyrant seeking to turn the United States into a communist paradise.¹⁵⁸⁴ In 2016, crowds at Trump rallies gleefully chanted “Lock her up!” in reference to Democratic candidate Hillary Clinton.¹⁵⁸⁵ In the absence of tolerance, forbearance dissolves into hardball.¹⁵⁸⁶

Representative Newt Gingrich inaugurated the modern era of Republican hardball.¹⁵⁸⁷ As a backbencher first elected to Congress in 1978, Gingrich provoked confrontations with Democratic leaders, filed ethics complaints against them, attacked them for a pay raise that he had voted for, and portrayed his colleagues as corrupt over an overdraft “scandal” at the congressional bank.¹⁵⁸⁸ Representative Gingrich’s goal was to sow public contempt for Congress and turn voters against incumbents, which would give Republicans their best chance in forty years to take control of the House.¹⁵⁸⁹

After Bill Clinton was elected President in 1992, Minority Whip Gingrich convinced Republicans to oppose President Clinton’s agenda even when there was policy agreement.¹⁵⁹⁰ President Clinton then suffered embarrassing policy failures, especially on healthcare reform, when he could not keep his party united.¹⁵⁹¹ In 1994, Representative Gingrich recruited conservative congressional candidates and encouraged them to attack Democrats as “radical,” “corrupt,” and “traitors.”¹⁵⁹² The strategy seemed to work, as Republicans gained fifty-two seats and took control of the House.¹⁵⁹³ Several Republican representatives elected that year later ascended to the Senate and took with them Gingrich’s norm-destroying tactics.¹⁵⁹⁴ As House Speaker beginning in 1995, Gingrich challenged President Clinton at every turn.¹⁵⁹⁵ His actions suggested that he calculated that willful obstruction of the federal government would harm Democrats more than it would harm Republicans because Democrats’ promises would be broken, and voters

¹⁵⁸² *Id.* at 156.

¹⁵⁸³ *See id.* at 155–60.

¹⁵⁸⁴ MANN & ORNSTEIN, *supra* note 996, at 212.

¹⁵⁸⁵ *See* LEVITSKY & ZIBLATT, *supra* note 35, at 62.

¹⁵⁸⁶ *See id.* at 109, 112.

¹⁵⁸⁷ *See id.* at 147; MANN & ORNSTEIN, *supra* note 996, at 42–43.

¹⁵⁸⁸ HACKER & PIERSON, *supra* note 352, at 260; *see* MANN & ORNSTEIN, *supra* note 996, at 33–38.

¹⁵⁸⁹ *See* HACKER & PIERSON, *supra* note 352, at 260; MANN & ORNSTEIN, *supra* note 996, at 33.

¹⁵⁹⁰ *See* MANN & ORNSTEIN, *supra* note 996, at 39.

¹⁵⁹¹ *See id.*

¹⁵⁹² *Id.*; *see also* HACKER & PIERSON, *supra* note 352, at 260.

¹⁵⁹³ *See* MANN & ORNSTEIN, *supra* note 996, at 39.

¹⁵⁹⁴ *See id.* at 43; LEVITSKY & ZIBLATT, *supra* note 35, at 148–49.

¹⁵⁹⁵ *See* MANN & ORNSTEIN, *supra* note 996, at 41.

would be uncertain which party to blame for government paralysis.¹⁵⁹⁶ If voters became cynical about government generally, that would also benefit Republicans in the long term, because modern Republicans' principal objective was to block government redistributive policies.¹⁵⁹⁷

After Barack Obama was elected President, Republican congressional leaders resurrected Speaker Gingrich's obstructionist tactics, but on steroids.¹⁵⁹⁸ In 2009, in the midst of the Great Recession, not a single House Republican supported an economic stimulus package that included the tax cuts they favored as well as spending increases.¹⁵⁹⁹ The favorable votes of three Republican senators were the "high-water mark" of Republican cooperation with President Obama.¹⁶⁰⁰ Republican leaders had decided not to support any legislation that might help President Obama politically.¹⁶⁰¹ In 2010, then-Minority Leader McConnell announced: "The single most important thing we want to achieve is for President Obama to be a one-term president."¹⁶⁰² By contrast, in 2020, congressional Democrats supported coronavirus aid packages that would help the economy, even though such measures might enhance President Trump's reelection chances.¹⁶⁰³

Republican hardball proliferated during Obama's presidency.¹⁶⁰⁴ Democrats controlled the Senate for the first six years of Obama's presidency, leading to a vast expansion in Republican use of the filibuster.¹⁶⁰⁵ The filibuster has a long history, but entrenched norms had discouraged its frequent use, with the one prominent exception of southern Democrats' regularly filibustering civil rights bills in the mid-twentieth century.¹⁶⁰⁶ The Senate took only 49 votes to cloture filibusters between

¹⁵⁹⁶ Cf. *id.* at 189 (arguing that in the age of polarized politics, the fact that voters view elections as referenda on the governing party "gives the opposition party a powerful incentive to obstruct the president's agenda").

¹⁵⁹⁷ See *id.* at 52–53; HACKER & PIERSON, *supra* note 352, at 261.

¹⁵⁹⁸ See DAVID FARIS, *IT'S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS* 21 (2018); HACKER & PIERSON, *supra* note 352, at 262–63; MANN & ORNSTEIN, *supra* note 996, at 110.

¹⁵⁹⁹ See HACKER & PIERSON, *supra* note 352, at 157; MANN & ORNSTEIN, *supra* note 996, at 81; MAYER, *supra* note 354, at 214, 216.

¹⁶⁰⁰ HACKER & PIERSON, *supra* note 352, at 157.

¹⁶⁰¹ See *id.* at 157, 264; MAYER, *supra* note 354, at 212–16.

¹⁶⁰² MANN & ORNSTEIN, *supra* note 996, at 190.

¹⁶⁰³ See Krugman, *Microbe Meltdown*, *supra* note 858.

¹⁶⁰⁴ See HACKER & PIERSON, *supra* note 352, at 247–48, 262–63; cf. LEVITSKY & ZIBLATT, *supra* note 35, at 134–35 (discussing how members of Congress historically upheld informal norms of courteous behavior and restrained use of the filibuster).

¹⁶⁰⁵ See LEVITSKY & ZIBLATT, *supra* note 35, at 163; MANN & ORNSTEIN, *supra* note 996, at 88.

¹⁶⁰⁶ See LEVITSKY & ZIBLATT, *supra* note 35, at 135; see also KLEIN, *supra* note 347, at 219–22; PAGE & GILENS, *supra* note 533, at 167–68.

1917 and 1970, but 218 such votes in 2013–2014.¹⁶⁰⁷ Republicans filibustered virtually every bill and presidential nomination, no matter how uncontroversial.¹⁶⁰⁸ Senator McConnell's strategy was to waste precious floor time, frustrate President Obama's agenda, and foster voter disenchantment with government, which would benefit the programmatically antigovernment Republican Party.¹⁶⁰⁹

The confirmation rate for federal appellate judges fell dramatically during Obama's presidency, to barely fifty percent.¹⁶¹⁰ For the first time ever, district court nominees were routinely filibustered.¹⁶¹¹ When Republicans blocked confirmation votes for any of President Obama's nominees to the powerful D.C. Circuit, Democrats abolished the filibuster for judicial nominees below the Supreme Court level.¹⁶¹² Republicans insisted Democrats had started the judicial confirmation wars by opposing the Bork nomination to the Supreme Court in 1987 and several of President George W. Bush's nominations to federal circuit courts in his first Administration,¹⁶¹³ but Democrats had largely filibustered judges they deemed ideologically extreme, not every nominee. Senate Republicans also systematically blocked the confirmation of President Obama's nominees to executive agencies.¹⁶¹⁴

The Republicans' most extreme norm violation during Obama's presidency was probably their 2011 threat to default on the national debt to force deep spending cuts.¹⁶¹⁵ Raising the debt ceiling is usually a mere formality to authorize federal borrowing to finance spending already approved.¹⁶¹⁶ Legislators had postured on the subject before, but this time Republicans were serious in their threat, while mischaracterizing the vote as one to assume additional government debt.¹⁶¹⁷ In response, a bond-rating agency downgraded the rating of U.S. Treasury

¹⁶⁰⁷ KLEIN, *supra* note 347, at 222.

¹⁶⁰⁸ See HACKER & PIERSON, *supra* note 352, at 263; MANN & ORNSTEIN, *supra* note 996, at 55.

¹⁶⁰⁹ See HACKER & PIERSON, *supra* note 352, at 263–64; MANN & ORNSTEIN, *supra* note 996, at 55, 90–91.

¹⁶¹⁰ See LEVITSKY & ZIBLATT, *supra* note 35, at 163.

¹⁶¹¹ See CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH 97–98 (2019); MANN & ORNSTEIN, *supra* note 996, at 94.

¹⁶¹² See FARIS, *supra* note 1598, at 21; HULSE, *supra* note 1611, at 109–11.

¹⁶¹³ See HULSE, *supra* note 1611, at 57–59, 109–10, 116–17; MANN & ORNSTEIN, *supra* note 996, at 43, 94, 184.

¹⁶¹⁴ See MANN & ORNSTEIN, *supra* note 996, at 94–98, 166.

¹⁶¹⁵ See LEVITSKY & ZIBLATT, *supra* note 35, at 164–65; MANN & ORNSTEIN, *supra* note 996, at 3–4.

¹⁶¹⁶ See MANN & ORNSTEIN, *supra* note 996, at 5.

¹⁶¹⁷ See *id.* at 5–9; see also KLEIN, *supra* note 347, at 223–24.

bonds, generally considered among the world's safest financial assets.¹⁶¹⁸ Had a default materialized, it might have caused a worldwide financial crisis.¹⁶¹⁹

In a properly functioning democracy, Republicans would have paid a steep political price for such reckless behavior. But, as we have seen, majorities do not rule in American politics.¹⁶²⁰ In addition, only citizens paying close attention to politics are able to discern which party is more at fault when political polarization produces dangerous government paralysis.¹⁶²¹

In circumstances of extreme political polarization, hardball can be invisible to the party playing it. In a Federalist Society speech given in the fall of 2019, Attorney General Barr made the extraordinary claim that in recent years the political tactics of conservatives have been more scrupulous than those of liberals, who he declared behave as if the ends justify the means.¹⁶²² Such a claim, if made in good faith, corroborates the teachings of cognitive psychologists regarding the extraordinary power of biased perception and motivated reasoning.¹⁶²³

6. Negative Partisanship. — Extreme political polarization can be a function not only of people's liking their own party but also of their disliking the opposing party.¹⁶²⁴ Most social scientists believe that distinctions between "us" and "them" are inherent in how human beings interpret the world, part of an evolutionary process involving the importance of groups to individual survival.¹⁶²⁵ Experimenters in the laboratory have shown that such group identities and attitudes exist even when the defining traits of a group are fairly arbitrary.¹⁶²⁶ Sports fans invest enormous psychological capital in whether their teams win or lose even though their choice of teams to root for can be fairly random, the team's wins and losses have no effect on their material well-being, and teams evince little reciprocal loyalty to their fans.¹⁶²⁷

¹⁶¹⁸ See KLEIN, *supra* note 347, at 223–24; MANN & ORNSTEIN, *supra* note 996, at 4.

¹⁶¹⁹ See KLEIN, *supra* note 347, at 223, 228.

¹⁶²⁰ See Nicole Hemmer, Opinion, *Don't Expect Polls to Change Republican Minds*, N.Y. TIMES (Nov. 10, 2019), <https://nyti.ms/33wlR7M> [<https://perma.cc/G6MD-RZW2>]; *supra* section I.C.1, pp. 46–47; see also *infra* section IV.A, pp. 231–42.

¹⁶²¹ Cf. MANN & ORNSTEIN, *supra* note 996, at 190–91 (noting tendency of voters to broadly blame whichever party is in control of the federal government and thus reinforce dysfunctional politics unless provided with additional information about underlying political dynamics).

¹⁶²² See William P. Barr, Essay, *The Role of the Executive*, 43 HARV. J.L. & PUB. POL'Y 605, 620–21 (2020); Packer, *supra* note 168; see also KLEIN, *supra* note 347, at 245.

¹⁶²³ See, e.g., KLEIN, *supra* note 347, at 100–01.

¹⁶²⁴ See *id.* at 9–10.

¹⁶²⁵ See, e.g., *id.* at 49–50, 57; JARDINA, *supra* note 787, at 4; Rauch, *supra* note 1476, at 91.

¹⁶²⁶ See KLEIN, *supra* note 347, at 52–55; see also JARDINA, *supra* note 787, at 27.

¹⁶²⁷ See KLEIN, *supra* note 347, at 56, 60.

American politics has become like a team sport, with Democrats and Republicans representing “us” and “them,” or vice versa.¹⁶²⁸ Strong partisan identities can influence attitudes and behavior as much as, if not more than, political ideology and pursuit of policy objectives.¹⁶²⁹ People who knock on doors to canvass voters, donate money to campaigns, and turn out to vote are often driven more by group identity and rivalry than by the pursuit of material self-interest or policy goals.¹⁶³⁰

Moreover, the motivation to harm or beat “them” rather than simply benefit “us” can become dominant, even when a particular conflict is not zero sum.¹⁶³¹ In other words, people will often punish out-groups gratuitously,¹⁶³² as any good sports fan understands. An ardent Boston Red Sox fan derives nearly as much pleasure from the New York Yankees’ losing as from the Red Sox’s winning. Similarly, in politics, negative partisanship is more predictive of activism than is any other single factor.¹⁶³³

The “feeling thermometer” used in ANES surveys shows that the percentage of voters with positive feelings toward the opposing party’s presidential candidate fell from fifty-one percent in 1968 to fifteen percent in 2012.¹⁶³⁴ In the latter year, the difference between the average voter’s feelings toward the presidential candidates of the two parties was larger than it had ever been before.¹⁶³⁵

The extent of negative partisanship today can be illustrated in various ways. In 1960 polls, only five percent of Republicans and four percent of Democrats expressed displeasure at the thought of one of their children marrying a person who belonged to the other major political party.¹⁶³⁶ By 2010, however, forty-nine percent of Republicans and thirty-three percent of Democrats expressed opposition to such an interparty marriage.¹⁶³⁷ A recent psychology experiment demonstrates that partisanship can trump even seemingly objective standards of merit. When shown resumes identifying three differing characteristics among high school seniors competing for a scholarship — extracurricular activities, grade-point average, and political affiliation — approximately eighty percent of both Republicans and Democrats selected the candidate sharing their political affiliation.¹⁶³⁸ In

¹⁶²⁸ See *id.* at 61.

¹⁶²⁹ See *id.* at 61–62; MASON, *supra* note 1463, at 125–26.

¹⁶³⁰ See KLEIN, *supra* note 347, at 62–63; MASON, *supra* note 1463, at 125–26; see also Rauch, *supra* note 1476, at 92, 96.

¹⁶³¹ See KLEIN, *supra* note 347, at 54–55; see also *id.* at 62–64.

¹⁶³² See *id.* at 54–55.

¹⁶³³ See *id.* at 61–62.

¹⁶³⁴ ABRAMOWITZ, *supra* note 346, at 5–7.

¹⁶³⁵ See *id.* at 6–7.

¹⁶³⁶ KLEIN, *supra* note 347, at 75.

¹⁶³⁷ Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OP. Q. 405, 418 (2012).

¹⁶³⁸ Iyengar & Westwood, *supra* note 1463, at 697–98.

2016, forty-five percent of Republicans and forty-one percent of Democrats who expressed very unfavorable opinions of the other party told pollsters that they regarded that party's policies as "so misguided that they threaten the nation's well-being."¹⁶³⁹

Negative partisanship played a vital role in Trump's defeat of Hillary Clinton in 2016.¹⁶⁴⁰ Many Republicans could not imagine voting for Hillary Clinton, one of the most polarizing figures in recent American history, no matter how much they disliked Trump.¹⁶⁴¹ Both candidates won roughly ninety percent of their party's regular supporters even though both were less popular within the party than the 2012 nominees were.¹⁶⁴² However, both 2016 nominees rated significantly lower among the opposing party's supporters than the 2012 nominees had.¹⁶⁴³ On the feeling thermometer, on which a higher rating indicates a more positive sentiment, Republicans rated President Obama at twenty-nine degrees, but Hillary Clinton at twelve.¹⁶⁴⁴ Negative partisanship may have been especially valuable to Trump given that establishment Republicans, such as the Bushes and Romney, refused to endorse him.¹⁶⁴⁵

In part due to negative partisanship, very few Republicans will desert President Trump no matter how egregiously he behaves.¹⁶⁴⁶ Their political identities are too intertwined with him, and their fear and loathing of Democrats are too great.¹⁶⁴⁷ President Trump's approval rating among Republicans has been above ninety percent for much of his presidency.¹⁶⁴⁸ They care less about particular policies than about being part of the team.¹⁶⁴⁹ The more Democrats criticize President Trump's incompetence, corruption, and autocratic tendencies, the more Republicans rally in his defense.¹⁶⁵⁰

When political opponents are perceived as an enemy, dangerous and unscrupulous, people will do just about anything to win, even if it means breaking rules and possibly destroying the entire system.¹⁶⁵¹ They will

¹⁶³⁹ *Partisanship and Political Animosity in 2016*, PEW RSCH. CTR. (June 22, 2016), <http://pewrsr.ch/28MsFTR> [<https://perma.cc/WQ59-TRBQ>].

¹⁶⁴⁰ See ABRAMOWITZ, *supra* note 346, at 142–43; cf. SIDES ET AL., *supra* note 585, at 153 (noting that the 2016 race demonstrated the prevalence of negative partisanship).

¹⁶⁴¹ See KLEIN, *supra* note 347, at 192–93.

¹⁶⁴² See ABRAMOWITZ, *supra* note 346, at 165–66.

¹⁶⁴³ See *id.* at 166.

¹⁶⁴⁴ See *id.*

¹⁶⁴⁵ See *id.* at 168.

¹⁶⁴⁶ See *id.*; Rauch, *supra* note 1476, at 92–93.

¹⁶⁴⁷ See KLEIN, *supra* note 347, at 193–95.

¹⁶⁴⁸ See *Presidential Approval Ratings — Donald Trump*, *supra* note 780.

¹⁶⁴⁹ See Rauch, *supra* note 1476, at 92; see also KLEIN, *supra* note 347, at 61–62.

¹⁶⁵⁰ See, e.g., Tavernise, *supra* note 783; see also *supra* section I.D, pp. 66–106.

¹⁶⁵¹ See LEVITSKY & ZIBLATT, *supra* note 35, at 102–06.

even overlook a President's authoritarian tendencies so long as he is on their team.¹⁶⁵²

7. *The Coronavirus Pandemic Reprised.* — The deep political divide over impeachment confirmed how little common ground exists in American politics today.¹⁶⁵³ The more Democrats criticized President Trump's behavior, the more Republicans defended him.¹⁶⁵⁴ Political polarization over the coronavirus pandemic further reveals the depth of our political predicament.¹⁶⁵⁵ Questions of science, not murky legal standards such as "high Crimes and Misdemeanors," are at issue, and bad decisions cost tens of thousands of people their lives.

As already noted, President Trump's response to the coronavirus pandemic has been catastrophic¹⁶⁵⁶ and, in ordinary times, would probably have been politically fatal. President Trump could not have survived this performance without the connivance of Fox News and the larger right-wing media ecosystem. Early on, Fox reaffirmed and encouraged President Trump's dismissive response to the coronavirus.¹⁶⁵⁷ Recent Presidential Medal of Freedom recipient Rush Limbaugh complained that the nation was being shut down over "the common cold."¹⁶⁵⁸ Rather than inform the public about a serious public health threat, right-wing media chose to bolster President Trump.¹⁶⁵⁹

Yet, once President Trump declared a state of emergency, Fox turned on a dime.¹⁶⁶⁰ Fox News host Laura Ingraham, who about a week earlier had called several news outlets "panic pushers," now called the pandemic "this dangerous health crisis."¹⁶⁶¹ Her fellow Fox News host Sean Hannity agreed that the pandemic was a crisis and declared that "we

¹⁶⁵² See *id.* at 104; see also KLEIN, *supra* note 347, at 195–96.

¹⁶⁵³ See, e.g., Balz & Costa, *supra* note 720; Tavernise, *supra* note 783.

¹⁶⁵⁴ See, e.g., Tavernise, *supra* note 783.

¹⁶⁵⁵ Cf. MANN & ORNSTEIN, *supra* note 996, at 101 (arguing that "the political system has become grievously hobbled at a time when the country faces unusually serious challenges and grave threats").

¹⁶⁵⁶ See *supra* section I.D.9(b), pp. 100–05.

¹⁶⁵⁷ See Oliver Darcy, *How Fox News Misled Viewers About the Coronavirus*, CNN (Mar. 12, 2020, 9:21 PM), <https://www.cnn.com/2020/03/12/media/fox-news-coronavirus/index.html> [<https://perma.cc/Q3BC-6G3T>].

¹⁶⁵⁸ Rush Limbaugh: *Coronavirus Is Like the Common Cold, and "All of This Panic Is Just Not Warranted,"* MEDIA MATTERS FOR AM. (Mar. 11, 2020, 2:06 PM), <https://www.mediamatters.org/coronavirus-covid-19/rush-limbaugh-coronavirus-common-cold-and-all-panic-just-not-warranted> [<https://perma.cc/F4W5-E4C8>]; see Neil Vigdor, *Rush Limbaugh Awarded Presidential Medal of Freedom at State of the Union*, N.Y. TIMES (Apr. 15, 2020), <https://nyti.ms/36S2tTG> [<https://perma.cc/B3T2-PXAR>].

¹⁶⁵⁹ See Serwer, *supra* note 198.

¹⁶⁶⁰ See Paul Farhi & Sarah Ellison, *On Fox News, Suddenly a Very Different Tune About the Coronavirus*, WASH. POST (Mar. 16, 2020, 5:57 PM), https://www.washingtonpost.com/lifestyle/media/on-fox-news-suddenly-a-very-different-tune-about-the-coronavirus/2020/03/16/7a7637cc-678f-11ea-9923-57073adce27c_story.html [<https://perma.cc/V6AW-QKNV>].

¹⁶⁶¹ *Id.*

are witnessing what will be a massive paradigm shift in the future of disease control and prevention.”¹⁶⁶² At the time, nobody on Fox said a word retracting, apologizing for, or clarifying any of the network’s previous statements.¹⁶⁶³ Within weeks, President Trump and Fox were celebrating the President’s extraordinary leadership during the crisis.¹⁶⁶⁴

We have seen how political polarization influences people’s views of facts and how that polarization has been asymmetrical.¹⁶⁶⁵ As Republicans have become more ideologically extreme, they have also become more disdainful of facts.¹⁶⁶⁶ Many Republican politicians still subscribe to supply-side economics, despite evidence since the Reagan Administration that tax cuts do not pay for themselves,¹⁶⁶⁷ and a majority of Republicans continue to embrace birtherism¹⁶⁶⁸ and climate-change denialism¹⁶⁶⁹ despite copious evidence decimating both theories.

Yet, despite all of the preexisting evidence that Republicans and Democrats live in different factual worlds, the contrasting political responses to the coronavirus pandemic remain extraordinary — for two reasons. First, the coronavirus presents certain issues of scientific fact: how the virus is transmitted, under what circumstances the virus is most fatal, whether it is preventable through social distancing, and whether it is remediable through hydroxychloroquine, to name a few.¹⁶⁷⁰ Yet biased perception and motivated reasoning apparently are stronger even than science.¹⁶⁷¹ Compared to Democrats, Republicans are much more

¹⁶⁶² *Id.*

¹⁶⁶³ *See id.*

¹⁶⁶⁴ *See* Jeremy W. Peters, *Alarm, Denial, Blame: The Pro-Trump Media’s Coronavirus Distortion*, N.Y. TIMES (Apr. 15, 2020), <https://nyti.ms/2UBaVUA> [<https://perma.cc/67N5-KH2S>].

¹⁶⁶⁵ *See supra* pp. 158–60; *see also* Alberto F. Alesina, Armando Miano & Stefanie Stantcheva, *The Polarization of Reality* 1, 5 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26675, 2020).

¹⁶⁶⁶ *See* MANN & ORNSTEIN, *supra* note 996, at 186–87.

¹⁶⁶⁷ *See id.* at 187; *Capitalisn’t: What Happened to the Middle?*, CHI. BOOTH REV. (Mar. 30, 2020), <https://review.chicagobooth.edu/economics/2020/article/capitalisn-t-what-happened-middle> [<https://perma.cc/BF7U-5YAT>].

¹⁶⁶⁸ *See* Janie Velencia, *Republicans Still Don’t Think Obama Is American, but Don’t Care Ted Cruz Was Born in Canada*, HUFFPOST (Jan. 12, 2016, 10:50 AM), https://www.huffpost.com/entry/republicans-trump-cruz-canadian-birth-eligibility_n_56940e76e4b0c8beacf7fe2d [<https://perma.cc/R5R-H7R4>].

¹⁶⁶⁹ *See* Nadja Popvich & Livia Albeck-Ripka, *How Republicans Think About Climate Change — In Maps*, N.Y. TIMES (Dec. 14, 2017), <https://nyti.ms/2jWhcYf> [<https://perma.cc/W8DV-FFZH>] (reporting that only thirty-one percent of Republicans believe climate change is mostly caused by humans).

¹⁶⁷⁰ *Cf. Coronavirus Disease (COVID-19) Advice for the Public: Mythbusters*, WORLD HEALTH ORG. (2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters> [<https://perma.cc/F9KU-GJJV>] (listing facts regarding treatment and transmission of COVID-19).

¹⁶⁷¹ *Cf.* Michael Gerson, *Opinion, Trump’s Coronavirus Address Was an Opportunity. He Butchered It.*, WASH. POST (Mar. 12, 2020, 3:22 PM), https://www.washingtonpost.com/opinions/it-wouldve-been-better-if-trump-hadnt-spoken-at-all/2020/03/12/cdf85adc-6489-11ea-b3fc-7841686c5c57_story.

likely to disparage the seriousness of the pandemic¹⁶⁷² and much less likely to wear masks.¹⁶⁷³

Second, the consequences of how one responds to the pandemic are a lot more direct and personal than those regarding how one responds to Russian interference with the 2016 election or President Trump's malfeasance regarding Ukraine. Even with regard to climate-change denial, how one responds is much more likely to affect the lives of one's children and grandchildren than one's own.¹⁶⁷⁴ By contrast, to follow President Trump's advice about ingesting hydroxychloroquine or not wearing a mask could result in one's death in a few weeks or less.¹⁶⁷⁵

Nonetheless, views about the coronavirus — how many people it has killed, when it is safe to reopen the economy, even whether to wear a mask — now correlate strongly with partisanship.¹⁶⁷⁶ Largely because of President Trump, the choice of whether to wear a mask in public has become an expression of political identity.¹⁶⁷⁷ More Republicans, and those around them, may die because of the President's aesthetic and macho aversion to wearing a mask.¹⁶⁷⁸

Moreover, despite President Trump's initial derision of the threat, his subsequent lies, the Administration's incompetent response, and the huge and growing toll of lives lost, as of July, seventy-nine percent of Republicans approved of his handling of the pandemic, while only four

html [<https://perma.cc/MV35-ZCST>] (noting "coronavirus denialism on the right" and questioning whether President Trump "really believe[s]" scientific facts related to the pandemic).

¹⁶⁷² See *id.*

¹⁶⁷³ Megan Brennan, *Americans' Face Mask Usage Varies Greatly by Demographics*, GALLUP (July 13, 2020), <https://news.gallup.com/poll/315590/americans-face-mask-usage-varies-greatly-demographics.aspx> [<https://perma.cc/GFT4-LWTS>].

¹⁶⁷⁴ Cf. KLEIN, *supra* note 347, at 96 (discussing the higher personal cost of changing opinions on issues that implicate one's close relationships and identity).

¹⁶⁷⁵ See, e.g., Gerson, *supra* note 1671; Thomas, *supra* note 907.

¹⁶⁷⁶ See *Republicans, Democrats Move Even Further Apart in Coronavirus Concerns*, PEW RSCH. CTR. (June 25, 2020), <https://www.pewresearch.org/politics/2020/06/25/republicans-democrats-move-even-further-apart-in-coronavirus-concerns> [<https://perma.cc/6LD4-NYPJ>]; Philip Bump, *What Does It Mean that Most Republicans See the Coronavirus Death Toll as Acceptable?*, WASH. POST (Aug. 24, 2020, 10:12 AM), <https://www.washingtonpost.com/politics/2020/08/24/what-does-it-mean-that-most-republicans-see-coronavirus-death-toll-acceptable/> [<https://perma.cc/6ZEW-6K7S>]; Rachel Roubein, *POLITICO-Harvard Poll: Stark Partisan Divide on Reopening America*, POLITICO (May 21, 2020, 7:55 PM), <https://www.politico.com/news/2020/05/21/poll-partisan-divide-273706> [<https://perma.cc/NGM6-LQT9>].

¹⁶⁷⁷ See Frank Bruni, Opinion, *Nobody Is Protected from President Trump*, N.Y. TIMES (May 12, 2020), <https://nyti.ms/3fL88jS> [<https://perma.cc/NFY8-QZCQ>].

¹⁶⁷⁸ See William Saletan, *The Trump Pandemic*, SLATE (Aug. 9, 2020, 7:00 PM), <https://slate.com/news-and-politics/2020/08/trump-coronavirus-deaths-timeline.html> [<https://perma.cc/69A5-WFLX>] ("The simplest way to control the virus was to wear face coverings. But instead of encouraging this precaution, Trump ridiculed masks. . . . Some scientific models imply that Trump's suppression of mask use may have contributed to hundreds, if not thousands, of deaths.").

percent of Democrats did.¹⁶⁷⁹ Fox News viewers were more likely to approve of the Trump Administration's response than those who trust other media sources,¹⁶⁸⁰ even though at a median age above sixty-five, they face a significantly elevated risk of death if they contract the virus.¹⁶⁸¹

F. Conclusion

The constituencies comprising the Republican Party share a perception that the world is changing in ways that render majority rule threatening to them. Eighty-one percent of Trump's supporters, compared with only nineteen percent of Hillary Clinton's, believed that life for people like them had gotten worse over the last fifty years.¹⁶⁸² Some of them fear that the United States will soon cease to be majority white or majority Christian. Others understand that a majority has never supported a neo-Ayn Randian economic agenda. Still others believe democracy is generating economic inequalities that are ruining their lives. Structural features of the American political system amplify the political power of these groups, but they recognize that power is gradually seeping away from them. Some of them view the Democratic Party as an existential threat to their interests.¹⁶⁸³ Their perspective is amplified by a right-wing media ecosystem that has financial incentives to ignore facts, reinforce their sense of grievance, and warn of the treachery of their opponents. President Trump is their team leader and protector, and they construe facts through the lens of team loyalty.¹⁶⁸⁴ Their commitment to democracy has become provisional: they support it only so long as they win.

¹⁶⁷⁹ See Gary Langer, *64% Distrust Trump on Coronavirus Pandemic; Approval Declines as Cases Grow: POLL*, ABC NEWS (July 17, 2020, 6:00 AM), <https://abcnews.go.com/Politics/64-distrust-trump-coronavirus-pandemic-approval-declines-cases/story?id=71779279> [<https://perma.cc/QP2D-6N88>].

¹⁶⁸⁰ Carlie Porterfield, *Viewers Who Trust Fox News Likely to Approve of Trump's Coronavirus Response — Unlike Other Audiences*, FORBES (Apr. 17, 2020, 5:18 PM), <https://www.forbes.com/sites/carlieporterfield/2020/04/17/viewers-who-trust-fox-news-likely-to-approve-of-trumps-coronavirus-response-unlike-other-audiences/#2bfe60d22e8b> [<https://perma.cc/Z985-8CC2>].

¹⁶⁸¹ See *Coronavirus Disease (COVID-19) Advice for the Public: Mythbusters*, *supra* note 1670; Derek Thompson, *The Twilight of Fox News*, THE ATLANTIC (Aug. 29, 2016), <https://www.theatlantic.com/business/archive/2016/08/the-twilight-of-fox-news/497684> [<https://perma.cc/VJ5G-RVU9>].

¹⁶⁸² See ABRAMOWITZ, *supra* note 346, at 142.

¹⁶⁸³ See, e.g., Publius Decius Mus [Michael Anton], *The Flight 93 Election*, CLAREMONT REV. BOOKS (Sept. 5, 2016), <https://claremontreviewofbooks.com/digital/the-flight-93-election> [<https://perma.cc/R5ER-FDTT>].

¹⁶⁸⁴ See Rauch, *supra* note 1476, at 92.

III. THE SUPREME COURT'S CONTRIBUTION TO THE DEGRADATION OF AMERICAN DEMOCRACY

Some of the Supreme Court's finest historical moments have involved safeguarding democracy. In 1915, the Court invalidated the grandfather clause,¹⁶⁸⁵ and between 1927 and 1953 it struck down several iterations of the white primary.¹⁶⁸⁶ *Brown v. Board of Education* struck an important blow against the American racial caste system at a time when most southern blacks were not permitted to vote,¹⁶⁸⁷ and six years later the Court for the first time recognized a cause of action against racial gerrymandering.¹⁶⁸⁸ In the 1960s, the Court struck down legislative malapportionment¹⁶⁸⁹ and the poll tax¹⁶⁹⁰ and upheld the constitutionality of the landmark Voting Rights Act of 1965.¹⁶⁹¹

The Court is at the peak of its institutional legitimacy when it intervenes to bolster democracy.¹⁶⁹² Because the Justices' constitutional interpretations are inevitably political,¹⁶⁹³ their rulings on issues such as abortion, gun control, or the death penalty implicate the "countermajoritarian difficulty" — the notion that unrepresentative and politically unaccountable judges ought not to resolve contested questions of social policy.¹⁶⁹⁴ Yet when incumbent legislators and political parties enact laws to entrench themselves in power, judicial intervention can foster democracy rather than subvert it.¹⁶⁹⁵ Unfortunately, today's Republican Justices seem insensitive, or even hostile, to this conception

¹⁶⁸⁵ *Guinn v. United States*, 238 U.S. 347, 356–57, 368 (1915).

¹⁶⁸⁶ See *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (plurality opinion); *Smith v. Allwright*, 321 U.S. 649, 656–57, 664–66 (1944); *Nixon v. Condon*, 286 U.S. 73, 81–82, 89 (1932); *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927). See generally KLARMAN, JIM CROW, *supra* note 233, at 135–41, 197–204, 236–39.

¹⁶⁸⁷ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 829 (1991) ("Blacks at the time of *Brown* were enfranchised in very small numbers, at least in the South.").

¹⁶⁸⁸ See *Gomillion v. Lightfoot*, 364 U.S. 339, 341–43 (1960); Stephen Ansolabehere & Maxwell Palmer, *A Two-Hundred Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741, 744 (2016).

¹⁶⁸⁹ See *Reynolds v. Sims*, 377 U.S. 533, 567–68, 586–87 (1964); *Baker v. Carr*, 369 U.S. 186, 187–88 (1962).

¹⁶⁹⁰ *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

¹⁶⁹¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

¹⁶⁹² See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87–88, 103 (1980).

¹⁶⁹³ See *infra* section III.I, pp. 224–31.

¹⁶⁹⁴ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986).

¹⁶⁹⁵ See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668 & n.100 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997) [hereinafter Klarman, *Majoritarian Judicial Review*].

of the Court's constitutional role — at a time when threats to democracy emanate from the Republican Party.

*A. Greenlighting the Assault on Democracy in the South:
Shelby County v. Holder (2013)*

The 1965 Voting Rights Act is one of the most noble and efficacious statutes in American history. African Americans were about one-third of the South's population in 1964, but only about forty percent of age-eligible African Americans were registered to vote, as compared with seventy percent of age-eligible whites.¹⁶⁹⁶ In Mississippi, the worst of the Jim Crow states, only six percent of age-eligible African Americans were registered to vote, many majority-black counties had almost no registered black voters, and only a handful of African Americans held elected office.¹⁶⁹⁷

The Voting Rights Act altered that situation almost overnight by departing from the traditional case-by-case approach to litigating claims of race discrimination in voting.¹⁶⁹⁸ The Act suspended literacy tests for most of the South and threatened to appoint federal voter registrars in locales where blacks were not being registered.¹⁶⁹⁹ It also required states or localities with registration or turnout rates below fifty percent that used a “test or device” restricting the opportunity to vote¹⁷⁰⁰ to “preclear” changes to their voting rules with the federal government before implementation to ensure those changes were nondiscriminatory.¹⁷⁰¹

Within a few years, voter registration among age-eligible blacks in Mississippi increased from six percent to sixty percent,¹⁷⁰² and registration across the covered southern states rose from twenty-nine percent in 1965 to fifty-two percent in 1967.¹⁷⁰³ The number of African American elected officials in the South increased from fewer than 100 in 1965 to 873 in March 1972.¹⁷⁰⁴ Over the forty years following the Act's passage, the Supreme Court through statutory interpretation and Congress

¹⁶⁹⁶ STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH 1944–1969*, at 271 (1976).

¹⁶⁹⁷ See BERMAN, *supra* note 7, at 89–92; SILVER, *supra* note 1268, at 86–87; John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 114, 116 (1972).

¹⁶⁹⁸ See *South Carolina v. Katzenbach*, 383 U.S. 301, 327–28 (1966); see also *Shelby County v. Holder*, 570 U.S. 529, 559–63 (2013) (Ginsburg, J., dissenting).

¹⁶⁹⁹ See Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 3(a), 4(a), 6, 7(a)–(b), 79 Stat. 437, 437–40 (codified as amended in scattered sections of 52 U.S.C.).

¹⁷⁰⁰ *Id.* § 4(b), 79 Stat. at 438 (codified as amended at 52 U.S.C. § 10303(b)), *invalidated by Shelby County*, 570 U.S. 529.

¹⁷⁰¹ See *id.* § 5, 79 Stat. at 439 (codified as amended at 52 U.S.C. § 10304).

¹⁷⁰² See BERMAN, *supra* note 7, at 89.

¹⁷⁰³ See BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 23 tbl.1 (1992).

¹⁷⁰⁴ Lewis & Allen, *supra* note 1697, at 114.

through statutory amendments expanded the Act to protect against more subtle interferences with the right to vote, vote dilution as well as vote suppression, and disparate racial effects as well as discriminatory racial animus.¹⁷⁰⁵

Many white southerners resented the Act, which applied special rules to the South that were reminiscent to them of federal military occupation during Reconstruction.¹⁷⁰⁶ As the Republican Party became more dependent on the votes of southern whites beginning in the 1960s,¹⁷⁰⁷ Republican administrations sometimes resisted efforts to expand the statute's reach and to renew it.¹⁷⁰⁸ The Nixon Administration initially opposed interpretations of the law that would cover less direct interferences with the right to vote.¹⁷⁰⁹ The Reagan Administration initially opposed congressional reauthorization of the Act without significant changes and argued against expanding it to forbid disparate racial effects as well as discriminatory racial purposes.¹⁷¹⁰ As a young lawyer in the Reagan White House Counsel's Office and the Justice Department, John Roberts worked assiduously for a "color-blind" interpretation of the Act.¹⁷¹¹

However, the Voting Rights Act proved enormously popular with most Americans: after the formal demise of Jim Crow, who could oppose the idea of African Americans enjoying equal access to political influence?¹⁷¹² In addition, Republicans discovered around 1990 that broadly construing the Act to require maximizing the number of majority-minority legislative districts enhanced their ability to elect candidates in surrounding districts.¹⁷¹³ Thus, the temporary provisions of the Act, such as the preclearance requirement, were renewed and expanded as their expiration dates approached in 1970, 1975, 1982, and 2006, and the Supreme Court rejected constitutional challenges to the reauthorized versions of the law.¹⁷¹⁴ The most recent renewal of the Act passed the

¹⁷⁰⁵ See *Thornburg v. Gingles*, 478 U.S. 30, 35, 80 (1986); *Rogers v. Lodge*, 458 U.S. 613, 622–23 (1982); *City of Rome v. United States*, 446 U.S. 156, 172–73, 183–87 (1980); *Allen v. State Bd. of Elections*, 393 U.S. 544, 568–71 (1969).

¹⁷⁰⁶ See BERMAN, *supra* note 7, at 34–35, 273.

¹⁷⁰⁷ See *id.* at 69–76.

¹⁷⁰⁸ See *id.* at 89–92, 141–45.

¹⁷⁰⁹ See *id.* at 89–92.

¹⁷¹⁰ See *id.* at 141–45.

¹⁷¹¹ JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 63 (2019); see BERMAN, *supra* note 7, at 149–51; BISKUPIC, *supra*, at 68–72.

¹⁷¹² See Lydia Saad, *Gallup Vault: Americans Side with Voting Rights Reforms*, GALLUP (Mar. 23, 2016), <https://news.gallup.com/vault/190259/gallup-vault-americans-side-voting-rights-reforms.aspx> [<https://perma.cc/2RS6-GDS3>] (sharing results of a 1965 poll showing that seventy-six percent of U.S. adults favored federal intervention to protect voting rights).

¹⁷¹³ See *supra* notes 994–1002 and accompanying text.

¹⁷¹⁴ See BERMAN, *supra* note 7, at 82–86, 112, 155–57, 240–43; see also *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197, 199–200 (2000) (avoiding the constitutional question in a challenge to the 2006 extension and describing the Court's previous rejections of other constitutional challenges to the law).

Senate unanimously and the House with only token opposition.¹⁷¹⁵ Support for the law, one conservative critic in *National Review* observed, was too good “a way to prove the [GOP’s] race credibility.”¹⁷¹⁶

In 2013, the conservative majority of the Court did what Republican lawyers, academics, and administrations had been unable to accomplish for decades — abrogate the preclearance provision of the Act.¹⁷¹⁷ In his opinion for the Court in *Shelby County v. Holder*, Chief Justice Roberts invalidated the geographic coverage formula, which necessarily terminated the preclearance requirement.¹⁷¹⁸ Preclearance was “a drastic departure from basic principles of federalism”¹⁷¹⁹ because it required the states to “beseech the Federal Government for permission” to change voting rules.¹⁷²⁰ As such, it could not be justified on the basis of an obsolete formula given how much political conditions in the South had changed since 1965.¹⁷²¹ Chief Justice Roberts noted, for example, that in the 2012 presidential election (when President Obama was on the ballot), turnout among blacks had been higher than among whites in several southern states.¹⁷²² The Chief Justice concluded that Congress could not constitutionally use criteria such as whether a state had low black voter registration approximately fifty years earlier to determine whether changes to its voting practices in 2013 must be precleared with the federal government.¹⁷²³

Doctrinally, Chief Justice Roberts invoked the principle of equal state sovereignty and insisted that departures from it required a demonstration of current need.¹⁷²⁴ This was probably an erroneous invocation of the principle, which previously had been limited to the idea that new states admitted to the Union must enjoy the same rights and privileges as existing states.¹⁷²⁵ For example, in 1820, white southerners argued that Congress could not constitutionally condition Missouri’s admission to the Union on its abolishing slavery when Congress clearly could not require an existing state to do so.¹⁷²⁶ However, because the Court in *Shelby County* could easily have reached the same result applying the

¹⁷¹⁵ See BERMAN, *supra* note 7, at 242–43.

¹⁷¹⁶ John J. Miller, *Every Man’s Burden*, NAT’L REV., Apr. 10, 2006, at 22, 22.

¹⁷¹⁷ See BERMAN, *supra* note 7, at 280.

¹⁷¹⁸ See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). A separate preclearance requirement for jurisdictions found to have violated the Fourteenth or Fifteenth Amendments remains in effect. See 52 U.S.C. § 10302(c).

¹⁷¹⁹ *Shelby County*, 570 U.S. at 535.

¹⁷²⁰ *Id.* at 544.

¹⁷²¹ See *id.* at 547, 557.

¹⁷²² See *id.* at 548.

¹⁷²³ See *id.* at 556–57.

¹⁷²⁴ See *id.* at 535–36, 544–45.

¹⁷²⁵ See *id.* at 587–88 (Ginsburg, J., dissenting) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (noting legal invocations of the doctrine)).

¹⁷²⁶ See GLOVER MOORE, *THE MISSOURI CONTROVERSY*, 1819–1821, at 118–20 (1966).

“congruence and proportionality” test for evaluating exercises of congressional power under the enforcement provisions of the Fourteenth and Fifteenth Amendments,¹⁷²⁷ quibbling over the Court’s use of the equal state sovereignty principle seems ungenerous.

The conservative majority was correct in one important sense: By 2013, Republican suppression of the votes of Democratic-leaning constituencies, such as people of color, was no longer limited to the South. In fact, Wisconsin Republicans were just as likely to suppress votes as were Georgia Republicans.¹⁷²⁸ In that sense, the geographic coverage formula was indeed obsolete, and a sensible one written in 2013 would have looked different from the one in the 1965 Act (although, in fairness, Congress did hear evidence of more successful lawsuits being brought under section 2 of the Act, which applies nationally, in the Deep South than in the North¹⁷²⁹). However, whether invalidating preclearance was the appropriate remedy when northern Republicans suppressed the votes of African Americans and Latinos as much as southern Republicans did is debatable.

In addition, differences in geographic rates of racially polarized voting may justify continued differential regional treatment.¹⁷³⁰ At oral argument, Chief Justice Roberts emphasized that in 2012 Mississippi blacks, who were about thirty-seven percent of the state’s population,¹⁷³¹ turned out to vote at higher rates than whites.¹⁷³² He did not mention the extent to which the state’s voting remains racially polarized. Only ten percent of white Mississippians voted for President Obama, and no blacks have been elected to statewide office in Mississippi since Reconstruction.¹⁷³³ When Mississippi Republicans entrench themselves in power, they are shutting out African Americans, which seems like a serious problem, regardless of whether their motive is racial or partisan. Blacks across regions vote overwhelmingly Democratic, but northern

¹⁷²⁷ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 518–20 (1997).

¹⁷²⁸ See BERMAN, *supra* note 7, at 277; see also *Shelby County v. Holder*, 679 F.3d 848, 902 (D.C. Cir. 2012) (Williams, J., dissenting), *rev’d*, 570 U.S. 529.

¹⁷²⁹ See H.R. REP. NO. 109-478, at 52–53 (2006); Ellen Katz with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 MICH. J.L. REFORM 643, 655–56 (2006).

¹⁷³⁰ See *Shelby County*, 570 U.S. at 578–79 (Ginsburg, J., dissenting).

¹⁷³¹ See BERMAN, *supra* note 7, at 275.

¹⁷³² See Transcript of Oral Argument at 32, *Shelby County*, 570 U.S. 529 (2013) (No. 12-96), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-96_7648.pdf [https://perma.cc/53L5-NYPF].

¹⁷³³ See BERMAN, *supra* note 7, at 275.

whites are not nearly as reliably Republican as are whites in the Deep South.¹⁷³⁴

Furthermore, the strong correlation between race and partisanship existing in the South today did not emerge for reasons independent of racial prejudice. As already noted, southern whites gradually fled the Democratic Party beginning in the 1960s because it embraced civil rights, while Republicans pursued a “southern strategy.”¹⁷³⁵ Section 2 lawsuits are still filed disproportionately in the states with the largest black populations and, concomitantly, the most pervasive white racial animus.¹⁷³⁶ A northern city today would be unlikely to cancel an election after blacks filed candidacies for office in unprecedented numbers, as a Mississippi town did in 2001.¹⁷³⁷ Northern state legislators are probably less likely to refer privately to African Americans as “Aborigines,” as Alabama legislators did in 2010,¹⁷³⁸ or to use a notorious racial slur to describe a 1990 legislative redistricting plan that would increase the number of majority-black districts, as Mississippi legislators did.¹⁷³⁹

Chief Justice Roberts also noted that Congress was free to enact a new geographic coverage formula, though he expressed doubt that preclearance, as an “extraordinary departure” from federalism principles, could be justified on any formula.¹⁷⁴⁰ National Republicans, of course, will not acquiesce to forbidding vote-suppression techniques critical to the party’s retention of power and employed by most states controlled by the Republican Party.¹⁷⁴¹ In 2014, not a single Republican senator would cosponsor a bill to restore preclearance.¹⁷⁴²

Finally, Chief Justice Roberts rejected the argument in defense of preclearance that it had deterred southern states from suppressing or diluting black votes: this argument proved too much, Chief Justice Roberts declared, because it would justify leaving section 5 in place forever.¹⁷⁴³ The post-*Shelby County* behavior of southern states suggests

¹⁷³⁴ See Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, Essay, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 211–13 (2013).

¹⁷³⁵ See *supra* section II.A, pp. 107–24.

¹⁷³⁶ See Katz et al., *supra* note 1729, at 655–56, 655 n.44; Candis Watts Smith, Rebecca J. Kreitzer & Feiya Suo, Reflection, *The Dynamics of Racial Resentment Across the 50 US States*, 18 PERSPS. ON POL. 527, 532 (2020).

¹⁷³⁷ See *Shelby County v. Holder*, 679 F.3d 848, 865 (D.C. Cir. 2012), *rev’d*, 570 U.S. 529 (2013).

¹⁷³⁸ See *Shelby County*, 570 U.S. at 584 (Ginsburg, J., dissenting).

¹⁷³⁹ *Shelby County*, 679 F.3d at 866.

¹⁷⁴⁰ See *Shelby County*, 570 U.S. at 557 (quoting *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 500 (1992)).

¹⁷⁴¹ See *supra* section I.C, pp. 45–66.

¹⁷⁴² See BERMAN, *supra* note 7, at 300–01; Jaime Fuller, *Republicans Used to Unanimously Back the Voting Rights Act. Not Any More.*, WASH. POST (June 26, 2014, 12:10 PM), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/26/republicans-used-to-unanimously-back-voting-rights-act-not-any-more> [<https://perma.cc/XHH3-2STX>].

¹⁷⁴³ See *Shelby County*, 570 U.S. at 550.

the deterrence argument was entitled to greater credence. Within twenty-four hours of the decision, Alabama had revived a bill previously blocked under preclearance that required photo identification for voting.¹⁷⁴⁴ Then, the state closed thirty-one driver's license offices, some of the principal venues for obtaining such identification, which were disproportionately located in counties with large black populations.¹⁷⁴⁵ Between 2012 and 2018, states formerly covered by section 5 closed nearly 1,700 polling places.¹⁷⁴⁶

*B. Greenlighting Voter Photo Identification Laws:
Crawford v. Marion County Election Board (2008)*

As already discussed, since 2005, Republicans everywhere have enacted voter photo identification laws to reduce voter turnout.¹⁷⁴⁷ They invoke the risk of voter fraud to justify such measures, but researchers have shown that voter impersonation fraud is almost nonexistent.¹⁷⁴⁸

In 2005, after gaining control of the Indiana government for the first time in decades, Republicans enacted one of the most restrictive voter identification laws in the country.¹⁷⁴⁹ In 2008, the Supreme Court considered a facial challenge to that law.¹⁷⁵⁰

*Crawford v. Marion County Election Board*¹⁷⁵¹ should have been an easy case. Court decisions from the 1960s had established that voting is a fundamental right.¹⁷⁵² Whatever formal doctrinal apparatus the Court uses to evaluate the constitutionality of burdens imposed on fundamental rights,¹⁷⁵³ at a minimum the state must be obliged to demonstrate some plausible benefit flowing from those burdens.¹⁷⁵⁴ Yet Indiana did not identify a single instance of voter impersonation fraud in the state.¹⁷⁵⁵

¹⁷⁴⁴ See Maggie Astor, *Seven Ways Alabama Has Made It Harder to Vote*, N.Y. TIMES (June 23, 2018), <https://nyti.ms/2Ijr33m> [<https://perma.cc/794D-XFWU>].

¹⁷⁴⁵ See *id.*

¹⁷⁴⁶ See THE LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 10 (2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/82Y2-JCEC>].

¹⁷⁴⁷ See *supra* section I.C.2, pp. 48–51.

¹⁷⁴⁸ See ANDERSON, *supra* note 6, at 56; *Resources on Voter Fraud Claims*, BRENNAN CTR. FOR JUST. (June 26, 2017), <https://www.brennancenter.org/our-work/research-reports/resources-voter-fraud-claims> [<https://perma.cc/VD92-SAX8>] (collecting studies).

¹⁷⁴⁹ See Brief for Petitioners at 4, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (No. 07-25); COHEN, *supra* note 1331, at 178–79.

¹⁷⁵⁰ See *Crawford*, 553 U.S. at 203–04 (plurality opinion).

¹⁷⁵¹ 553 U.S. 181.

¹⁷⁵² See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667–68 (1966); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

¹⁷⁵³ Compare *Crawford*, 553 U.S. at 189–91 (plurality opinion), with *id.* at 204–08 (Scalia, J., concurring in the judgment).

¹⁷⁵⁴ See *id.* at 191 (plurality opinion); *id.* at 209 (Souter, J., dissenting).

¹⁷⁵⁵ See *id.* at 194 (plurality opinion); ANDERSON, *supra* note 6, at 56.

Announcing the judgment of the Court but writing only for himself and two other Justices, Justice Stevens upheld the law under the balancing test the Court had previously used to sustain a state law prohibiting write-in voting.¹⁷⁵⁶ Justice Stevens distinguished *Harper v. Virginia Board of Elections*,¹⁷⁵⁷ where the Court had invalidated a poll tax requirement for voting,¹⁷⁵⁸ on the ground that payment of a poll tax bore no relationship to a person's qualifications to vote, while Indiana had a legitimate interest in detecting and deterring voter fraud.¹⁷⁵⁹

Even in the context of a facial challenge, where the plaintiff bears the burden of demonstrating that the law at issue would be unconstitutional in most of its applications, Indiana should have been required to present *some* evidence that voter impersonation fraud was a problem in need of a solution and that the law would address the problem.¹⁷⁶⁰ In *Crawford*, Indiana presented *no* evidence of such fraud in the state's history and only minimal evidence of such fraud in other states.¹⁷⁶¹ Justice Stevens mostly focused, strangely, on voter impersonation fraud perpetrated by Tammany Hall in New York City in the *late nineteenth century*.¹⁷⁶² Indeed, the record in *Crawford* showed that fraud with regard to absentee ballots *had* been an issue in Indiana, yet the law did not address it, probably because more Republicans than Democrats voted absentee.¹⁷⁶³ In the campaign finance context, the Court has invalidated restrictions on money in politics absent evidence of the corruption that the challenged regulation purported to prevent.¹⁷⁶⁴ Yet Justice Stevens nonetheless concluded that the risk of voter impersonation fraud was real and “could affect the outcome of a close election.”¹⁷⁶⁵

Justice Stevens also invoked the state's interest in protecting public confidence in the integrity of the voting system: whether or not voter impersonation fraud actually existed, people might believe that it did.¹⁷⁶⁶ However, that rationale simply rewarded the Republican Party for a decade's worth of lies perpetuating the myth of voter impersonation fraud.¹⁷⁶⁷

Justice Stevens acknowledged that photo identification requirements posed “some burdens” on prospective voters, although he understated

¹⁷⁵⁶ See *Crawford*, 553 U.S. at 191–203 (plurality opinion); *Burdick v. Takushi*, 504 U.S. 428, 434, 440 (1992).

¹⁷⁵⁷ 383 U.S. 663.

¹⁷⁵⁸ See *id.* at 666, 670.

¹⁷⁵⁹ See *Crawford*, 553 U.S. at 189–91 (plurality opinion).

¹⁷⁶⁰ See *id.* at 236 (Souter, J., dissenting).

¹⁷⁶¹ See *id.* at 226.

¹⁷⁶² See *id.* at 195 n.11 (plurality opinion); ANDERSON, *supra* note 6, at 58.

¹⁷⁶³ See *Crawford*, 553 U.S. at 225 (Souter, J., dissenting); ANDERSON, *supra* note 6, at 59.

¹⁷⁶⁴ See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion).

¹⁷⁶⁵ *Crawford*, 553 U.S. at 196 (plurality opinion); see *id.* at 195–96.

¹⁷⁶⁶ See *id.* at 197.

¹⁷⁶⁷ See *supra* section I.C.2, pp. 48–51.

their extent.¹⁷⁶⁸ Studies conducted prior to *Crawford* showed that between six and eleven percent of Americans, including twenty-five percent of African Americans, lacked the sort of identification that Indiana required for voting.¹⁷⁶⁹ The trial judge in a case that was consolidated with *Crawford* estimated that about 43,000 Indianans of voting age lacked a state-issued photo identification and that nearly three-quarters of them lived in the county with one of the highest concentrations of black voters in the state.¹⁷⁷⁰

However, Justice Stevens rejected the argument that requiring voters to collect the required documentation, travel to a government office, and pose for a photograph constituted a substantial burden on the right to vote.¹⁷⁷¹ Because Indiana provided free photo identification to the poor, there was no poll tax problem.¹⁷⁷² Justice Stevens left open the possibility that the law might be unconstitutional as applied to the few prospective voters who might have difficulty locating or paying for the required documentation to obtain a photo identification.¹⁷⁷³ Finally, Justice Stevens expressed concern that legislators had divided on the bill strictly along partisan lines, but he nonetheless concluded that it was constitutional so long as a valid, nonpartisan justification had been proffered for it.¹⁷⁷⁴

Writing for himself and two others, Justice Scalia concurred only in the judgment because he would have ruled out an as-applied challenge to the law as well.¹⁷⁷⁵ Absent a “severe” burden on the right to vote, to be determined by assessing its impact on all prospective voters, the law was constitutional.¹⁷⁷⁶ Justice Scalia suggested that focusing on the burdensome impact of a law on particular individuals would be inconsistent with the holding in *Washington v. Davis*¹⁷⁷⁷ that proof of discriminatory purpose was required to establish an equal protection violation.¹⁷⁷⁸ However, the whole point of treating voting as a fundamental right had been to create a separate strand of equal protection cases focusing on

¹⁷⁶⁸ *Crawford*, 553 U.S. at 197 (plurality opinion); see *id.* at 197–98.

¹⁷⁶⁹ See *id.* at 219 (Souter, J., dissenting); BRENNAN CTR. FOR JUST., CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf [<https://perma.cc/9MNZ-4V7P>].

¹⁷⁷⁰ *Crawford*, 553 U.S. at 218 (Souter, J., dissenting); Brief for Petitioners at 17–18, *Ind. Democratic Party v. Rokita*, 551 U.S. 1192 (2007) (No. 07-25).

¹⁷⁷¹ *Crawford*, 553 U.S. at 198 (plurality opinion).

¹⁷⁷² See *id.*

¹⁷⁷³ See *id.* at 199.

¹⁷⁷⁴ See *id.* at 203–04.

¹⁷⁷⁵ See *id.* at 204 (Scalia, J., concurring in the judgment).

¹⁷⁷⁶ *Id.* at 205–06.

¹⁷⁷⁷ 426 U.S. 229 (1976).

¹⁷⁷⁸ See *Crawford*, 553 U.S. at 207 (Scalia, J., concurring in the judgment) (citing *Davis*, 426 U.S. at 248).

impact, not purpose.¹⁷⁷⁹ Justice Scalia did not explain how *Reynolds v. Sims*¹⁷⁸⁰ or *Harper* could be reconciled with his approach.

Within a couple years of *Crawford*, the number of states with strict voter identification laws had increased from three to twelve.¹⁷⁸¹ Justice Stevens later recanted his vote, acknowledging that the law burdened the poor, people with disabilities, the elderly, and people of color more than he had initially recognized.¹⁷⁸² Likewise, Judge Posner, who had written the Seventh Circuit opinion upholding the Indiana law, later denounced such measures as “now widely regarded as a means of voter suppression rather than of fraud prevention.”¹⁷⁸³ The conservative Justices, however, have given no hint of reconsidering the matter.

C. *Greenlighting Purges of the Voter Rolls:*
Husted v. A. Philip Randolph Institute (2018)

As already discussed, since roughly 2000, Republicans have also purged voter rolls to reduce the political participation of people least likely to vote for them.¹⁷⁸⁴ The National Voter Registration Act of 1993 requires states to make a “reasonable effort” to remove ineligible registrants from the rolls, but it limits who may be removed and how.¹⁷⁸⁵ Voters may be removed if they request it, are convicted of a felony rendering them ineligible to vote, or move out of the jurisdiction in which they were previously registered.¹⁷⁸⁶ However, voters may be removed from the rolls for change of residence only if they also fail to respond to a follow-up inquiry.¹⁷⁸⁷ Further, the Act forbids using registrants’ failure to vote in recent elections as a reason for removing them from the rolls.¹⁷⁸⁸ A 2002 amendment further provides that “registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, *except that no registrant may be removed solely by reason of a failure to vote.*”¹⁷⁸⁹

Ohio Republicans took advantage of the federal law’s failure to fully clarify the circumstances under which a state was authorized to send

¹⁷⁷⁹ See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 264–66 (1991).

¹⁷⁸⁰ 377 U.S. 533 (1964).

¹⁷⁸¹ See BERMAN, *supra* note 7, at 260.

¹⁷⁸² See *id.* at 309; COHEN, *supra* note 1331, at 181–82.

¹⁷⁸³ BERMAN, *supra* note 7, at 309.

¹⁷⁸⁴ See *supra* section I.C.3, pp. 51–55.

¹⁷⁸⁵ 52 U.S.C. § 20507(a)(4); see *id.* § 20507(a)(3)–(4).

¹⁷⁸⁶ See *id.* § 20507(a)(3)–(4).

¹⁷⁸⁷ *Id.* § 20507(d)(1)(B).

¹⁷⁸⁸ *Id.* § 20507(b)(2).

¹⁷⁸⁹ Help America Vote Act of 2002, Pub. L. No. 107-252, § 303(a)(4)(A), 116 Stat. 1666, 1710 (codified at 52 U.S.C. § 21083(a)(4)(A)) (emphasis added).

the warning notice to registrants in the first place. They passed a law requiring that such notices be sent to those who had failed to vote within the last two years.¹⁷⁹⁰ A failure either to respond to the warning notice or to vote in the next four years would then lead to removal from the rolls.¹⁷⁹¹ Ohio Republicans argued that while federal law did not permit purges *solely* for recent failures to vote, it did not bar them for failures to vote *and* to respond to a follow-up inquiry, even though the inquiry had been sent only because of a failure to vote.¹⁷⁹²

In 2018, the Court considered whether Ohio's law violated the federal statute.¹⁷⁹³ This, too, should have been an easy case. The right to vote is fundamental, which is why the federal statute tried to make it easier to register voters and forbade removal from the rolls simply for failures to vote, no matter in how many elections.¹⁷⁹⁴ Ohio's effort to evade that prohibition was transparent: When people failed to vote in a single two-year election cycle, they would be sent a warning notice, which a majority of them would predictably ignore, and then they would be purged if they failed to either respond to the notice or to vote in the next two election cycles. The response rate on such warning notices is skewed by race and class,¹⁷⁹⁵ which is why Republicans support such purge laws.¹⁷⁹⁶

By the usual 5–4 division, the Republican Justices ruled that the Ohio law was not preempted.¹⁷⁹⁷ Writing for the majority, Justice Alito conceded that failing to vote in the last two years was perhaps not strong evidence of a registrant's change of residence, but insisted that the federal statute did not require a "particular quantum of evidence" before the state mailed warning notices.¹⁷⁹⁸ He refused to second-guess the empirical judgments of Congress and the Ohio legislature that failure to vote was *some* evidence of ineligibility to vote.¹⁷⁹⁹ Justice Alito also expressed annoyance at the suggestion in Justice Sotomayor's dissent that the nation's history of voter suppression was relevant to the case.¹⁸⁰⁰ Justice Thomas wrote separately to suggest that interpreting federal law to bar Ohio's action would have raised a significant constitutional question.¹⁸⁰¹

¹⁷⁹⁰ *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1840 (2018).

¹⁷⁹¹ See OHIO REV. CODE ANN. § 3503.21(B)(2) (West 2020); *Husted*, 138 S. Ct. at 1841.

¹⁷⁹² See Brief for the Petitioner at 23–27, *Husted*, 138 S. Ct. 1833 (No. 16-980).

¹⁷⁹³ See *Husted*, 138 S. Ct. at 1838, 1841.

¹⁷⁹⁴ See *id.* at 1863–64 (Sotomayor, J., dissenting).

¹⁷⁹⁵ See *id.* at 1864.

¹⁷⁹⁶ See Adam Liptak, *Supreme Court Upholds Ohio's Purge of Voting Rolls*, N.Y. TIMES (June 11, 2018), <https://nyti.ms/2Mh1LWX> [<https://perma.cc/CF58-L6AH>].

¹⁷⁹⁷ See *Husted*, 138 S. Ct. at 1843, 1846, 1848.

¹⁷⁹⁸ *Id.* at 1847; see *id.* at 1846–47.

¹⁷⁹⁹ See *id.* at 1845–46.

¹⁸⁰⁰ See *id.* at 1848; *id.* at 1863–65 (Sotomayor, J., dissenting).

¹⁸⁰¹ *Id.* at 1848–50 (Thomas, J., concurring).

Justice Alito’s argument boiled down to the proposition that while Congress did not wish states to presume registrants ineligible to vote simply because they had failed to vote, it had no objection to states’ sending warning notices based on a failure to vote and then purging registrants who neither responded to the notice nor voted within the next four years. “If the law supposes that, . . . the law is a ass — a idiot.”¹⁸⁰² Although Congress could perhaps have specified its intentions more precisely, the federal statute, the underlying purpose of which was to facilitate voter registration, was clear enough. The Republican Justices were hardly bound to reward the determination of Ohio Republicans to exploit a glitch in the statute to interfere with the fundamental right to vote for partisan advantage.¹⁸⁰³

The record in the case established that very few registered voters relocate outside the jurisdiction in which they are registered in any given year, but many registered voters fail to vote in an election.¹⁸⁰⁴ Most of those who fail to vote also fail to respond to a warning notice.¹⁸⁰⁵ As a result, “[t]he number of registered voters who both fail to vote and fail to respond to the [warning] notice exceeds the number . . . who move outside of their county each year.”¹⁸⁰⁶ Only four percent of Americans relocate to another county each year, but in 2014 nearly sixty percent of Ohio’s registered voters failed to vote, and thus were eligible to be sent warning notices.¹⁸⁰⁷ Of the 1.5 million warning notices Ohio mailed after the 2012 election, more than two-thirds were not returned — not because many people had moved or died, but because most people are busy, inattentive, or both.¹⁸⁰⁸ The purpose of the electoral system, as Justice Breyer noted in dissent, is “to discern the will of the majority,”¹⁸⁰⁹ not to “test the fortitude and determination of the voter.”¹⁸¹⁰

It is no mystery why Ohio Republicans wished to purge so many qualified registrants from the voting rolls. Voter purges disproportionately affect Democratic constituencies, such as people of color and the poor.¹⁸¹¹ Purges for failure to vote removed ten percent of registrants in predominantly African American neighborhoods in Hamilton County,

¹⁸⁰² CHARLES DICKENS, *OLIVER TWIST* 347 (Fred Kaplan ed., W.W. Norton & Co. 1993) (1838).

¹⁸⁰³ See *Husted*, 138 S. Ct. at 1850–60 (Breyer, J., dissenting); *id.* at 1863–65 (Sotomayor, J., dissenting).

¹⁸⁰⁴ See *id.* at 1856 (Breyer, J., dissenting).

¹⁸⁰⁵ *Id.*

¹⁸⁰⁶ *Id.*

¹⁸⁰⁷ See *id.*

¹⁸⁰⁸ See *id.*

¹⁸⁰⁹ *Id.* at 1851 (quoting S. REP. NO. 103-6, at 3 (1993)).

¹⁸¹⁰ *Id.* at 1850–51 (quoting S. REP. NO. 103-6, at 3).

¹⁸¹¹ See *id.* at 1864 (Sotomayor, J., dissenting); Brief of *Amici Curiae* NAACP & the Ohio State Conference of the NAACP in Support of Respondents at 18–19, *Husted*, 138 S. Ct. 1833 (No. 16-980) [hereinafter Brief of *Amici Curiae* NAACP].

where Cincinnati is located, but only four percent of registrants in majority-white suburban neighborhoods.¹⁸¹²

Since the Court's ruling, conservative voter suppression groups have begun suing states and localities to force them to purge their voter rolls.¹⁸¹³ One such suit evenly divided the Wisconsin Supreme Court — with a justice up for reelection in April 2020 recused — which led Republican legislators to force voters to confront the choice between risking possible death from COVID-19 and being disfranchised.¹⁸¹⁴

*D. Greenlighting Partisan Gerrymandering:
Rucho v. Common Cause (2019)*

For most of American history, few people would have imagined that partisan gerrymandering presented a justiciable issue for courts to adjudicate, even though the political process justification for judicial intervention is quite strong.¹⁸¹⁵ Partisan gerrymandering is a classic instance of a currently dominant political party seeking to entrench itself in power.¹⁸¹⁶ Unlike legislative malapportionment, which can be rationally justified — for example, on the ground that sparsely populated legislative districts should not encompass too much geographic territory — very little can be said in defense of gerrymandering.¹⁸¹⁷ In its extreme form, it produces ludicrously antidemocratic results and dilutes the voting power of enormous numbers of individuals, in violation of the principle that all votes should count equally.¹⁸¹⁸

The challenge for judicial intervention in the gerrymandering context has always been devising a “manageable” standard, which is arguably especially important if the Court is to involve itself in contentious partisan battles over political power.¹⁸¹⁹ The American political system, unlike that of much of the world, is not one of proportional

¹⁸¹² Brief of *Amici Curiae* NAACP, *supra* note 1811, at 19.

¹⁸¹³ See Joan Biskupic, *Legal Battles over Voter Roll Purges Heat Up as Mail-In Ballot Fight Continues*, CNN (May 28, 2020, 6:08 AM), <https://www.cnn.com/2020/05/28/politics/voter-roll-purges-lawsuits-vote-by-mail/index.html> [<https://perma.cc/GY99-4SKP>]; Reid J. Epstein, *Upset Victory in Wisconsin Supreme Court Race Gives Democrats a Lift*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/politics/wisconsin-primary-results.html> [<https://perma.cc/7LZF-6XAM>]; *supra* note 446 and accompanying text.

¹⁸¹⁴ See Epstein, *supra* note 1813; see also *supra* section I.C.7(d), pp. 65–66.

¹⁸¹⁵ See Klarman, *Majoritarian Judicial Review*, *supra* note 1695, at 533–34.

¹⁸¹⁶ See *id.*

¹⁸¹⁷ See *id.* at 531–33.

¹⁸¹⁸ See *supra* section I.C.1, pp. 46–47; *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting).

¹⁸¹⁹ *Rucho*, 139 S. Ct. at 2500 (majority opinion); see *id.* at 2500–01; *id.* at 2519–20 (Kagan, J., dissenting); see also *Baker v. Carr*, 369 U.S. 186, 327–28 (1962) (Frankfurter, J., dissenting).

representation, and if party political power proportionate to voter support is not the baseline against which to measure impermissible gerrymandering, it is not clear what should be.¹⁸²⁰

However, in 1986 in *Davis v. Bandemer*,¹⁸²¹ for the first time, six Justices agreed that partisan gerrymandering posed a justiciable issue, although they disagreed among themselves over the correct substantive standard for identifying a constitutional violation.¹⁸²² A plurality opinion for four Justices would have required plaintiffs to prove both a partisan purpose, which is usually easy to show in gerrymandering cases, and a “continued frustration of the will of [the] majority” persisting across multiple elections, which would be difficult to demonstrate given the constitutional requirement of new legislative districting after each decennial census.¹⁸²³ A separate opinion representing the views of two Justices would have required proof of partisan purpose and discriminatory effect but would not have required that the effect be shown to have persisted across multiple elections.¹⁸²⁴

No lower court applying the standard of the *Davis* plurality vindicated a claim of unconstitutional gerrymandering.¹⁸²⁵ In 2004, the Court’s conservative majority rejected the *Davis* approach.¹⁸²⁶ However, only four of these Justices ruled that gerrymandering claims were nonjusticiable. Justice Kennedy, the fifth vote for the judgment of the Court, agreed that *Davis* had created too low a threshold for invalidating a gerrymander, but left open the possibility that a manageable standard short of proportional representation might be devised.¹⁸²⁷

Responding to Justice Kennedy’s invitation, political scientists and law professors sought to develop such a standard.¹⁸²⁸ By 2019, when the Court took up the question again, it seemed that they had done so.¹⁸²⁹ Yet Justice Kennedy had retired in 2018, replaced by Justice Kavanaugh, who provided the fifth vote in *Rucho v. Common Cause*.¹⁸³⁰

¹⁸²⁰ See *Rucho*, 139 S. Ct. at 2499 (majority opinion); *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O’Connor, J., concurring in the judgment).

¹⁸²¹ 478 U.S. 109.

¹⁸²² See *id.* at 113 (plurality opinion); *id.* at 161–62 (Powell, J., concurring in part and dissenting in part).

¹⁸²³ *Id.* at 133 (plurality opinion); see *id.* at 113, 128–29.

¹⁸²⁴ See *id.* at 161–62, 171 n.10 (Powell, J., concurring in part and dissenting in part).

¹⁸²⁵ See *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (plurality opinion).

¹⁸²⁶ See *id.* at 305–06, 308 (Kennedy, J., concurring in the judgment).

¹⁸²⁷ See *id.* at 306, 308.

¹⁸²⁸ See ANDERSON, *supra* note 6, at 110.

¹⁸²⁹ See, e.g., *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 800–01 (M.D.N.C. 2018) (finding partisan gerrymander unconstitutional), *vacated*, 139 S. Ct. 2484 (2019); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 884–99 (2015) (proposing standard); see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516–19 (2019) (Kagan, J., dissenting) (describing standards used by lower courts).

¹⁸³⁰ 139 S. Ct. 2484.

to rule definitively that challenges to partisan gerrymandering posed a nonjusticiable political question.¹⁸³¹

Writing for the majority, Chief Justice Roberts had nothing positive to say about partisan gerrymandering, even acknowledging that it produces unfair political outcomes.¹⁸³² Nonetheless, he ruled the challenge nonjusticiable for two reasons. First, there was no “judicially discoverable and manageable” standard¹⁸³³ short of proportional representation against which to measure gerrymandering.¹⁸³⁴ Second, methods of counteracting gerrymandering other than judicial review were available.¹⁸³⁵ Congress has power under the Constitution’s Elections Clause to bar partisan gerrymandering in congressional elections, and citizens could use voter initiatives to circumvent recalcitrant state legislatures and mandate that legislative districts be drawn by nonpartisan commissions.¹⁸³⁶

Neither of the majority’s rationales is persuasive. There are two responses to the concern that judicially manageable standards for curbing gerrymandering are unavailable. First, it is not true. Second, such concerns have not always deterred the Court’s intervention in other constitutional spheres.

While Chief Justice Roberts is right that no standard for evaluating partisan gerrymandering is as neat and mathematical as the one person, one vote rule imposed by the Court with regard to apportionment, that does not mean no manageable standards exist.¹⁸³⁷ As Justice Kagan noted in dissent, social scientists have devised multiple methods of measuring and evaluating partisan gerrymandering that do not entail a proportionality baseline and allow states to devise their own criteria for districting, barring, of course, pursuit of partisan gain.¹⁸³⁸

One such method, the “efficiency gap,” measures the number of “wasted” votes that a particular districting scheme entails for both parties.¹⁸³⁹ The larger the gap, the more obvious the partisan purpose and the more probable that the gerrymander will have a durable and substantial effect.¹⁸⁴⁰ Alternatively, one can evaluate gerrymandering by

¹⁸³¹ Robert Barnes, *Supreme Court Says Federal Courts Don't Have a Role in Deciding Partisan Gerrymandering Claims*, WASH. POST (June 27, 2019, 7:16 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-says-federal-courts-dont-have-a-role-in-deciding-partisan-gerrymandering-claims/2019/06/27/2fe82340-93ab-11e9-b58a-a6a9afaa0e3e_story.html [https://perma.cc/QD5Q-YK8Y].

¹⁸³² See *Rucho*, 139 S. Ct. at 2506–07.

¹⁸³³ *Id.* at 2496 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

¹⁸³⁴ See *id.* at 2499.

¹⁸³⁵ See *id.* at 2507–08.

¹⁸³⁶ See *id.* at 2495, 2507–08.

¹⁸³⁷ See *id.* at 2509 (Kagan, J., dissenting).

¹⁸³⁸ See *id.* at 2520–21.

¹⁸³⁹ Stephanopoulos & McGhee, *supra* note 1829, at 834; see *Whitford v. Gill*, 218 F. Supp. 3d 837, 903 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

¹⁸⁴⁰ See Stephanopoulos & McGhee, *supra* note 1829, at 850–53.

measuring it against computer simulations, randomly drawing hundreds or thousands of districts informed only by legitimate criteria, such as compactness, contiguity, and the preservation of communities of interest.¹⁸⁴¹ Past election results are then mapped onto these computer-drawn districts, and the partisan distribution of seats produced by the actual legislative map can then be compared with the median partisan result generated by the computer simulations.¹⁸⁴² At oral argument in a gerrymandering case the preceding Term, *Gill v. Whitford*,¹⁸⁴³ Chief Justice Roberts disparaged this social science as “gobbledygook,”¹⁸⁴⁴ but it is not actually that complicated.

Both measurement methods confirm that the two gerrymanders before the Court in *Rucho* could have been invalidated without any danger of establishing a requirement of proportional representation. For example, measured against three thousand randomly generated districting maps, the one actually enacted by North Carolina Republicans produced *the most extreme* partisan impact.¹⁸⁴⁵

Equally telling, it is not true that the Court never intervenes without a judicially manageable standard to guide it. For example, the Court has intervened aggressively in the last quarter century to constrain punitive damage awards under the Due Process Clause.¹⁸⁴⁶ How is a rule barring punitive damages more than ten times as high as compensatory damages¹⁸⁴⁷ any less arbitrary than a rule stating that efficiency gaps over ten percent or districting maps producing partisan effects in the outer ten percent of the distribution curve of randomly generated computer maps are unconstitutional gerrymanders? The Court must draw difficult lines whenever it enters a new constitutional field, such as gun control or campaign finance reform.¹⁸⁴⁸ The Chief Justice was not put off by the impossibility of drawing coherent lines in finding the ACA’s Medicaid expansion provision unconstitutionally coercive of the states.¹⁸⁴⁹ If the conservative Justices were willing to draw arbitrary lines to limit punitive damages but

¹⁸⁴¹ See *Rucho*, 139 S. Ct. at 2517–18 (Kagan, J., dissenting) (citing Brief for *Amicus Curiae* Eric S. Lander in Support of Appellees at 7–22, *Rucho*, 139 S. Ct. 2484 (No. 18-422)).

¹⁸⁴² *Id.*

¹⁸⁴³ 138 S. Ct. 1916.

¹⁸⁴⁴ Transcript of Oral Argument at 40, *Gill v. Whitford*, 138 S. Ct. 1916 (No. 16-1161), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_mjno.pdf [<https://perma.cc/438W-D4XW>].

¹⁸⁴⁵ See *Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting).

¹⁸⁴⁶ See, e.g., *Phillip Morris USA v. Williams*, 549 U.S. 346, 349 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424–25, 429 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996).

¹⁸⁴⁷ See *Campbell*, 538 U.S. at 425.

¹⁸⁴⁸ Cf. *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting) (noting that “courts all the time make judgments about the substantiality of harm”).

¹⁸⁴⁹ See *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 583, 585 (2012) (opinion of Roberts, C.J.).

not to limit partisan gerrymandering, might that suggest that they care less about protecting democracy than about protecting large corporations?

As noted, Chief Justice Roberts's second argument for nonjusticiability was the availability of alternative means of dealing with the gerrymandering problem.¹⁸⁵⁰ Yet, as Justice Kagan noted in dissent, these alternatives were not clearly workable.¹⁸⁵¹ While the national government could theoretically bar gerrymandering of congressional districts under the Elections Clause,¹⁸⁵² that would require simultaneous Democratic control of the presidency and Congress because Republicans will not solve a problem that they have exploited to significant partisan advantage.

With regard to state-level reform, Chief Justice Roberts noted that voters in Missouri and elsewhere have recently enacted through ballot initiative constitutional amendments to limit gerrymandering.¹⁸⁵³ However, he failed to note that Missouri Republicans are assiduously trying to negate that initiative, which sixty-two percent of voters supported, and replace it with their own amendment to ensure continued Republican advantage in mapmaking.¹⁸⁵⁴ Moreover, less than half the state constitutions allow for ballot initiatives,¹⁸⁵⁵ and no Republican legislature will end partisan gerrymandering on its own. Nor did Chief Justice Roberts mention that only four years earlier, the conservative Justices implied that they would invalidate a voter initiative that entirely circumvented a state legislature in drawing congressional district lines on the ground that Article I empowers *legislatures*, not the people, to regulate the time, place, and manner of congressional elections.¹⁸⁵⁶

Partisan gerrymandering debases democracy by enabling a political party to entrench itself in power against the wishes of voters, and it fosters extreme political polarization that renders democracy dysfunctional.¹⁸⁵⁷ In the past, the Court has intervened to remedy democratic dysfunction flowing from legislative malapportionment and black disfranchisement.¹⁸⁵⁸ Today's Court could have done likewise. Would the conservative Justices have done so had it been Republicans who are usually on the short end of gerrymandering today?

¹⁸⁵⁰ *Rucho*, 139 S. Ct. at 2507–08.

¹⁸⁵¹ *See id.* at 2523–24 (Kagan, J., dissenting).

¹⁸⁵² *See id.* at 2508 (majority opinion).

¹⁸⁵³ *See id.* at 2507.

¹⁸⁵⁴ *See id.* at 2524 (Kagan, J., dissenting); David A. Lieb, *Republicans Seek to Undo New Missouri Redistricting Model*, ABC NEWS (Jan. 14, 2020, 2:47 PM), <https://abcnews.go.com/Politics/wireStory/republicans-seek-undo-missouri-redistricting-model-68275952> [https://perma.cc/6H3H-467Y].

¹⁸⁵⁵ *See Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting).

¹⁸⁵⁶ *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677–78 (2015) (Roberts, C.J., dissenting).

¹⁸⁵⁷ *See Rucho*, 139 S. Ct. at 2525 (Kagan, J., dissenting).

¹⁸⁵⁸ *See id.* at 2523; COHEN, *supra* note 1331, at 178.

E. Gutting Campaign Finance Reform

In no field has the Court's conservative majority done more damage to American democracy than in campaign finance. For nearly the first two hundred years of the republic, few people imagined that spending money on politics was "speech" protected by the First Amendment. Beginning in the early 1900s, Congress restricted corporate financial contributions to political campaigns but did not create an effective enforcement mechanism.¹⁸⁵⁹ Congress first seriously regulated federal campaign finance in a 1971 statute and amendments to it passed three years later.¹⁸⁶⁰ These measures limited individual contributions and independent spending "relative to a clearly identified candidate," restricted candidate spending, and established the Federal Election Commission to enforce the law.¹⁸⁶¹

In 1976, the Court considered whether such restrictions violated the First Amendment.¹⁸⁶² The Court ruled that the government's legitimate interests in this field were limited to preventing corruption or its appearance and did not include equalizing political influence.¹⁸⁶³ Applying that rationale to the restrictions at issue, the Court determined that limits on campaign contributions could be justified, but limits on a candidate's own campaign expenditures or the independent spending of third parties could not be justified.¹⁸⁶⁴

In this era, attitudes toward campaign finance restrictions did not divide neatly along ideological lines.¹⁸⁶⁵ In 1973, Mitch McConnell, who was then a local Republican Party chair in Kentucky, expressed alarm that the United States was becoming a "bought nation," supported stringent limits on campaign spending, and even advocated public financing of elections.¹⁸⁶⁶ By contrast, some liberal challengers expressed concern that campaign finance regulations were inevitably incumbent-protecting.¹⁸⁶⁷

Supreme Court Justices also did not divide along ideological lines in their initial ruling on campaign finance.¹⁸⁶⁸ The Court's most liberal

¹⁸⁵⁹ See Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)); COHEN, *supra* note 1331, at 136.

¹⁸⁶⁰ Federal Election Campaign Act of 1971, Pub. L. No. 92-225 §§ 301-311 (prior to 1974 amendment); Pub. L. No. 93-443 §§ 201-320 (1974).

¹⁸⁶¹ 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV); see also COHEN, *supra* note 1331, at 136.

¹⁸⁶² See *Buckley v. Valeo*, 424 U.S. 1, 11 (1976) (per curiam).

¹⁸⁶³ See *id.* at 26-27, 48-49.

¹⁸⁶⁴ See *id.* at 26-29, 51, 54, 58-59.

¹⁸⁶⁵ See COHEN, *supra* note 1331, at 138; HASEN, *supra* note 1562, at 20.

¹⁸⁶⁶ Mitch McConnell, Opinion, *Election Ordinance Is, in Part, Reaction to Past Excesses*, LOUISVILLE COURIER-J., Dec. 10, 1973, at A23 (internal quotation marks omitted).

¹⁸⁶⁷ See COHEN, *supra* note 1331, at 138; cf. HASEN, *supra* note 1562, at 20 (noting that a "diverse group of plaintiffs" challenged the campaign finance restrictions).

¹⁸⁶⁸ See COHEN, *supra* note 1331, at 141.

Justices, Justice Brennan and Justice Marshall, may have joined the majority opinion in *Buckley v. Valeo*¹⁸⁶⁹ invalidating spending restrictions for the same reason the ACLU opposed them. However, in recent decades, these cases have divided the Justices along the usual ideological lines, with the conservatives voting to invalidate restrictions and liberals voting to uphold them.¹⁸⁷⁰

The Court's campaign finance decisions are notable for the thinness of the constitutional grounding upon which they rest, especially for conservative Justices who pride themselves on judicial restraint and profess a commitment to textualism and originalism as methodologies of constitutional interpretation. For the Court to demolish any workable system of campaign finance regulation is not obviously an expression of judicial modesty. The text of the First Amendment does not suggest that money is speech. Moreover, the Founding generation had a notoriously narrow conception of the scope of freedom of speech and of the press.¹⁸⁷¹ Most Federalists, including many of those who wrote and ratified the Constitution, believed that the First Amendment permitted the government to punish seditious libel but not to impose prior restraints on it.¹⁸⁷² Yet the Court's campaign finance rulings rarely mention the original understanding of the First Amendment or early judicial interpretations of it.

Similarly, in terms of doctrine, the Court's campaign finance rulings have been grounded more in undefended assertions than reasoned analysis. *Buckley* barely justified its conclusions that money is speech, that equalizing political influence through regulating money in politics is a flatly impermissible objective, and that campaign expenditures purportedly made independently of a candidate's campaign do not pose a substantial risk of corruption or the public perception of it.¹⁸⁷³

Yet why is spending money to get oneself or another elected to political office a purer form of speech than burning a draft card in protest of the Vietnam War, an action that the Court had ruled unprotected by the First Amendment?¹⁸⁷⁴ If the government has a legitimate reason unrelated to suppressing speech for criminalizing draft-card burning, then it has an equally strong interest unrelated to suppressing speech for regulating money in politics: preventing competing voices from being drowned out. To take a different analogy, money amplifies speech in the same way that a sound truck does, and the Court has ruled that

¹⁸⁶⁹ 424 U.S. 1.

¹⁸⁷⁰ See COHEN, *supra* note 1331, at 155.

¹⁸⁷¹ See LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY*, at vii–viii, 87 (1960).

¹⁸⁷² See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 33–36 (2004).

¹⁸⁷³ See *Buckley*, 424 U.S. at 16–21, 46–49.

¹⁸⁷⁴ See *Buckley v. Valeo*, 519 F.2d 821, 840–41 (D.C. Cir. 1975) (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)); COHEN, *supra* note 1331, at 139.

governments may impose reasonable, non-content-related restrictions on the use of sound trucks.¹⁸⁷⁵

Buckley also simply asserted, rather than defended, the proposition that government has no legitimate interest in leveling the playing field of politics by restricting the influence of money.¹⁸⁷⁶ During the *Lochner* era, the Court similarly declared constitutionally off limits the government objective of ameliorating market-driven inequalities in wealth.¹⁸⁷⁷ Since *Buckley*, the Court has repeatedly invoked the notion that government may not seek to equalize political influence as if this prohibition were written in scripture rather than concocted in *Buckley*.¹⁸⁷⁸

It is not. The Court's 1960s voting rights decisions clarified that the Constitution forbids the government from granting some people's votes more weight than others through malapportionment or disfranchising the poor through poll taxes.¹⁸⁷⁹ Presumably, awarding extra votes to the wealthy would also violate the Equal Protection Clause.¹⁸⁸⁰ So how could *Buckley* be so cavalier in rejecting as an illegitimate interest the government objective to equalize political influence?

Buckley also asserted, rather than demonstrated, that political expenditures "relative to a clearly identified candidate" but made independently of a campaign cannot corrupt or appear to corrupt politics in the same way that campaign contributions may.¹⁸⁸¹ Yet the independence requirement is widely understood today to be a farce rendering contribution limits meaningless.¹⁸⁸² In 2012, the super PAC of former Governor Mitt Romney, which was legally required to operate independently of his campaign, was founded by several former campaign officials.¹⁸⁸³ In addition, is it plausible that candidates will not feel as beholden to someone spending millions of dollars independently to support their campaign as they would to someone directly contributing to it?

¹⁸⁷⁵ See *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949); see also *Buckley*, 424 U.S. at 259 (White, J., concurring in part and dissenting in part); *Davis v. FEC*, 554 U.S. 724, 751 (2008) (Stevens, J., concurring in part and dissenting in part).

¹⁸⁷⁶ *Buckley*, 424 U.S. at 48–49, 56–57; see also COHEN, *supra* note 1331, at 142.

¹⁸⁷⁷ See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 16–19 (1915).

¹⁸⁷⁸ See, e.g., *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014); *Citizens United v. FEC*, 558 U.S. 310, 349–50 (2010).

¹⁸⁷⁹ See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966); *Reynolds v. Sims*, 377 U.S. 533, 559–60 (1964).

¹⁸⁸⁰ Cf., e.g., PAGE & GILENS, *supra* note 533, at 185–87; COHEN, *supra* note 1331, at 142–43; ADAM LIOZ, DEMOS, *BUCKLEY V. VALEO* AT 40, at 7–8 (2015), <https://www.demos.org/sites/default/files/publications/Buckley%20at%2040.pdf> [<https://perma.cc/K4ZW-ZRWU>].

¹⁸⁸¹ *Buckley*, 424 U.S. at 41 (quoting 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV)); see also *id.* at 43–47.

¹⁸⁸² See PAGE & GILENS, *supra* note 533, at 185–86; MANN & ORNSTEIN, *supra* note 996, at 73–78.

¹⁸⁸³ See MANN & ORNSTEIN, *supra* note 996, at 76.

Buckley led to the inundation of politics with money.¹⁸⁸⁴ So long as spending is not formally coordinated with a campaign, which is an unenforceable restriction, the wealthy are largely unregulated in their ability to spend money to influence political outcomes.¹⁸⁸⁵ The Court created a free market democracy.¹⁸⁸⁶ The neo-Ayn Randians have won in politics in large part because they won in the Court.¹⁸⁸⁷

Two years after *Buckley*, the Court expanded the ruling to protect the right of corporations to spend money on politics. In *First National Bank of Boston v. Bellotti*,¹⁸⁸⁸ the Court invalidated a Massachusetts law limiting corporate contributions to a ballot initiative campaign,¹⁸⁸⁹ starting down a road that culminated in *Citizens United*.¹⁸⁹⁰

Bellotti reasoned that speech was valuable to listeners whatever its source but limited its holding to the ballot initiative context and declined to decide whether corporations enjoyed the same free speech rights as individuals with regard to candidate elections.¹⁸⁹¹ The Court divided mostly along ideological lines, with the majority opinion written by Justice Powell,¹⁸⁹² who seven years earlier had authored the famous memorandum calling for business to undertake a more vigorous defense of the free enterprise system.¹⁸⁹³ In dissent, Justice White criticized the notion that corporations, which enjoyed special legal advantages in amassing great wealth, should enjoy the same free speech rights as persons.¹⁸⁹⁴

Justices favorably disposed toward campaign finance regulation then won two narrowly divided victories. In 1990, *Austin v. Michigan State Chamber of Commerce*¹⁸⁹⁵ distinguished *Bellotti* and upheld a Michigan law forbidding corporations to use general treasury funds to run a newspaper advertisement endorsing a candidate for political office; the Court emphasized that preventing the corrupting influence of corporate wealth on politics was an important government interest.¹⁸⁹⁶ In 2003,

¹⁸⁸⁴ See COHEN, *supra* note 1331, at 142.

¹⁸⁸⁵ See *id.*; J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 613 n.29, 645 (1982).

¹⁸⁸⁶ See David Schultz, Essay, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259, 261–62 (2016).

¹⁸⁸⁷ See *id.*

¹⁸⁸⁸ 435 U.S. 765 (1978).

¹⁸⁸⁹ See *id.* at 776; COHEN, *supra* note 1331, at 143–44.

¹⁸⁹⁰ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁸⁹¹ See *Bellotti*, 435 U.S. at 781–88.

¹⁸⁹² *Id.* at 767.

¹⁸⁹³ See *supra* notes 1269–1280 and accompanying text.

¹⁸⁹⁴ See *Bellotti*, 435 U.S. at 809 (White, J., dissenting).

¹⁸⁹⁵ 494 U.S. 652 (1990).

¹⁸⁹⁶ See *id.* at 657–60, 666; COHEN, *supra* note 1331, at 146.

*McConnell v. FEC*¹⁸⁹⁷ upheld a federal ban on “phony” issue advertisements by unions and corporations within specified time periods of elections; the Court ruled the prohibition necessary to prevent unions and corporations from circumventing limits on their spending in support of candidates.¹⁸⁹⁸ *McConnell* also upheld “soft money” limits, which were intended to prevent corporations, unions, and wealthy individuals from circumventing candidate-contribution limits by contributing unlimited amounts of money to political parties for party-building and get-out-the-vote operations.¹⁸⁹⁹ In dissent, Justice Kennedy lamented that the ruling made Americans “less free.”¹⁹⁰⁰

On the key issues, Justice O’Connor voted with the four liberal Justices in *McConnell*. After she was replaced by Justice Alito in 2006, the conservatives would not lose another campaign finance case.¹⁹⁰¹ Although Justice Kennedy often provided a fifth vote for the liberals in cases involving gay rights and abortion, he was a rock-ribbed conservative on campaign finance reform.¹⁹⁰²

In 2007, the Court undermined the federal provision barring corporations from financing with general treasury funds broadcasts referring to clearly identified federal candidates within thirty days of a primary election or sixty days of a general election.¹⁹⁰³ The law’s purpose was to prevent circumvention of the ban on “express advocacy” of a candidate’s election during that time period by running “phony” issue ads, which mentioned a candidate’s name without using the “magic words” urging a vote for or against the candidate.¹⁹⁰⁴ The conservative plurality ruled that speech could be regulated as the “functional equivalent of express advocacy” only if susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.¹⁹⁰⁵ Corporations could now spend money promoting or opposing political candidates just prior to federal elections so long as they refrained from using the magic words.¹⁹⁰⁶

In 2008, the conservative Justices invalidated the federal “Millionaire’s Amendment,” which provided that when self-financing candidates for congressional office planned to spend more than \$350,000

¹⁸⁹⁷ 540 U.S. 93 (2003).

¹⁸⁹⁸ COHEN, *supra* note 1331, at 147; *see McConnell*, 540 U.S. at 185, 196; COHEN, *supra* note 1331, at 146–48.

¹⁸⁹⁹ *McConnell*, 540 U.S. at 145; COHEN, *supra* note 1331, at 146–48.

¹⁹⁰⁰ *McConnell*, 540 U.S. at 341 (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹⁹⁰¹ *See MANN & ORNSTEIN*, *supra* note 996, at 73; *HASEN*, *supra* note 1562, at 29.

¹⁹⁰² *See COHEN*, *supra* note 1331, at 151–52.

¹⁹⁰³ *See FEC v. Wis. Right to Life*, 551 U.S. 449, 455–57 (2007); COHEN, *supra* note 1331, at 148.

¹⁹⁰⁴ *Wis. Right to Life*, 551 U.S. at 471 (plurality opinion); *see also COHEN*, *supra* note 1331, at 148.

¹⁹⁰⁵ *Wis. Right to Life*, 551 U.S. at 469 (plurality opinion); *see also id.* at 469–70.

¹⁹⁰⁶ *See COHEN*, *supra* note 1331, at 148.

of their own money, the limits on individual contributions to the opposing candidate would triple.¹⁹⁰⁷ The majority ruled that this scheme penalized the right of self-funding candidates to spend their own money in pursuit of elected office in service of the government interest in equalizing political influence, which *Buckley* had ruled impermissible.¹⁹⁰⁸

Justice Stevens wrote the dissent for the liberal Justices. In addition to criticizing *Buckley* for departing from the original understanding of the First Amendment and its history, Justice Stevens noted that it had ignored the government interest in freeing candidates from interminable fundraising, which justified spending limits.¹⁹⁰⁹ Yet even within the *Buckley* framework, Justice Stevens thought the law permissible in light of the strong government interest in countering the perception that congressional seats were up for sale.¹⁹¹⁰

The conservatives' hostility to campaign finance restrictions culminated in 2010 in *Citizens United*, which ruled that corporations enjoy the same right of political speech as individuals do.¹⁹¹¹ In reaching that conclusion, the conservative Justices resolved an important and controversial issue of constitutional law in a case that could easily have been resolved on narrow grounds — an abandonment of their customary calls for judicial modesty.¹⁹¹²

The case involved the same federal law provision at issue three years earlier, which barred corporations from financing with general treasury funds broadcasts referring to clearly identified federal candidates within specified periods before elections.¹⁹¹³ *Citizens United*, a 501(c)(4) organization funded mostly by individuals, produced *Hillary: The Movie*, a ninety-minute documentary criticizing Hillary Clinton that was released in theaters and on DVD.¹⁹¹⁴ Because *Citizens United* did not clearly qualify as a "corporation" and its movie did not clearly qualify as an "electioneering communication," the Court could easily have construed the statute not to cover the organization or its film.¹⁹¹⁵ The Court has often adopted less plausible narrowing constructions of statutes to avoid resolving contentious constitutional issues.¹⁹¹⁶

The parties had not asked the Court to reconsider *Austin*, which upheld differential treatment of corporate and individual political speech, or

¹⁹⁰⁷ *Davis v. FEC*, 554 U.S. 724, 729 (2008); *see also id.* at 743–44.

¹⁹⁰⁸ *See id.* at 738–41 (citing *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam)).

¹⁹⁰⁹ *See id.* at 751 (Stevens, J., concurring in part and dissenting in part).

¹⁹¹⁰ *See id.* at 752–57.

¹⁹¹¹ *Citizens United v. FEC*, 558 U.S. 310, 343 (2010).

¹⁹¹² *See* MANN & ORNSTEIN, *supra* note 996, at 72.

¹⁹¹³ *See Citizens United*, 558 U.S. at 320.

¹⁹¹⁴ *See id.* at 319–20, 404.

¹⁹¹⁵ *See id.* at 405–08 (Stevens, J., concurring in part and dissenting in part).

¹⁹¹⁶ *See, e.g.,* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

the portion of *McConnell* that had rejected a facial challenge to the statutory provision at issue.¹⁹¹⁷ Justice Kennedy prepared an opinion for the conservative Justices invalidating the statute and overruling the two prior decisions, but Justice Souter apparently prevailed upon Chief Justice Roberts to put the case over for reargument and briefing on the constitutional question.¹⁹¹⁸ However, the delay did not change the outcome. As Justice Stevens charged in dissent, “five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”¹⁹¹⁹

Citizens United overruled *Austin* and the relevant part of *McConnell*.¹⁹²⁰ Justice Kennedy’s majority opinion noted that political speech is indispensable to democratic decisionmaking, regardless of its source,¹⁹²¹ and emphasized the difficulty of drawing lines that would safeguard obviously protected speech from the statute’s coverage.¹⁹²² Justice Kennedy noted that the statute would apply to political advertisements run in the specified preelection time period that were sponsored by a nonprofit corporation such as the Sierra Club if they expressed approval or disapproval of candidates based on their environmental views.¹⁹²³ Justice Kennedy also noted that many newspapers are owned by media corporations, and although the statute specifically exempted media corporations from coverage, under the government’s reasoning that exemption was not constitutionally required.¹⁹²⁴ As Chief Justice Roberts noted in a concurring opinion, the government’s interpretation of the First Amendment would allow newspapers’ editorial endorsements of candidates to be regulated.¹⁹²⁵

Justice Stevens dissented from the Court’s principal holding in an opinion joined by the other liberals. He noted that the Court’s ruling upset the conventional wisdom that had prevailed since 1907, when Congress had first prohibited corporate financial contributions to political campaigns.¹⁹²⁶ In 1947, Congress had extended that prohibition to cover both political expenditures and contributions made by corporations and labor unions.¹⁹²⁷ Justice Stevens noted that the power of the federal government to restrict corporate political spending had been so well established by the 1970s that the *Buckley* plaintiffs had not even

¹⁹¹⁷ See *Citizens United*, 558 U.S. at 322.

¹⁹¹⁸ See HASEN, *supra* note 1562, at 30; MANN & ORNSTEIN, *supra* note 996, at 73.

¹⁹¹⁹ *Citizens United*, 558 U.S. at 398 (Stevens, J., concurring in part and dissenting in part).

¹⁹²⁰ *Id.* at 365–66 (majority opinion).

¹⁹²¹ See *id.* at 349.

¹⁹²² See *id.* at 352.

¹⁹²³ See *id.* at 337.

¹⁹²⁴ See *id.* at 351–53.

¹⁹²⁵ See *id.* at 373 (Roberts, C.J., concurring).

¹⁹²⁶ See *id.* at 433 (Stevens, J., concurring in part and dissenting in part).

¹⁹²⁷ See *id.* at 434; Taft-Hartley Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159.

contested those sections of the statute, even though they had challenged virtually every other part of it.¹⁹²⁸

Justice Stevens also rightly questioned whether the First Amendment, as understood by those who wrote it, would have protected corporate speech at all.¹⁹²⁹ The Founding generation, deeply suspicious of corporations, would have deemed absurd the notion that corporations enjoyed the same constitutional rights as persons.¹⁹³⁰ General incorporation laws did not emerge until the early nineteenth century,¹⁹³¹ and even then, governments were allowed to prospectively regulate corporations in ways that they could not regulate individuals.¹⁹³²

Justice Stevens also criticized the majority's stringent conception of the government's anticorruption interest.¹⁹³³ Corruption exists on a spectrum,¹⁹³⁴ and corporate spending to promote a political candidate, even if technically independent of the candidate's campaign, usually becomes known to the candidate, who may then feel beholden to that corporation.¹⁹³⁵

Justice Stevens denied that speech by corporations was constitutionally equivalent to speech by persons given that corporations are not self-actualizing.¹⁹³⁶ Perhaps more importantly, individuals' speech might be drowned out by corporations' speech as corporations command vast wealth and legal advantages in accumulating that wealth.¹⁹³⁷ If nothing else, corporate political spending may create the appearance of corporate political domination, which makes Americans cynical about politics.¹⁹³⁸ Finally, Justice Stevens noted the government's interest in protecting corporate shareholders from being compelled to subsidize speech with which they disagree.¹⁹³⁹

Justice Kennedy's majority opinion relied heavily on the difficulty of drawing a coherent line between political speech of nonprofit corporations funded primarily by individuals, such as *Citizens United*, and that

¹⁹²⁸ See *Citizens United*, 558 U.S. at 436 (Stevens, J., concurring in part and dissenting in part); COHEN, *supra* note 1331, at 137–38.

¹⁹²⁹ See *Citizens United*, 558 U.S. at 425–29 (Stevens, J., concurring in part and dissenting in part).

¹⁹³⁰ See *id.* at 426–29; David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 578 (1991).

¹⁹³¹ *Citizens United*, 558 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).

¹⁹³² See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 675–77 (1819) (Story, J., concurring).

¹⁹³³ *Citizens United*, 558 U.S. at 447–52 (Stevens, J., concurring in part and dissenting in part).

¹⁹³⁴ *Id.* at 448.

¹⁹³⁵ See *id.* at 454–55.

¹⁹³⁶ See *id.* at 394.

¹⁹³⁷ See *id.* at 469–70; cf. COHEN, *supra* note 1331, at 153.

¹⁹³⁸ See *Citizens United*, 558 U.S. at 449–52, 470 (Stevens, J., concurring in part and dissenting in part); COHEN, *supra* note 1331, at 164–65.

¹⁹³⁹ See *Citizens United*, 558 U.S. at 475–78 (Stevens, J., concurring in part and dissenting in part).

of for-profit corporations,¹⁹⁴⁰ such as Koch Industries, which spends hundreds of millions of dollars to help elect Republican climate change deniers.¹⁹⁴¹ If this slippery-slope argument were compelling, then government could never constitutionally regulate anything. In the speech context alone, the Court draws murky distinctions between commercial and noncommercial speech,¹⁹⁴² obscene and nonobscene speech,¹⁹⁴³ content and viewpoint restrictions,¹⁹⁴⁴ and reckless and negligent defamation.¹⁹⁴⁵ By its nature, law draws distinctions, and many drawn by the Court have been murkier than the proposed line between *Hillary: The Movie* and the spending by for-profit corporations.

Justice Kennedy also blithely asserted that the appearance of corporate political influence would not cause Americans to lose faith in democracy.¹⁹⁴⁶ However, the percentage of Americans saying that the government is run “for the benefit of all” rather than “by a few big interests” fell from sixty-four percent in 1964 to seven percent in 2016.¹⁹⁴⁷ At the time the Bipartisan Campaign Reform Act¹⁹⁴⁸ was passed, eighty percent of Americans believed that corporations engaging in electioneering communications received special consideration from elected officials.¹⁹⁴⁹ In another case, Justice Kennedy, writing for the majority, ruled that a litigant could reasonably question whether a fair trial could be obtained from a judge whose election campaign had benefited from millions of dollars in independent spending by an opposing litigant.¹⁹⁵⁰ Why should citizens expect fair treatment from a political system in which corporations with opposing views are permitted to spend vast sums to influence election outcomes?

Citizens United ended campaign finance regulation as it had existed and unleashed a flood of corporate money into politics through a new entity known as the “super PAC.”¹⁹⁵¹ Traditional political action committees (PACs) raise money from individual donors, not corporations, and contribute the money to candidates, which renders them subject to the usual

¹⁹⁴⁰ See *id.* at 327–29 (majority opinion).

¹⁹⁴¹ See *supra* notes 1336–1340 and accompanying text.

¹⁹⁴² See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762–65 (1976).

¹⁹⁴³ See *Roth v. United States*, 354 U.S. 476, 481 (1957).

¹⁹⁴⁴ See, e.g., Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232–33, 239–41 (2012).

¹⁹⁴⁵ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964).

¹⁹⁴⁶ See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

¹⁹⁴⁷ COHEN, *supra* note 1331, at 164–65.

¹⁹⁴⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-55, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2, 8, 18, 28, 36, 47, and 52 U.S.C.).

¹⁹⁴⁹ *Citizens United*, 558 U.S. at 449 (Stevens, J., concurring in part and dissenting in part).

¹⁹⁵⁰ See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009); *Citizens United*, 558 U.S. at 458 (Stevens, J., concurring in part and dissenting in part).

¹⁹⁵¹ See COHEN, *supra* note 1331, at 153–54.

statutory contribution limits.¹⁹⁵² However, super PACs make independent expenditures, and after *Citizens United*, they could accept unlimited money from corporations — an interpretation of the ruling confirmed in short order by the D.C. Circuit and the Federal Election Commission.¹⁹⁵³

Contributions to purely political entities such as PACs and super PACs are at least subject to federal disclosure requirements.¹⁹⁵⁴ But nonprofit entities that do not have politics as their “primary focus” — social welfare organizations also known as “501(c)(4)s” — are exempt from disclosure requirements.¹⁹⁵⁵ Such entities can spend vast sums on politics without disclosing their donors — a type of political spending known as “dark money.”¹⁹⁵⁶ Since 2010, dark money has played an increasing role in election spending.¹⁹⁵⁷ In 2015, President Obama warned that the nation was “drowning in dark money.”¹⁹⁵⁸

Since *Citizens United*, the conservative Justices have invalidated more campaign finance regulations. In 2011, they struck down an Arizona law that authorized additional matching funds for state candidates participating in the public campaign finance system if their privately funded opponents outspent them.¹⁹⁵⁹ Even though the state maintained that the law had been enacted in response to concerns about actual corruption,¹⁹⁶⁰ the Court concluded that its purpose was to equalize political influence, which was impermissible under *Buckley*.¹⁹⁶¹

In 2014, the Republican Justices invalidated aggregate contribution limits for federal candidates.¹⁹⁶² Federal law permitted individuals to contribute up to \$2,600 per election to a federal candidate but no more than \$48,600 to all federal candidates, and it imposed limits on contributions to party committees.¹⁹⁶³ *Buckley* had upheld both individual and aggregate contribution limits as potentially preventing corruption or its appearance,¹⁹⁶⁴ calling the aggregate limit a “quite modest restraint” on

¹⁹⁵² See *id.* at 154.

¹⁹⁵³ See *id.*; *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010).

¹⁹⁵⁴ See COHEN, *supra* note 1331, at 154–55.

¹⁹⁵⁵ Sean Sullivan, *What Is a 501(c)(4), Anyway?*, WASH. POST (May 13, 2013, 1:51 PM), <https://www.washingtonpost.com/news/the-fix/wp/2013/05/13/what-is-a-501c4-anyway> [https://perma.cc/5GGD-6DFG]; see also DIAMOND, *supra* note 28, at 90.

¹⁹⁵⁶ See COHEN, *supra* note 1331, at 154–55.

¹⁹⁵⁷ See *id.*; see also MAYER, *supra* note 354, at 281, 305.

¹⁹⁵⁸ COHEN, *supra* note 1331, at 155.

¹⁹⁵⁹ See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011).

¹⁹⁶⁰ See *id.* at 777–78 (Kagan, J., dissenting).

¹⁹⁶¹ See *id.* at 748–50 (majority opinion).

¹⁹⁶² See *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014) (plurality opinion).

¹⁹⁶³ See *id.* at 193–94.

¹⁹⁶⁴ See *Buckley v. Valeo*, 424 U.S. 1, 26, 38 (1976) (per curiam).

speech.¹⁹⁶⁵ However, the 2014 decision *McCutcheon v. FEC*¹⁹⁶⁶ invalidated the statutory limits at issue as bearing too attenuated a connection to anticorruption objectives.¹⁹⁶⁷ The conservative plurality reiterated that preventing corruption or the appearance of corruption was the only legitimate government purpose with regard to campaign finance regulation and narrowly defined corruption as quid pro quo exchanges.¹⁹⁶⁸ A political party as a whole simply feeling gratitude toward a large donor was not a concern the First Amendment permitted the government to address.¹⁹⁶⁹

Dissenting with the other liberals, Justice Breyer criticized the plurality's narrow definition of corruption, arguing that government has a strong interest in maintaining the integrity of political institutions, not just preventing quid pro quos.¹⁹⁷⁰ The First Amendment, according to Justice Breyer, protects not only an individual's interest in participating in politics, but also democracy itself. Democracy requires government accountability to the people, which money in politics threatens.¹⁹⁷¹ *McConnell* had upheld limits on "soft money" contributions to political parties, Justice Breyer explained, because of concerns about privileged access to officeholders, not quid pro quo bribes.¹⁹⁷² Moreover, the public's belief that political contributions influence officeholders' decisionmaking, even if inaccurate, could feed cynicism and diminish political participation.¹⁹⁷³ Indeed, if unfounded public concerns about voter fraud justify restrictive voter identification laws,¹⁹⁷⁴ why would public concerns about money corrupting politicians, whether or not warranted, not justify campaign finance regulations?

The Court's campaign finance decisions from *Buckley* to the present have "transformed American politics"¹⁹⁷⁵ — and pretty clearly for the worse, except from a neo-Ayn Randian perspective.¹⁹⁷⁶ The American political system is awash in money, and the wealthiest Americans dominate the political spending.¹⁹⁷⁷ The percentage of all federal campaign

¹⁹⁶⁵ *Id.*

¹⁹⁶⁶ 572 U.S. 185.

¹⁹⁶⁷ *See id.* at 218–20 (plurality opinion).

¹⁹⁶⁸ *See id.* at 206–08.

¹⁹⁶⁹ *See id.* at 208–09.

¹⁹⁷⁰ *See id.* at 235–38 (Breyer, J., dissenting).

¹⁹⁷¹ *See id.*

¹⁹⁷² *See id.* at 240–42 (citing *McConnell v. FEC*, 540 U.S. 93 (2003)).

¹⁹⁷³ *See id.* at 238.

¹⁹⁷⁴ *See supra* sections I.C.2, pp. 48–51; III.B, pp. 184–87.

¹⁹⁷⁵ COHEN, *supra* note 1331, at 156; *see also* MANN & ORNSTEIN, *supra* note 996, at 127; DANIEL I. WEINER, BRENNAN CTR. FOR JUST., *CITIZENS UNITED FIVE YEARS LATER* 3–4 (2015), https://www.brennancenter.org/sites/default/files/analysis/Citizens_United_%20Five_Years_Later.pdf [<https://perma.cc/9SY5-C5ZN>].

¹⁹⁷⁶ *See supra* section II.C, pp. 135–48.

¹⁹⁷⁷ *See* HACKER & PIERSON, *supra* note 352, at 347; PAGE & GILENS, *supra* note 533, at 93–96.

contributions made by the wealthiest 0.01% of voting-age Americans increased from 10 percent in the 1980s to more than 40 percent in 2012.¹⁹⁷⁸ One recent study showed that, in 2014, the 100 largest individual donors gave nearly as much collectively as the 4.75 million Americans who contributed \$200 or less.¹⁹⁷⁹

Of course, corporations have far more money at their disposal than even the wealthiest individuals have.¹⁹⁸⁰ In the first five years after *Citizens United*, corporations, super PACS, labor unions, and other groups independent of political campaigns spent nearly \$2 billion on federal elections alone, more than twice what they had spent during the entire period from 1990 to 2008.¹⁹⁸¹ Spending by outside groups nearly tripled between the 2008 and 2012 presidential elections.¹⁹⁸² Moreover, almost one-third of that \$2 billion in spending since *Citizens United* was in the form of dark money.¹⁹⁸³

The Kochs substantially increased their spending on politics the year of *Citizens United*.¹⁹⁸⁴ Their political network spent over \$400 million to elect Republican candidates in 2012 and had planned to spend about \$900 million on the 2016 election before the Republican Party nominated Trump.¹⁹⁸⁵ The Tax Cuts and Jobs Act of 2017 was projected to save Koch Industries up to \$1.4 billion per year, and the month after it was enacted, groups affiliated with the Koch political network announced as much as \$400 million in spending to support conservative candidates and causes in the 2018 midterm elections.¹⁹⁸⁶ Much of the Koch network's spending occurred through dark money, enabling conservative billionaires to support neo-Ayn Randian policies without having to identify themselves publicly with those policies.¹⁹⁸⁷ When Senate Democrats sought to create a robust disclosure regime to restrict dark money after *Citizens United*, not a single Republican supported the measure.¹⁹⁸⁸ No other country in the world comes close to allowing as much money to be spent on elections as does the United States.¹⁹⁸⁹

¹⁹⁷⁸ PAGE & GILENS, *supra* note 533, at 95–96.

¹⁹⁷⁹ WEINER, *supra* note 1975, at 1, 5.

¹⁹⁸⁰ See COHEN, *supra* note 1331, at 156.

¹⁹⁸¹ See WEINER, *supra* note 1975, at 4.

¹⁹⁸² *Id.*

¹⁹⁸³ *Id.* at 7.

¹⁹⁸⁴ HACKER & PIERSON, *supra* note 352, at 234; see also MAYER, *supra* note 354, at 305.

¹⁹⁸⁵ See PAGE & GILENS, *supra* note 533, at 99; see also MAYER, *supra* note 354, at 313–14, 377.

¹⁹⁸⁶ See COHEN, *supra* note 1331, at 161–63.

¹⁹⁸⁷ See, e.g., MAYER, *supra* note 354, at 287; PAGE & GILENS, *supra* note 533, at 105–06; see also *supra* section II.C, pp. 135–48.

¹⁹⁸⁸ See MANN & ORNSTEIN, *supra* note 996, at 75–76.

¹⁹⁸⁹ See PAGE & GILENS, *supra* note 533, at 95.

Recent pathbreaking research has shown that working-class and middle-class Americans exercise almost no influence on political outcomes across a wide array of issues at the federal level.¹⁹⁹⁰ While the policies they favor sometimes become law, the enactment of those policies occurs mostly when wealthy people and well-financed interest groups favor those policies as well.¹⁹⁹¹ Even among the wealthiest twenty percent of Americans, most of the influence is likely exerted by multimillionaires and billionaires.¹⁹⁹²

Money influences which candidates get on the ballot¹⁹⁹³ and which policy proposals gain salience and support.¹⁹⁹⁴ Early money is crucial to political success.¹⁹⁹⁵ In the first six months of the 2016 presidential campaign, nearly half of the money supporting both parties' candidates came from just 158 families and their companies.¹⁹⁹⁶ Most of the contributions went to Republican super PACs and came from people who were whiter, wealthier, and older — that is, more conservative¹⁹⁹⁷ — than is the general population, and many of these donors had made their fortunes in energy and finance.¹⁹⁹⁸ Money plays an even larger role in “low-salience, low-turnout” elections, such as primaries and state legislative contests.¹⁹⁹⁹ Large donors are also less likely to support blue-collar candidates who do not usually resemble them.²⁰⁰⁰ Wealthy candidates, like wealthy donors, push economic policy to the right.²⁰⁰¹

Big donors influence policymaking in both parties.²⁰⁰² In 2011–2012, about two-thirds of the reported political contributions of the wealthiest Americans went to Republicans,²⁰⁰³ likely in support of their neo-Ayn Randian agenda. Many Americans are misled into believing otherwise by the prominence of a few liberal billionaires, such as Michael Bloomberg,

¹⁹⁹⁰ See *id.* at 91–92.

¹⁹⁹¹ See *id.*; BARTELS, *supra* note 1413, at 6, 233–35.

¹⁹⁹² See PAGE & GILENS, *supra* note 533, at 91–92.

¹⁹⁹³ See *id.* at 159.

¹⁹⁹⁴ See *id.* at 98–99, 159–60.

¹⁹⁹⁵ See *id.* at 104.

¹⁹⁹⁶ *Id.*

¹⁹⁹⁷ See Paul Taylor, *The Demographic Trends Shaping American Politics in 2016 and Beyond*, PEW RSCH. CTR. (Jan. 27, 2016), <https://www.pewresearch.org/fact-tank/2016/01/27/the-demographic-trends-shaping-american-politics-in-2016-and-beyond> [https://perma.cc/VJB7-FBPP]; *2016 Party Identification Detailed Tables*, PEW RSCH. CTR. (Sept. 13, 2016), <https://www.pewresearch.org/politics/2016/09/13/2016-party-identification-detailed-tables> [https://perma.cc/72KT-2ENM].

¹⁹⁹⁸ See PAGE & GILENS, *supra* note 533, at 105.

¹⁹⁹⁹ *Id.* at 107; see also *id.* at 119–20.

²⁰⁰⁰ See *id.* at 112, 124; see also BARTELS, *supra* note 1413, at 265–66.

²⁰⁰¹ See PAGE & GILENS, *supra* note 533, at 114–20; *2016 Party Identification Detailed Tables*, *supra* note 1997.

²⁰⁰² See PAGE & GILENS, *supra* note 533, at 7, 119–20.

²⁰⁰³ See *id.* at 107.

Tom Steyer, and George Soros.²⁰⁰⁴ Liberal big donors tend to support gay rights, gun control, and action on climate change in ways that most conservative big donors do not, but big donors of both parties generally favor economic policies that most Americans do not: free trade, less generous social welfare programs, less business regulation, and lower taxes.²⁰⁰⁵

On average, the wealthiest Americans are far more conservative on economic policy issues than is the average citizen, and the wealthier they are, the more conservative they tend to be.²⁰⁰⁶ The affluent are more likely to prioritize reducing budget deficits over reducing unemployment and are much less likely to acknowledge government responsibility to provide food, clothing, and shelter to the poor.²⁰⁰⁷ While two-thirds of Americans say the federal government should ensure that everyone who wants to work can find a job, only one-fifth of multimillionaires agree.²⁰⁰⁸ Further, fifty-five percent of Americans favor expanding Social Security while only three percent of multimillionaires do.²⁰⁰⁹

In a political system containing multiple veto points, blocking change in government policy is easier than achieving it.²⁰¹⁰ Maintaining control of one branch of Congress, the presidency, or the Court is sufficient to stymie most policy initiatives.²⁰¹¹ Government inaction is also usually less salient than is government action, meaning people are less likely to be aware of monied influence preventing the enactment of policies that would help most Americans but harm the interests of the affluent.²⁰¹²

In 2015, about two-thirds of Americans agreed that wealth should be more evenly distributed.²⁰¹³ Large majorities of Americans favor paid sick leave and parental leave for workers, a higher minimum wage, and higher taxes on millionaires.²⁰¹⁴ But such policies do not get enacted.²⁰¹⁵

Until the recent pandemic, the federal government's deficit problem was largely attributable to healthcare expenditures.²⁰¹⁶ Americans pay twice as much as citizens of other developed nations for healthcare that is generally inferior in quality, largely because of the political influence

²⁰⁰⁴ See *id.* at 106.

²⁰⁰⁵ See *id.* at 107–09, 114–18.

²⁰⁰⁶ See *id.* at 114–18.

²⁰⁰⁷ See *id.* at 114–15.

²⁰⁰⁸ See *id.* at 115.

²⁰⁰⁹ See *id.* at 116 tbl. 4.1.

²⁰¹⁰ See *id.* at 150, 153; MANN & ORNSTEIN, *supra* note 996, at 102.

²⁰¹¹ See PAGE & GILENS, *supra* note 533, at 150.

²⁰¹² See HACKER & PIERSON, *supra* note 352, at 272, 284; PAGE & GILENS, *supra* note 533, at 92.

²⁰¹³ See PAGE & GILENS, *supra* note 533, at 49.

²⁰¹⁴ See *id.* at 49, 53–54, 81, 88.

²⁰¹⁵ See *id.*

²⁰¹⁶ See HACKER & PIERSON, *supra* note 352, at 273; Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Rick Scott, Sen., U.S. Senate (June 5, 2020), <https://www.cbo.gov/system/files/2020-06/56388-CBO-Scott-Letter.pdf> [<https://perma.cc/4AAC-6LL3>].

of the healthcare industry.²⁰¹⁷ For example, that industry spends vast sums of money to block the federal government from using its immense purchasing power to bargain over pharmaceutical prices.²⁰¹⁸

Most Americans worry about human-caused climate change, want their government to respond to it, and say they are less likely to vote for candidates calling global warming a hoax.²⁰¹⁹ Yet because of the immense political influence of fossil fuel companies within the Republican Party, nothing happens, even though the planet's future is at stake.²⁰²⁰ Indeed, the Trump Administration has undone most of President Obama's initiatives to curb greenhouse gas emissions, withdrawn the United States from the Paris climate accords, and even sought to excise the term "climate change" from the Environmental Protection Agency's vocabulary.²⁰²¹

More infrastructure spending, expansion of government-provided healthcare, more gun control — such policies are all supported by most Americans, yet they do not get enacted.²⁰²² After twenty first graders were killed in a mass shooting in Connecticut in 2012, as many as ninety percent of Americans supported universal background checks for firearms purchases.²⁰²³ Yet such a bill never reached the Senate floor, largely because Republicans are beholden to the National Rifle Association for its vast political spending.²⁰²⁴

A political system that responds to the policy preferences of wealthy individuals and well-funded interest groups, rather than to those of most voters, is not a democracy.²⁰²⁵ Reducing the influence of money in politics would produce both a fairer political system and one that is less ideologically polarized and dysfunctional.²⁰²⁶ It would also liberate officeholders from having to spend half of their time raising money, which

²⁰¹⁷ See HACKER & PIERSON, *supra* note 352, at 273, 276, 278–79.

²⁰¹⁸ See *id.* at 278–79; see also COHEN, *supra* note 1331, at 160–61.

²⁰¹⁹ See PAGE & GILENS, *supra* note 533, at 73–74.

²⁰²⁰ See HACKER & PIERSON, *supra* note 352, at 94, 290–96; PAGE & GILENS, *supra* note 533, at 74.

²⁰²¹ See Laignee Barron, *Here's What the EPA's Website Looks Like After a Year of Climate Change Censorship*, TIME (Mar. 1, 2018, 4:28 AM), <https://time.com/5075265/epa-website-climate-change-censorship> [<https://perma.cc/GWV9-UF3C>]; John Schwartz, *Major Climate Change Rules the Trump Administration Is Reversing*, N.Y. TIMES (Aug. 29, 2019), <https://nyti.ms/2Zlea6q> [<https://perma.cc/X44V-W6YQ>].

²⁰²² See PAGE & GILENS, *supra* note 533, at 49, 53–54, 81, 88.

²⁰²³ See *id.* at 166.

²⁰²⁴ See Paul Kane, *Proponents of Stricter Gun Control Face a Reality Check in the Senate*, WASH. POST (Aug. 6, 2019, 5:38 PM), https://www.washingtonpost.com/powerpost/proponents-of-stricter-gun-control-face-a-reality-check-in-the-senate/2019/08/06/1cd7613e-b7ba-11e9-b3b4-2bb69e8c4e39_story.html [<https://perma.cc/3RXX-PMMM>].

²⁰²⁵ See PAGE & GILENS, *supra* note 533, at 3–4, 6–8.

²⁰²⁶ See *id.* at 3–4, 111, 218.

keeps them in constant contact with affluent individuals whose political views are not representative of those of most Americans.²⁰²⁷

At the end of his majority opinion in *Rucho v. Common Cause*,²⁰²⁸ Chief Justice Roberts criticized the plaintiffs and the dissenters for seeking an unprecedented expansion of the power of unelected federal judges to the intensely partisan field of gerrymandering.²⁰²⁹ Where has that judicial modesty been as the conservative Justices have decimated campaign finance restrictions enacted by democratically elected legislatures?²⁰³⁰ These rulings have done incalculable damage to the American political system on the basis of contrived rationales largely divorced from political reality.²⁰³¹ They have also advantaged the Republican Party that put these conservative Justices on the Court.²⁰³² One recent study shows that Republicans increased their share of state legislative seats by about five percentage points after *Citizens United*.²⁰³³

At the conclusion of his concurring opinion in *Citizens United*, Justice Scalia declared that Americans should “celebrate” the decision for adding corporate speech to political debate.²⁰³⁴ In contrast, Justice Stevens declared that few people other than the conservative Justices believed that among the many flaws of American democracy was “a dearth of corporate money in politics.”²⁰³⁵

In the aftermath of *Citizens United*, opinion polls revealed that eighty percent of Americans, including roughly similar percentages of Republicans and Democrats, appeared to agree with Justice Stevens.²⁰³⁶ In 1960, even the libertarian Senator Barry Goldwater thought that neither corporations nor labor unions should participate directly in politics.²⁰³⁷ *Citizens United* reveals the extent to which the neo-Ayn Randians have realized their vision. Not only the Republican Party but

²⁰²⁷ See COHEN, *supra* note 1331, at 158–59; *Buckley v. Valeo*, 424 U.S. 1, 265 (1976) (White, J., concurring in part and dissenting in part).

²⁰²⁸ 139 S. Ct. 2484 (2019).

²⁰²⁹ See *id.* at 2507.

²⁰³⁰ See COHEN, *supra* note 1331, at 135, 141, 143–44, 146, 151.

²⁰³¹ See DIAMOND, *supra* note 28, at 277; see also COHEN, *supra* note 1331, at 142–43, 152–53, 157.

²⁰³² See KLEIN, *supra* note 347, at 257–58.

²⁰³³ See *id.* at 258; Nour Abdul-Razzak, Carlo Prato & Stephane Wolton, *After Citizens United: How Outside Spending Shapes American Democracy* 65 (Apr. 21, 2020), <https://ssrn.com/abstract=2823778> [<https://perma.cc/B5KJ-BLSW>]; Nour Abdul-Razzak, Carlo Prato & Stéphane Wolton, *How Citizens United Gave Republicans a Bonanza of Seats in U.S. State Legislatures*, WASH. POST (Feb. 24, 2017, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/24/how-citizens-united-gave-republicans-a-bonanza-of-seats-in-u-s-state-legislatures> [<https://perma.cc/NB78-WYC4>].

²⁰³⁴ *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Scalia, J., concurring).

²⁰³⁵ *Id.* at 479 (Stevens, J., concurring in part and dissenting in part).

²⁰³⁶ See COHEN, *supra* note 1331, at 153.

²⁰³⁷ See BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 54 (1960); PAGE & GILENS, *supra* note 533, at 260–61.

also Republican Justices appear to have no qualms about economic inequalities translating into inequalities in political influence.²⁰³⁸ Indeed, they think the Constitution forbids democratic majorities from trying to prevent this from happening. Unlimited money in politics, mostly a result of rulings by conservative Justices, has rendered farcical the idea of a nation of political equals.²⁰³⁹

F. Picking a Republican President: Bush v. Gore (2000)

In December 2000, the Supreme Court helped pick a President.²⁰⁴⁰ That year's presidential contest turned on the electoral votes of Florida, where, after an automatic machine recount, Democratic candidate Vice President Al Gore and Republican candidate Governor George W. Bush were separated by only a few hundred votes.²⁰⁴¹ The election in Florida had been beset by many problems — voters wrongly purged from the rolls,²⁰⁴² a “butterfly” ballot in Palm Beach County that appeared to have confused many voters into casting votes for Patrick Buchanan rather than Vice President Gore,²⁰⁴³ and thousands of African American voters' spoiling their ballots by both checking the box for Vice President Gore and writing in his name (“overvotes”).²⁰⁴⁴ However, the legal controversy centered around “undervotes,” punch-card ballots on which voters had indented or punched only partially through the chad, possibly indicating an intention to vote for a particular candidate that the machine could not register.²⁰⁴⁵

Florida Secretary of State Katherine Harris — who also served as one of Governor Bush's campaign co-chairs in the state²⁰⁴⁶ — ruled that state law did not authorize counting such votes from manual recounts as the punch-card ballots that had not been properly marked did not

²⁰³⁸ COHEN, *supra* note 1331, at 151–53.

²⁰³⁹ See BARTELS, *supra* note 1413, at 344–45; PAGE & GILENS, *supra* note 533, at 185–86.

²⁰⁴⁰ See Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1721 (2001) [hereinafter Klarman, Bush v. Gore].

²⁰⁴¹ See RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 6–7 (2001).

²⁰⁴² See HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 168 (2001).

²⁰⁴³ See Dan Keating, *Fla. “Overvotes” Hit Democrats the Hardest*, WASH. POST (Jan. 27, 2001), <https://www.washingtonpost.com/archive/politics/2001/01/27/fla-overvotes-hit-democrats-the-hardest/db6dcd31-8b88-40e7-ab9d-d4622b43a2b3> [<https://perma.cc/L5LT-JK7J>].

²⁰⁴⁴ See POSNER, *supra* note 2041, at 7–8, 77–79; Dan Keating & John Mintz, *Florida Black Ballots Affected Most in 2000*, WASH. POST (Nov. 13, 2001), <https://www.washingtonpost.com/archive/politics/2001/11/13/florida-black-ballots-affected-most-in-2000/16784e7d-439a-4b96-9653-1b7362312d2a> [<https://perma.cc/JT32-3C4Y>].

²⁰⁴⁵ See POSNER, *supra* note 2041, at 7–8.

²⁰⁴⁶ See David Margolick, Evgenia Peretz & Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, 317, <https://archive.vanityfair.com/article/2004/10/the-path-to-florida> [<https://perma.cc/CGF2-THLQ>].

qualify as uncounted “legal votes.”²⁰⁴⁷ Vice President Gore sued in state court, first filing an emergency motion challenging that determination, then demanding a manual recount of the undervotes in several Democratic-leaning counties, and finally filing a lawsuit challenging the election results after Secretary Harris had certified them.²⁰⁴⁸ The Florida Supreme Court sided with Vice President Gore and ordered a statewide manual recount of the undervotes.²⁰⁴⁹ Probably because the U.S. Supreme Court had previously warned the Florida justices against changing state law retrospectively,²⁰⁵⁰ the state jurists declined to impose a unitary statewide standard for determining voters’ intent from indented and hanging chads.²⁰⁵¹ Thus, county canvassing boards were left to devise their own varying standards.²⁰⁵²

On December 12, 2000, the Supreme Court shut down the recount, handing the presidency to Governor Bush.²⁰⁵³ To be sure, Vice President Gore probably would not have become President even had the Court abstained.²⁰⁵⁴ Later recounts conducted by a newspaper consortium yielded divergent results depending on which ballots were recounted and which standard was used for determining valid votes.²⁰⁵⁵ More importantly, Republicans, who strenuously opposed the recount,²⁰⁵⁶ controlled the state legislature, the governorship (held by Governor Bush’s younger brother, Jeb Bush), and the U.S. House.²⁰⁵⁷ Had a manual recount shown Vice President Gore in the lead, the governor and state legislature probably would have refused to certify the result and instead sent Congress their own list of Republican electors, which congressional Republicans likely would have approved.²⁰⁵⁸

Yet the Justices did not know what a recount might have shown when they shut it down.²⁰⁵⁹ The Court divided mainly along ideological

²⁰⁴⁷ See *Bush v. Gore*, 531 U.S. 98, 116–20 (2000) (Rehnquist, C.J., concurring); Klarman, *Bush v. Gore*, *supra* note 2040, at 1742–43; Margolick et al., *supra* note 2046, at 318.

²⁰⁴⁸ See *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 74–76 (2000) (per curiam); *Bush v. Gore*, 531 U.S. at 101–03 (per curiam); POSNER, *supra* note 2041, at 177–79; Margolick et al., *supra* note 2046, at 317.

²⁰⁴⁹ See *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000) (per curiam).

²⁰⁵⁰ See *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76–77.

²⁰⁵¹ See Klarman, *Bush v. Gore*, *supra* note 2040, at 1728 n.28; see also *Bush v. Gore*, 531 U.S. at 105–06 (asserting that “the standards for accepting or rejecting contested ballots might vary . . . from county to county,” *id.* at 106).

²⁰⁵² See Klarman, *Bush v. Gore*, *supra* note 2040, at 1728 n.31.

²⁰⁵³ *Id.* at 1721–22. The Court had already stayed the recount on December 9, just one day after the Florida Supreme Court issued its decision. *Id.* at 1745.

²⁰⁵⁴ See POSNER, *supra* note 2041, at 49, 66–67.

²⁰⁵⁵ See *id.* at 66–67.

²⁰⁵⁶ See GILLMAN, *supra* note 2042, at 124.

²⁰⁵⁷ See *id.* at 17; POSNER, *supra* note 2041, at 175.

²⁰⁵⁸ See GILLMAN, *supra* note 2042, at 192–94; POSNER, *supra* note 2041, at 155, 158.

²⁰⁵⁹ See Margolick et al., *supra* note 2046, at 322.

lines, though an aborted compromise effort complicated the vote breakdown.²⁰⁶⁰ Liberal Justices Souter and Breyer agreed with the five conservatives that a statewide recount without a unitary standard for ascertaining voter intent violated the Equal Protection Clause, although they disagreed as to the appropriate remedy.²⁰⁶¹ The five conservatives ruled against a remand to allow the state supreme court to impose a unitary standard for the recount, on the ground that not enough time remained to complete the recount before the date — set by federal law — by which the Florida results had to be certified to avoid a challenge in Congress.²⁰⁶² Justice Kennedy ultimately rejected a potential deal with Justices Souter and Breyer that would have identified the equal protection problem but authorized a remand to conduct the recount under a unitary standard set by the state court.²⁰⁶³ Possibly recognizing the weakness of the equal protection rationale, the three most conservative Justices — Chief Justice Rehnquist, Justice Scalia, and Justice Thomas — also would have ruled that the state court’s interpretation of Florida law to require the manual recount of undervotes was so “distorted” that it violated Article II’s requirement that state *legislatures*, not courts, specify the method of selecting presidential electors.²⁰⁶⁴

Bush v. Gore is probably the Court’s most absurd opinion in a highly consequential case.²⁰⁶⁵ The per curiam opinion essentially instructed litigants and lower courts not to treat the decision as binding precedent by limiting its rationale to the specific facts of the case.²⁰⁶⁶ Moreover, Justice Scalia, who famously loved a good argument, often responded “[g]et over it” when asked about the ruling, rather than defending it on the merits.²⁰⁶⁷

The equal protection rationale was novel, and conservative Justices who embraced it were on record strenuously objecting to unprecedented and expansive interpretations of that concept.²⁰⁶⁸ Moreover, courts have

²⁰⁶⁰ See *id.* at 356–58.

²⁰⁶¹ See *Bush v. Gore*, 531 U.S. 98, 134 (2000) (Souter, J., dissenting); *id.* at 145–46 (Breyer, J., dissenting).

²⁰⁶² See *id.* at 110–11 (majority opinion).

²⁰⁶³ See Margolick et al., *supra* note 2046, at 356.

²⁰⁶⁴ *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

²⁰⁶⁵ Cf. COHEN, *supra* note 1331, at 169–70 (describing the equal protection rationale as “hypocritical,” *id.* at 169, and arguing that the conservative Justices “all but admitted their bad faith,” *id.* at 170); JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* 24 (2003) (calling *Bush v. Gore* “the least defensible Supreme Court decision in history”).

²⁰⁶⁶ See *Bush v. Gore*, 531 U.S. at 109; see also COHEN, *supra* note 1331, at 170.

²⁰⁶⁷ Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Nov. 29, 2010), <https://www.newyorker.com/magazine/2010/12/06/precedent-and-prologue> [<https://perma.cc/CZX7-5Y2T>].

²⁰⁶⁸ See COHEN, *supra* note 1331, at 169–70; Klarman, *Bush v. Gore*, *supra* note 2040, at 1727–28; see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 133, 138 (1996) (Thomas, J., dissenting); *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting); *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

generally not interpreted the Equal Protection Clause as requiring geographic uniformity within a state,²⁰⁶⁹ and there appears to be no record of any court's having previously ruled unconstitutional the use of different vote-counting standards in different counties.²⁰⁷⁰ Indeed, if such intercounty disparities were unconstitutional, then so was the entire Florida election system, because different voting technologies in different counties posed very different risks of ballots not being counted.²⁰⁷¹ Indeed, the manual recount was a solution to that very problem, as poor people and people of color faced much higher risks of their votes not counting because of the use of low-technology punch-card ballots in their counties.²⁰⁷²

The Article II rationale — that state *legislatures* must specify the method by which presidential electors are selected — was no more convincing.²⁰⁷³ The Florida court had interpreted Florida statutes to permit a manual recount when voters' intentions were ascertainable from ballots that machines had failed to count.²⁰⁷⁴ Florida judicial precedent plainly supported ascertaining voters' intentions when possible rather than discarding ballots.²⁰⁷⁵ The Florida court's interpretation of state law in *Bush v. Gore* was plausible, if not compelling.²⁰⁷⁶ The Supreme Court's conservative Justices turned an otherwise ordinary instance of state court statutory construction into a federal constitutional question likely because they did not approve of the court's interpretation, which potentially could have cost George W. Bush the presidency.²⁰⁷⁷

Bush v. Gore stands for the proposition that if Justices care enough about a case's outcome, the law goes out the window.²⁰⁷⁸ The conservative Justices wanted Governor Bush to become President.²⁰⁷⁹ Justice O'Connor confirmed this at an election night party when a television network mistakenly called Florida for Vice President Gore, meaning he would become President, and she exclaimed in response that this was

²⁰⁶⁹ See Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 263–64, 264 n.8 (1987) (quoting *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 230–31 (1964)); see also *Griffin*, 377 U.S. at 230 (“[T]here is no rule that counties, as counties, must be treated alike . . .”).

²⁰⁷⁰ See Klarman, *Bush v. Gore*, *supra* note 2040, at 1727–28, 1727 n.27.

²⁰⁷¹ See *id.* at 1728–30; see also POSNER, *supra* note 2041, at 70.

²⁰⁷² See Klarman, *Bush v. Gore*, *supra* note 2040, at 1728–29; see also BERMAN, *supra* note 7, at 213; Margolick et al., *supra* note 2046, at 356.

²⁰⁷³ See Klarman, *Bush v. Gore*, *supra* note 2040, at 1733–37.

²⁰⁷⁴ See *id.* at 1742.

²⁰⁷⁵ See *id.* at 1742 & n.110.

²⁰⁷⁶ See *id.* at 1742–43.

²⁰⁷⁷ See *id.* at 1746–47.

²⁰⁷⁸ See *id.* at 1727.

²⁰⁷⁹ See *id.* at 1725.

“terrible.”²⁰⁸⁰ Her husband explained that a victory for Vice President Gore meant she could not retire for at least another four years.²⁰⁸¹ Had the facts been reversed, and Vice President Gore asked the Court to shut down a manual recount ordered by state courts that jeopardized his lead in the vote counting, the conservative Justices almost certainly would not have intervened.²⁰⁸²

For the Court to have played a role in picking a President is bad enough, but that President then picked two new Justices. When Chief Justice Rehnquist died and Justice O’Connor announced her intention to retire in 2005, President Bush replaced them, respectively, with Chief Justice Roberts and Justice Alito, thus shaping the Court’s future direction.²⁰⁸³

The Court intervened on a thin legal basis in a presidential election once, and it could do so again. The political parties are much more polarized today than they were in 2000,²⁰⁸⁴ and so are the Justices.²⁰⁸⁵ Extreme political polarization means that Republicans and Democrats are more likely to disagree about facts today than in 2000 and are more likely to regard each other as enemies.²⁰⁸⁶ In 2016, Trump suggested he might not concede the legitimacy of an electoral defeat, and he has repeatedly challenged the reliability of the mail-in balloting that will be prevalent in 2020.²⁰⁸⁷ Given legal indeterminacy and motivated reasoning,²⁰⁸⁸ any contested election ending up in today’s Supreme Court would probably produce a Republican victory.

G. Blocking the Rigging of the Census:
Department of Commerce v. New York (2019)

One of the most brazen recent efforts to entrench Republican power was the Trump Administration’s attempt to add a citizenship question to the 2020 census. The Framers in Philadelphia added to the Constitution a requirement for a decennial census in response to southern delegates’ concerns that northerners, who initially would control the House and the Senate, would refuse to reallocate political power once

²⁰⁸⁰ Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK (Dec. 24, 2000, 7:00 PM), <https://www.newsweek.com/truth-behind-pillars-155985> [<https://perma.cc/Z84Q-GDLT>].

²⁰⁸¹ *Id.*

²⁰⁸² See Klarman, *Bush v. Gore*, *supra* note 2040, at 1747.

²⁰⁸³ See COHEN, *supra* note 1331, at 75–78.

²⁰⁸⁴ See *supra* section II.E.1, pp. 154–58.

²⁰⁸⁵ See *infra* notes 2246–2250 and accompanying text.

²⁰⁸⁶ See *supra* notes 1476–1480 and 1624–1639 and accompanying text.

²⁰⁸⁷ See *supra* section I.B.11, pp. 42–44.

²⁰⁸⁸ See *infra* section III.I, pp. 224–31.

the population advantage shifted to the South,²⁰⁸⁹ which virtually everybody in 1787 (wrongly) assumed would happen quickly.²⁰⁹⁰

To be clear, in the abstract, the federal government is entitled to know how many noncitizens reside in the nation, and the Census Act delegates broad discretion to the Commerce Secretary to determine the “form and content” of the census.²⁰⁹¹ Previous censuses included questions about military service, radio ownership, and native language.²⁰⁹² Before 1950, most censuses asked the citizenship question.²⁰⁹³ Beginning in 1960, the Census Bureau asked about citizenship only on the long-form questionnaire, distributed to one-quarter to one-sixth of the population, and not on the short-form questionnaire, mailed to all households.²⁰⁹⁴ Beginning in 2010, the Bureau abandoned the long-form questionnaire, and the citizenship question was not asked at all.²⁰⁹⁵ Instead, the Bureau calculated the number of noncitizens from the American Community Survey, distributed annually to only two or three percent of households.²⁰⁹⁶

However, the Trump Administration’s motives for adding the citizenship question were dubious.²⁰⁹⁷ First, asking the question would almost certainly depress the response rate.²⁰⁹⁸ Many immigrants and children of immigrants, including citizens and noncitizens lawfully in the country, would refuse to participate in a census asking about citizenship for fear of endangering undocumented family members at risk of deportation, an amplified concern under the Trump Administration.²⁰⁹⁹ Undercounting such people would cost the districts and states in which they live federal political representation and federal government resources allocated based on the census.²¹⁰⁰

²⁰⁸⁹ KLARMAN, FRAMERS’ COUP, *supra* note 340, at 272.

²⁰⁹⁰ *Id.* at 192.

²⁰⁹¹ See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2561 (2019) (quoting 13 U.S.C. § 141(a)).

²⁰⁹² See *id.*

²⁰⁹³ See *id.*

²⁰⁹⁴ See *id.*

²⁰⁹⁵ See *id.* at 2562.

²⁰⁹⁶ See *id.*

²⁰⁹⁷ See KLEIN, *supra* note 347, at 258; Tara Bahrapour & Robert Barnes, *Despite Trump Administration Denials, New Evidence Suggests Census Citizenship Question Was Crafted to Benefit White Republicans*, WASH. POST (May 30, 2019, 9:07 PM), https://www.washingtonpost.com/local/social-issues/despite-trump-administration-denials-new-evidence-suggests-census-citizenship-question-was-crafted-to-benefit-white-republicans/2019/05/30/ca188dea-82eb-11e9-933d-7501070ee669_story.html [<https://perma.cc/ER6B-T2DJ>].

²⁰⁹⁸ See *Dep’t of Com.*, 139 S. Ct. at 2562.

²⁰⁹⁹ See Amelia Thomson-DeVeaux, *The Citizenship Question Could Cost California and Texas a Seat in Congress*, FIVETHIRTYEIGHT (June 17, 2019), <https://fivethirtyeight.com/features/the-citizenship-question-could-cost-california-and-texas-a-seat-in-congress> [<https://perma.cc/PY8F-PQYX>]; see also KLEIN, *supra* note 347, at 258 (arguing that the purpose of the citizenship question was to scare Latinos away from completing the census form).

²¹⁰⁰ See *Dep’t of Com.*, 139 S. Ct. at 2565.

Second, Republicans have recently considered shifting the basis of apportioning legislative districts from total population to “citizens.”²¹⁰¹ Such a departure from traditional districting practices would diminish the political clout of districts with large numbers of noncitizens (mostly Latinos), which tend to be Democratic-leaning.²¹⁰² Both Justices Alito and Thomas have already suggested such a shift in the basis of representation may be constitutionally permissible,²¹⁰³ though a demonstrated *purpose* to reduce Latino political power would be constitutionally problematic.²¹⁰⁴

The principal legal challenge raised in *Department of Commerce v. New York*²¹⁰⁵ was that the Administration had violated the Administrative Procedure Act (APA) by insufficiently justifying its decision to add the citizenship question to the census.²¹⁰⁶ This should have been an easy case for the Court. The record contained copious evidence that the Administration had lied about its reason for adding the citizenship question.²¹⁰⁷ Commerce Secretary Wilbur Ross told Congress that the Justice Department had asked for the question to aid in its enforcement of the Voting Rights Act.²¹⁰⁸ But this rationale turned out to be a pretext.²¹⁰⁹ In fact, Secretary Ross himself had pressed the Department to request the question after conversations with White House political officials.²¹¹⁰ In addition, civil servants at the Census Bureau had opposed asking the question, both because doing so would depress response rates

²¹⁰¹ See Galen Druke, *There Is More at Stake in the Census's Citizenship Question than Response Rates*, FIVETHIRTYEIGHT (Mar. 30, 2018, 4:08 PM), <https://fivethirtyeight.com/features/there-is-more-at-stake-in-the-census-citizenship-question-than-response-rates> [https://perma.cc/H79J-Y7VK]; Stephen Wolf, *Voting Rights Roundup: Virginia Democrats Advance Redistricting Reform Measures*, DAILY KOS (Feb. 7, 2020, 5:46 PM), <https://www.dailykos.com/stories/2020/2/7/1917538/-Voting-Rights-Roundup-Virginia-Democrats-advance-redistricting-reform-measures> [https://perma.cc/C69M-UFXX] (describing such a proposal in Missouri).

²¹⁰² See Nick Brown, *Republicans Want Census Data on Citizenship for Redistricting*, REUTERS (Apr. 8, 2019, 7:05 AM), <https://www.reuters.com/article/us-usa-census-redistricting-insight/republicans-want-census-data-on-citizenship-for-redistricting-idUSKCN1RK18D> [https://perma.cc/8TXR-SKL6]; Wolf, *supra* note 2101.

²¹⁰³ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1143–44 (2016) (Alito, J., concurring in the judgment).

²¹⁰⁴ *Cf., e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960) (holding that redrawing district lines in a way that would remove almost all black voters from the city of Tuskegee was unconstitutional).

²¹⁰⁵ 139 S. Ct. 2551.

²¹⁰⁶ *See id.* at 2569.

²¹⁰⁷ *See id.* at 2575; Hansi Lo Wang, *Commerce Secretary Now Recalls Discussing Citizenship Question with Steve Bannon*, NPR (Oct. 11, 2018, 4:12 PM), <https://www.npr.org/2018/10/11/656570447/commerce-secretary-now-recalls-discussing-citizenship-question-with-steve-bannon> [https://perma.cc/QB98-YK69].

²¹⁰⁸ *See Dep't of Com.*, 139 S. Ct. at 2575; Wang, *supra* note 2107.

²¹⁰⁹ *See Dep't of Com.*, 139 S. Ct. at 2575; Wang, *supra* note 2107.

²¹¹⁰ *See Dep't of Com.*, 139 S. Ct. at 2575; Wang, *supra* note 2107.

and because alternative methods of obtaining an accurate citizenship count were available.²¹¹¹

Chief Justice Roberts, joined by the Court's four liberals, ruled that the Administration had violated the APA.²¹¹² Although asking a citizenship question could be rationally defended, Chief Justice Roberts concluded, the Administration's proffered rationale was "contrived," so it failed even deferential "arbitrary and capricious" review.²¹¹³

Dissenting in part, Justice Alito seemed to take offense at the suggestion that adding a citizenship question to the census might be racist, given that many countries routinely ask such a question.²¹¹⁴ Yet context always matters. Those countries might not be governed by a political party that routinely suppresses and dilutes the votes of people of color²¹¹⁵ or a President who constantly stokes racial resentment and displays racial animus.²¹¹⁶

H. Upholding the Muslim Travel Ban: Trump v. Hawaii (2018)

Liberal democracy entails not only free and fair elections but also protection of certain basic human rights, including safeguards against discrimination on the basis of characteristics such as race, religion, sex, and sexual orientation.²¹¹⁷ As already noted, autocrats often vilify racial and religious minorities to rally popular support and divert attention from problems they cannot solve.²¹¹⁸

Trump won the Republican nomination and the presidential election warning of the threat posed to the nation by "Muslims" and "Mexicans."²¹¹⁹ After a terrorist attack by a Muslim couple killed fourteen people in California in December 2015, Trump called for a "total and complete shutdown of Muslims entering the United States," which a majority of Republicans supported.²¹²⁰ He also declared on national

²¹¹¹ See *Dep't of Com.*, 139 S. Ct. at 2587–88, 2590–92 (Breyer, J., concurring in part and dissenting in part).

²¹¹² *Id.* at 2573–76 (majority opinion).

²¹¹³ *Id.* at 2576.

²¹¹⁴ *Id.* at 2596 (Alito, J., concurring in part and dissenting in part).

²¹¹⁵ See *supra* section I.C, pp. 45–66.

²¹¹⁶ See *supra* section I.B.7, pp. 33–35.

²¹¹⁷ See generally JOHN RAWLS, A THEORY OF JUSTICE 195–201 (1971).

²¹¹⁸ See *supra* notes 96–107 and accompanying text.

²¹¹⁹ See, e.g., Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 AM), <https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html> [<https://perma.cc/BX6B-AZVU>]; Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016, 11:35 AM), <https://time.com/4473972/donald-trump-mexico-meeting-insult> [<https://perma.cc/JV2G-YVWX>].

²¹²⁰ See Jenna Johnson & Abigail Hauslohner, "I Think Islam Hates Us": A Timeline of Trump's Comments About Islam and Muslims, WASH. POST (May 20, 2017, 3:16 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims> [<https://perma.cc/F4UK-SSG7>]; *Nearly One-Fifth of Americans Would Deny Their Country's Muslims the Right to Vote*, THE ECONOMIST (June 14,

television that “Islam hates us,” and he suggested placing American mosques under surveillance.²¹²¹ In campaign speeches, Trump often recounted with approval an apocryphal story of General John “Blackjack” Pershing’s killing Muslim insurgents in the Philippines with bullets dipped in pig’s blood.²¹²² Right-wing autocrats elsewhere also portray Muslims as dangerous terrorists.²¹²³

One week into office, apparently without consulting experts on immigration or national security, President Trump signed the first iteration of his Muslim travel ban.²¹²⁴ The executive order suspended for 90 days entry into the United States of all nationals of seven predominantly Muslim nations,²¹²⁵ and it also suspended admission of all refugees for 120 days,²¹²⁶ except those from Syria — whom President Trump had linked to terrorists²¹²⁷ — who were banned indefinitely.²¹²⁸ Once refugee admissions resumed, priority would be extended to those belonging to minority religions in the covered countries,²¹²⁹ a clear violation of the Establishment Clause. After the initial order was enjoined, the Administration conducted a worldwide security review, and its lawyers eliminated the most flagrantly illegal aspects of the plan.²¹³⁰ The final version of the order barred travel to the United States from eight nations, most of which were majority-Muslim, on the grounds that they sponsored terrorism or did not share adequate information with the United States to enable an assessment of the national security risks posed by their nationals.²¹³¹

The Muslim travel ban should not have posed a difficult issue for the Court. To be sure, the President is empowered and obliged to protect the nation from foreign threats.²¹³² Moreover, the Court has long recognized that excluding foreign nationals is a fundamental attribute of sovereignty, which courts should not stringently review.²¹³³

2018), <https://www.economist.com/graphic-detail/2018/06/14/nearly-one-fifth-of-americans-would-deny-their-countrys-muslims-the-right-to-vote> [<https://perma.cc/AQH4-QNTA>].

²¹²¹ See Johnson & Hauslohner, *supra* note 2120.

²¹²² See *Trump v. Hawaii*, 138 S. Ct. 2392, 2436–38 (2018) (Sotomayor, J., dissenting).

²¹²³ See *supra* notes 100–105 and accompanying text.

²¹²⁴ See WOLFF, *supra* note 1229, at 65; see also Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611, 615 (2019).

²¹²⁵ Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977 (Jan. 27, 2017).

²¹²⁶ *Id.* § 5(a).

²¹²⁷ See Family, *supra* note 2124, at 625.

²¹²⁸ Exec. Order No. 13,769 § 5(c).

²¹²⁹ *Id.* § 5(b).

²¹³⁰ See Family, *supra* note 2124, at 617–18, 626.

²¹³¹ Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

²¹³² See U.S. CONST. art. II, § 1, cl. 8. See generally *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

²¹³³ See, e.g., *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 603–04, 609 (1889).

Yet one of the most well-established principles of equal protection and free exercise doctrine is that government action that is facially neutral but motivated by discriminatory racial or religious animus, respectively, is subject to strict scrutiny and presumptive invalidation.²¹³⁴ Those doctrines apply to executive actors as much as to legislatures.²¹³⁵ Indeed, just weeks before upholding the Muslim travel ban, the conservative Justices joined a decision invalidating an administrative action by the Colorado Civil Rights Commission that penalized a Christian baker for refusing to make a wedding cake for a gay couple.²¹³⁶ Members of the Commission, according to the Court, had revealed “a clear and impermissible hostility toward . . . sincere religious beliefs” by stating that many awful things have been done in the past in the name of religion.²¹³⁷

President Trump has never disguised his animus toward Muslims. While the ban was being litigated in the courts, President Trump used a wink and a nod to assure his supporters that while lawyers had laundered the ban to improve its prospects of surviving legal challenge, its purpose was still to keep Muslims out of the country.²¹³⁸ When he publicly read the title of his executive order, President Trump said: “We all know what that means.”²¹³⁹ Later, he told supporters that the second iteration of the ban was just a “watered down version of the first one” and had been “tailor[ed]” per the request of “the lawyers,” and that he preferred the original.²¹⁴⁰ Prominent former national security officials charged that the order did nothing to advance national security and possibly undermined it.²¹⁴¹ Not a single national of any of the nations covered by the ban had killed any Americans in a terrorist attack in the United States from 1975 to 2015.²¹⁴² The ban did not apply to other Muslim-majority nations such as Saudi Arabia — which is larger and more powerful than most of the covered nations — from which terrorists

²¹³⁴ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–40 (1993); *Washington v. Davis*, 426 U.S. 229, 239–42 (1976).

²¹³⁵ See *Yick Wo v. Hopkins*, 118 U.S. 356, 371, 373–74 (1886).

²¹³⁶ See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723–24 (2018); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2446–47 (2018) (Sotomayor, J., dissenting) (contrasting the Court’s decision with its holding in *Masterpiece Cakeshop*).

²¹³⁷ *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

²¹³⁸ See *Trump*, 138 S. Ct. at 2437 (Sotomayor, J., dissenting).

²¹³⁹ *Id.* at 2436.

²¹⁴⁰ *Id.* at 2437 (alteration in original).

²¹⁴¹ See, e.g., Brief of *Amici Curiae* Former National Security Officials in Support of Respondents at 15, *Trump*, 138 S. Ct. 2392 (No. 17–965); Jamie Crawford, *Former Spy Chief Calls Trump’s Travel Ban “Recruiting Tool for Extremists,”* CNN (Feb. 9, 2017, 6:22 PM), <https://www.cnn.com/2017/02/09/politics/james-clapper-trump-travel-ban> [https://perma.cc/RT2W-TENE].

²¹⁴² See Hannah Giorgis, *The Faulty Logic in Trump’s Travel Ban*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-travel-ban-logic-flaw/579631> [https://perma.cc/5AMQ-B6U2].

had traveled to the United States to kill nearly three thousand Americans on September 11, 2001.²¹⁴³

Chief Justice Roberts, writing for the conservative Justices, ruled that the President is entitled to great deference with regard to immigration and that courts have little leeway in investigating presidential motive.²¹⁴⁴ To be sure, Presidents have exercised broad discretion in the immigration sphere before, and when challenges to such actions have reached the Court, it has upheld the presidential actions. However, none of those instances remotely resembled what was at issue in *Trump v. Hawaii*.²¹⁴⁵ President Carter had excluded Iranians during the 1979–1981 hostage crisis,²¹⁴⁶ and President Reagan had suspended Cuban immigration after the Mariel boatlift of 1980,²¹⁴⁷ but neither of these executive actions was the product of a manufactured political crisis, and neither generated a case reaching the Court.²¹⁴⁸ Previous cases that did reach the Court had involved Presidents' excluding individuals based on specific determinations of a threat to national security.²¹⁴⁹ Moreover, the most recent of these cases that Chief Justice Roberts invoked as precedent had explicitly refrained from rejecting judicial inquiry into executive motive.²¹⁵⁰

Chief Justice Roberts expressed irritation at the accusation leveled in Justice Sotomayor's dissent that the Court was repeating its mistake in *Korematsu v. United States*,²¹⁵¹ where it upheld the exclusion of Japanese Americans and Japanese noncitizens from their West Coast homes during World War II.²¹⁵² "*Korematsu* has nothing to do with this case," Chief Justice Roberts insisted.²¹⁵³

To be sure, the cases were distinguishable. President Trump's order affected foreign nationals,²¹⁵⁴ while President Franklin D. Roosevelt's impacted American citizens and resident noncitizens.²¹⁵⁵ Moreover,

²¹⁴³ See *id.*

²¹⁴⁴ See *Trump*, 138 S. Ct. at 2408–09.

²¹⁴⁵ 138 S. Ct. 2392.

²¹⁴⁶ See David J. Bier, Opinion, *Trump's Immigration Ban Is Illegal*, N.Y. TIMES (Jan. 27, 2017), <https://nyti.ms/2jGCwhW> [<https://perma.cc/5XK6-KYUZ>].

²¹⁴⁷ See Linda Greenhouse, *U.S. Assailed Again on Curbing Cuban Immigrants*, N.Y. TIMES (Sept. 27, 1986), <https://nyti.ms/29w6lyc> [<https://perma.cc/B4AH-4STK>].

²¹⁴⁸ See Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986); Exec. Order No. 12,172, 3 C.F.R. 461 (1979), *amended by* Exec. Order No. 12,206, 3 C.F.R. 249 (1980); Family, *supra* note 2124, at 624–25.

²¹⁴⁹ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 757–59 (1972).

²¹⁵⁰ See *Trump*, 138 S. Ct. at 2419 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring in the judgment)).

²¹⁵¹ 323 U.S. 214 (1944).

²¹⁵² See *Trump*, 138 S. Ct. at 2423; *Korematsu*, 323 U.S. at 215–16, 224.

²¹⁵³ *Trump*, 138 S. Ct. at 2423.

²¹⁵⁴ See *id.*

²¹⁵⁵ See *Korematsu*, 323 U.S. at 215–16.

President Trump's order was facially neutral,²¹⁵⁶ while the exclusion order in *Korematsu* was not (though President Roosevelt's underlying executive order that formed the basis of the military's exclusion order was).²¹⁵⁷

However, the commonalities between the two cases were substantial.²¹⁵⁸ In *Korematsu*, demagogic politicians had stoked popular animus against people of Japanese descent after the attack on Pearl Harbor, and openly racist interest groups, such as Caucasian farmers on the West Coast who competed against fruit and vegetable growers of Japanese descent, had demanded an exclusion and internment order.²¹⁵⁹ Government lawyers had deliberately misled the Supreme Court, concealing evidence that would have revealed the alleged national security threat was exaggerated.²¹⁶⁰

The Muslim travel ban was not so very different. President Trump's animus towards Muslims was open and notorious, and it was shared by a majority of Republicans, who view Muslims as a national security threat per se,²¹⁶¹ which is how many Americans saw people of Japanese descent in 1942.²¹⁶² Many experts ridiculed the Muslim travel ban as irrelevant to national security.²¹⁶³ That creative government lawyers laundered the ban to make it facially neutral and created exceptions and waiver provisions as "window dressing" — to quote Justice Breyer's dissent — did not render the Court powerless to do the right thing.²¹⁶⁴

In fact, doing the right thing in *Trump v. Hawaii* should have been easier than in *Korematsu*. The military exclusion order at issue in *Korematsu* was issued in March 1942, not long after the Japanese attack on Pearl Harbor, which an investigative commission had blamed partially on espionage and sabotage by people of Japanese descent in Hawaii.²¹⁶⁵ Many Americans feared a Japanese invasion of the West Coast, and even the ACLU was divided over whether to challenge the

²¹⁵⁶ See *Trump*, 138 S. Ct. at 2418.

²¹⁵⁷ See *Korematsu*, 323 U.S. at 216–17; Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

²¹⁵⁸ See *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

²¹⁵⁹ See PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES 38–40 (1983); James McDonald, Note, *Democratic Failure and Emergencies: Myth or Reality?*, 93 VA. L. REV. 1785, 1808–14 (2007).

²¹⁶⁰ See *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting) (citing Brief of *Amicus Curiae* the Japanese American Citizens League in Support of Respondents at 14–19, *Trump*, 138 S. Ct. 2392 (No. 17-965)).

²¹⁶¹ See, e.g., *How the U.S. General Public Views Muslims and Islam*, PEW RSCH. CTR. (July 26, 2017), <http://pewrsr.ch/2uzUA3B> [<https://perma.cc/LT3V-U6LP>] (reporting poll results indicating that seventy percent of Republicans believe Islam is more likely than other religions to “encourage violence”).

²¹⁶² See McDonald, *supra* note 2159, at 1808–14.

²¹⁶³ See sources cited *supra* note 2141.

²¹⁶⁴ *Trump*, 138 S. Ct. at 2433 (Breyer, J., dissenting) (quoting Declaration of Christopher Richardson at 3–4, *Alharbi v. Miller*, 368 F. Supp. 3d 527 (E.D.N.Y. 2019)).

²¹⁶⁵ See IRONS, *supra* note 2159, at 40.

military order.²¹⁶⁶ Had the Court confronted the constitutionality of the order when it was issued, rather than late in 1944, the Justices probably would have been unanimous, rather than divided six to three, in rejecting the challenge. By contrast, President Trump's order fulfilled an Islamophobic campaign promise, the United States was not involved in a world war, and the 9/11 terrorist attacks had occurred more than fifteen years earlier.²¹⁶⁷ The liberal Justices had no problem seeing through the Administration's pretextual justifications.²¹⁶⁸

Judge Friendly, for whom Chief Justice Roberts clerked in 1979–1980,²¹⁶⁹ once famously said that “[j]udges are not required to exhibit a naiveté from which ordinary citizens are free.”²¹⁷⁰ Indeed, the Chief Justice quoted that very statement in the census case, explaining that the APA did not require the Court to defer to the Administration's obviously pretextual justification for adding the citizenship question to the census.²¹⁷¹

Constitutional law does not require the Court to show such naiveté either. Indeed, well-established principles of equal protection and free exercise do not permit such naiveté. Motive inquiries are fundamental to these areas of constitutional law.²¹⁷² The Court was not compelled to accept the President's national security justification at face value. President Trump did not even try to hide his anti-Muslim animus. If the conservative Justices were unwilling to check the abuses of an Islamophobic and autocratically disposed President, they might have been better off following the approach taken by Justice Jackson in his *Korematsu* dissent: confess powerlessness to check the Executive and absolve the judiciary of all responsibility in the field.²¹⁷³ That approach would at least have had the virtue of not legitimizing the President's unconstitutional actions. Hopefully, some future Court will show *Trump v. Hawaii* no more respect than this Court showed *Korematsu*, which most of us today rightly recognize as the Justices' craven capitulation to racism.

²¹⁶⁶ See *id.* at 26, 128–30.

²¹⁶⁷ See Family, *supra* note 2124, at 624–25.

²¹⁶⁸ See *Trump*, 138 S. Ct. at 2431–33 (Breyer, J., dissenting); *id.* at 2438–40 (Sotomayor, J., dissenting).

²¹⁶⁹ *Current Members*, SUP. CT. OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/KUJ5-XEGZ>].

²¹⁷⁰ *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977).

²¹⁷¹ *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *Stanchich*, 550 F.2d at 1300).

²¹⁷² See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–40 (1993); *Washington v. Davis*, 426 U.S. 229, 239–42 (1976).

²¹⁷³ See *Korematsu v. United States*, 323 U.S. 214, 244–48 (1944) (Jackson, J., dissenting).

*I. How Constitutional Interpretation Works
and Why the Court Won't Save Democracy*

This section seeks to explain the decisions described in this Part, in which the Court failed to protect democracy and instead defended the interests of the Republican Party. The Supreme Court is and always has been a political institution, meaning simply that the Justices' legal interpretations are influenced by their personal values and by their perception of the limits placed on their decisionmaking by the contemporary social and political context. Some Justices dispute this description, suggesting that their job is more akin to a baseball umpire's "call[ing] balls and strikes."²¹⁷⁴ Others accept this description as accurate, but only as applied to politically liberal Justices, especially those serving since the heyday of the Warren Court.²¹⁷⁵

Yet since the Founding, Justices resolving constitutional conflicts have always had to make controversial choices that reflect their own values and political calculations. In *McCulloch v. Maryland*,²¹⁷⁶ Chief Justice Marshall read Hamiltonian nationalism into the Constitution, and his Jeffersonian critics loudly objected.²¹⁷⁷ In *Dred Scott*, Democratic Justices and Whig/Republican Justices disagreed about whether the Constitution barred Congress from regulating slavery in federal territories.²¹⁷⁸ During the *Lochner* era, liberal and conservative Justices disagreed about the extent to which the Constitution protected market allocations of wealth and power from government redistribution.²¹⁷⁹ Even in *Brown*, northern and southern Justices initially disagreed about whether the Fourteenth Amendment barred state-mandated segregation of public schools.²¹⁸⁰

Constitutional interpretation invariably reflects the Justices' personal values for two principal reasons.²¹⁸¹ First, constitutional law involves issues about which most people feel very strongly: abortion, race-based affirmative action, the death penalty, gun control, and whether Vice

²¹⁷⁴ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr.).

²¹⁷⁵ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629–30, 2630 n.22 (2015) (Scalia, J., dissenting); see also RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 117–18, 160–61 (2018) (describing conservatives' calls for judicial restraint during the Warren Court era).

²¹⁷⁶ 17 U.S. (4 Wheat.) 316 (1819).

²¹⁷⁷ See R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 295–99 (2007).

²¹⁷⁸ See FEHRENBACHER, *supra* note 1245, at 365.

²¹⁷⁹ See generally GILLMAN, *supra* note 1247, at 1–4 (discussing the ideological motivations behind the Court's decision in *Lochner*).

²¹⁸⁰ See KLARMAN, JIM CROW, *supra* note 233, at 293–98.

²¹⁸¹ See *id.* at 5–6.

President Al Gore or Governor George W. Bush should have been elected President in 2000.²¹⁸² Second, constitutional interpretation usually involves the resolution of legal indeterminacy, beginning with the constitutional text.²¹⁸³ The constitutional requirement that each state have two senators is not subject to much debate, but the meaning of phrases such as “equal protection,” “due process,” and “necessary and proper” is.

Constitutional indeterminacy extends to methodologies of interpretation. Conservative Justices purport to be more restrictive in the sources of constitutional law they consult — text, original understanding, tradition, and precedent.²¹⁸⁴ By contrast, liberal Justices acknowledge a willingness to consult a wider variety of sources, including evolving social mores, international norms, and political process theory.²¹⁸⁵ Neither side offers convincing normative justification for its methodology, and more importantly, neither side seems much constrained by the approach it purports to embrace.

Sometimes, conservative Justices celebrate the importance of text uninformed by context,²¹⁸⁶ but in other cases, they consult historical context to explain the meaning of text,²¹⁸⁷ and in still others they identify constitutional limits with no basis in text.²¹⁸⁸ In addition, conservative Justices favor an originalist methodology to interpret vague constitutional phrases when the issue is gay marriage²¹⁸⁹ or abortion,²¹⁹⁰ but not when it is campaign finance regulation²¹⁹¹ or race-based affirmative action,²¹⁹² which are difficult to invalidate on originalist grounds. Liberal Justices do not purport to be originalists, but are happy to argue in such terms

²¹⁸² See *id.* at 5.

²¹⁸³ See *id.*

²¹⁸⁴ See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 803 & n.8, 804–05 (2010) (Scalia, J., concurring).

²¹⁸⁵ See, e.g., *id.* at 872–77 (Stevens, J., dissenting).

²¹⁸⁶ See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738–41 (2020).

²¹⁸⁷ See, e.g., *id.* at 1776–77 (Alito, J., dissenting); *King v. Burwell*, 135 S. Ct. 2480, 2489–96 (2015).

²¹⁸⁸ See, e.g., *Alden v. Maine*, 527 U.S. 706, 712–30 (1999); *Printz v. United States*, 521 U.S. 898, 907–09 (1997).

²¹⁸⁹ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628–30 (2015) (Scalia, J., dissenting).

²¹⁹⁰ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 951–53 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

²¹⁹¹ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 386–89 (2010) (Scalia, J., concurring); see also *id.* at 425–26 (Stevens, J., concurring in part and dissenting in part) (“[The majority] makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the [First] Amendment.”).

²¹⁹² See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); see also Cass R. Sunstein, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 22, 26–27 (2016); Book Note, *Justice Thomas’s Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1434–37, 1435 n.16 (2008).

when originalist evidence supports their conclusions.²¹⁹³ Justices sometimes invoke political process theory to support their reasoning,²¹⁹⁴ but other times ignore it when it seems equally pertinent.²¹⁹⁵

Indeterminacy extends to a whole series of constitutional law arguments and maxims that appear “flippable.” Conservative Justices accuse liberals of being a “threat to American democracy” when the Court rules that same-sex marriage is a constitutional right,²¹⁹⁶ but do not hesitate themselves to invalidate a local school board’s efforts to integrate its schools²¹⁹⁷ or gun control measures enacted by city councils.²¹⁹⁸ Government paternalism deeply offends the conservative Justices,²¹⁹⁹ except when they embrace it.²²⁰⁰ Justices love referenda,²²⁰¹ except when they distrust them.²²⁰² Justices celebrate the Court’s role in defending the rights of unpopular minorities,²²⁰³ except when they celebrate the virtues of democratic decisionmaking, in which case the opposing Justices suddenly become “black-robed rulers overriding citizens’ choices.”²²⁰⁴

Precedents are not to be lightly overruled,²²⁰⁵ except when “there are strong grounds for doing so,” which is not the most determinate of legal standards.²²⁰⁶ Legislative departures from tradition are frowned upon in constitutional law,²²⁰⁷ except when they are not.²²⁰⁸ Justices instruct us to interpret the past at a low level of generality when defining constitutional rights,²²⁰⁹ except when that approach will not get them the result they favor, in which case they read the past at a higher level of generality.²²¹⁰ Justices insist they should not second guess the cost-

²¹⁹³ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 640–62, 662 n.28 (2008) (Stevens, J., dissenting); *Printz*, 521 U.S. at 945–54 (Stevens, J., dissenting).

²¹⁹⁴ See, e.g., *McConnell v. FEC*, 540 U.S. 93, 306 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part).

²¹⁹⁵ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 306–17 (2004) (Kennedy, J., concurring in the judgment).

²¹⁹⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting).

²¹⁹⁷ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007).

²¹⁹⁸ See *Heller*, 554 U.S. at 636.

²¹⁹⁹ See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 557–58 (2012) (opinion of Roberts, C.J.).

²²⁰⁰ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

²²⁰¹ See, e.g., *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 309–14 (2014) (plurality opinion).

²²⁰² See, e.g., *Romer v. Evans*, 517 U.S. 620, 634–36 (1996).

²²⁰³ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

²²⁰⁴ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

²²⁰⁵ See, e.g., *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment).

²²⁰⁶ *Janus*, 138 S. Ct. at 2478.

²²⁰⁷ See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) (opinion of Roberts, C.J.).

²²⁰⁸ See, e.g., *United States v. Windsor*, 570 U.S. 744, 776–78 (2013) (Roberts, C.J., dissenting).

²²⁰⁹ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion).

²²¹⁰ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 385–93 (2010) (Scalia, J., concurring).

benefit calculus of legislatures,²²¹¹ except when they know better.²²¹² The primary responsibility of the Court is to declare what the law is,²²¹³ except when Justices determine that the judiciary has no business involving itself in a certain sphere.²²¹⁴

In some doctrinal areas, government motive is everything,²²¹⁵ but in others it is irrelevant, and no attempt to reconcile the inconsistencies is offered.²²¹⁶ Judicial intervention in a particular sphere requires administrable standards, except when it does not.²²¹⁷ The Court will not decide more than is necessary to resolve the matter before it,²²¹⁸ except when it does;²²¹⁹ and the Court will not decide issues unless properly presented,²²²⁰ unless it feels like doing so.²²²¹ The Court has no expertise on certain issues,²²²² but lots on others.²²²³ In calculating how harm effected by legislative action ought to be aggregated in determining whether the Constitution has been violated, sometimes a Justice will frame the inquiry narrowly²²²⁴ and sometimes broadly,²²²⁵ without explaining the divergent choices.²²²⁶ With so many diametrically opposed practices and maxims of interpretation to choose from, how could constitutional interpretation not be thoroughly political?

Judges, like everyone else, are susceptible to motivated reasoning.²²²⁷ Cognitive psychology has established that the human brain is better at devising arguments to defend positions reached through intuitive judgment than at impartially weighing evidence while suspending judgment until all the facts are known.²²²⁸ The judicial brain, though trained to

²²¹¹ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324–25 (2016) (Thomas, J., dissenting).

²²¹² See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 761–66 (2007) (Thomas, J., concurring).

²²¹³ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

²²¹⁴ See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–08 (2019).

²²¹⁵ See, e.g., *Washington v. Davis*, 426 U.S. 229, 245–46 (1976).

²²¹⁶ See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996).

²²¹⁷ See *supra* section III.D, pp. 190–94.

²²¹⁸ See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009).

²²¹⁹ See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 574 (2012) (opinion of Roberts, C.J.).

²²²⁰ See, e.g., *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578–79 (2020).

²²²¹ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 396 (2010) (Stevens, J., concurring in part and dissenting in part) (“[T]he majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court’s invitation.”).

²²²² See, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

²²²³ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 628–36 (2008) (Scalia, J.).

²²²⁴ See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 555 (2004) (Scalia, J., dissenting).

²²²⁵ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 34–35 (2005) (Scalia, J., concurring in the judgment).

²²²⁶ See generally Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002) (explaining the manipulability inherent in framing “transactions” in constitutional law).

²²²⁷ See Kahan, *supra* note 1477, at 7–8.

²²²⁸ See HAIDT, *supra* note 1477, at 91–95.

resist that tendency, cannot transcend nature.²²²⁹ In addition, smarter and better educated people are simply more adept at formulating justificatory arguments.²²³⁰

The impulse toward motivated reasoning is more powerful when value differences are greater and the stakes of the debate are larger. The stakes are greatest when entire worldviews are at issue. As just discussed, constitutional law and practice contain sufficient ammunition for judges to rationalize nearly any position coinciding with their political preferences.²²³¹ Given the extent of ideological and partisan polarization today, is it any wonder that Justice Alito cannot fathom how adding a citizenship question to the census could be problematic, or that Chief Justice Roberts would be outraged that Justice Sotomayor would compare President Trump's Muslim travel ban to Japanese American internment?

Some would argue that the Justices' felt need to reconcile past decisions with the outcome of the case before the Court would force them to be more principled than politicians. One is no longer surprised at politicians' blatantly contradicting their past positions when, for example, a President of a different party has assumed office since the last time the politicians criticized executive overreach, defended legislative oversight, or blocked the confirmation of judges. Yet the Supreme Court no longer invariably does better than this. In 2018, the conservative Justices invalidated under the First Amendment a California law that forced antiabortion pregnancy-counseling centers to inform patients that abortion was a legal option.²²³² However, conservative Justices earlier had raised no First Amendment objection to states' requiring abortion providers to advise women seeking abortions about the availability of printed materials that provided information on adoption and other alternatives.²²³³ "Really?" Justice Breyer asked quizzically in dissent.²²³⁴ This is how reasoned elaboration is supposed to work?²²³⁵

The Court's near-invalidating of the ACA's individual mandate to buy health insurance illustrates how the open-endedness of constitutional argument enables political disagreement to be translated into constitutional disagreement. In *NFIB v. Sebelius*,²²³⁶ the five conservative Justices ruled that the individual mandate could not be justified under

²²²⁹ See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 28 (2011).

²²³⁰ See KLEIN, *supra* note 347, at 91–93; Rauch, *supra* note 1476, at 91.

²²³¹ See KLEIN, *supra* note 347, at 97–102.

²²³² See *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2368, 2378 (2018).

²²³³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion).

²²³⁴ *Becerra*, 138 S. Ct. at 2386 (Breyer, J., dissenting).

²²³⁵ On "reasoned elaboration," see, for example, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Kahan, *supra* note 1477, at 28.

²²³⁶ 567 U.S. 519 (2012).

Congress's commerce power, even though healthcare spending constitutes roughly one-sixth of the nation's economy.²²³⁷ Chief Justice Roberts provided two rationales for this conclusion. First, the Commerce Clause empowers Congress to regulate action, not inaction.²²³⁸ Second, no administrable line could be drawn between forcing people to buy health insurance and to buy broccoli — the latter scenario supposedly being intolerable and thus obviously unconstitutional.²²³⁹

The idea that Congress could not compel Americans to buy health insurance as part of a complex scheme for expanding healthcare coverage to millions was so absurd that questioning its constitutionality would have been considered a fringe position when Congress first took up the Obama Administration's healthcare bill in 2009.²²⁴⁰ Yet constitutional law arguments are sufficiently malleable that the conservative Justices could credibly contend that no Court decision had ever sustained an exercise of the commerce power that coerced action and could invoke the *reductio ad absurdum* that upholding the individual mandate would authorize Congress to force Americans to buy broccoli.²²⁴¹ The open-endedness of constitutional law argument, combined with the extreme political polarization that led at least one prominent Republican to compare the ACA to slavery,²²⁴² left the Court within a whisker of invalidating arguably the most significant piece of domestic legislation since 1965. Many Republicans deemed Chief Justice Roberts a traitor for casting the decisive vote to uphold the mandate under Congress's taxing power.²²⁴³

For much of American history, for a judge to be political did not necessarily mean to be ideological or even partisan, because the parties were not ideologically sorted. On the bench, Justice Stewart behaved like a fairly conservative Republican and Chief Justice Warren like a fairly liberal one, which is what they were off the bench as well.²²⁴⁴ Yet, over the last half century, the parties have sorted ideologically and have

²²³⁷ *Id.* at 561 (opinion of Roberts, C.J.).

²²³⁸ *Id.* at 552.

²²³⁹ *Id.* at 557–58.

²²⁴⁰ See Ezra Klein, *Unpopular Mandate*, NEW YORKER (June 18, 2012), <https://www.newyorker.com/magazine/2012/06/25/unpopular-mandate> [<https://perma.cc/LEX2-L2US>].

²²⁴¹ See *NFIB*, 567 U.S. at 549, 558 (opinion of Roberts, C.J.).

²²⁴² Sean Sullivan, *Ben Carson: Obamacare Worst Thing "Since Slavery,"* WASH. POST (Oct. 11, 2013, 1:19 PM), <https://www.washingtonpost.com/news/post-politics/wp/2013/10/11/ben-carson-obamacare-worst-thing-since-slavery> [<https://perma.cc/LG48-Y4AW>].

²²⁴³ See, e.g., Geoffrey R. Stone, *Savaging Roberts: Conservatives Run Amok*, HUFFPOST (Sept. 2, 2012), https://www.huffpost.com/entry/savaging-roberts-conserva_b_1647980 [<https://perma.cc/9QKH-2N4F>].

²²⁴⁴ See ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 184 (1997); Tinsley E. Yarbrough, *Justice Potter Stewart: Decisional Patterns in Search of Doctrinal Moorings*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 375, 375–85 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

polarized, albeit asymmetrically.²²⁴⁵ The Justices have also polarized asymmetrically. While the five conservatives on the Court in 2012 were among the most supportive of the Chamber of Commerce's agenda of any Justices serving since World War II, the four liberal Justices, on average, fell just left of center.²²⁴⁶

Why would Justices appointed by Republican Presidents and vetted over decades of party service and membership in the Federalist Society,²²⁴⁷ an organization funded from its inception by neo-Ayn Randians like the Koch brothers,²²⁴⁸ not think about the world in the same way as conservative Republicans?²²⁴⁹ Indeed, some of these Justices have admitted that they share the Republican propensity to distrust liberal media sources such as *The New York Times* and get their news instead from more politically friendly sources, such as *The Wall Street Journal* and even right-wing media figures such as Bill Bennett.²²⁵⁰

When the Court confronts a case involving abortion or race-based affirmative action, the Justices naturally divide along ideological lines. Liberal and conservative Justices think differently about these issues as policy matters, and constitutional law is malleable enough to enable them to legally rationalize the outcomes they prefer. This is probably inevitable and thus difficult to criticize, though it would be constructive if the conservatives would stop pretending they do law while the liberals do politics and would cease accusing the liberals of being a threat to democracy while the conservatives concoct obstacles to campaign finance reform, gun control, and race-based affirmative action. One of the truest things President Trump has said in office is that there are "Obama judges" and "Trump judges."²²⁵¹ Can anyone honestly think differently?

Parties that win elections are entitled to have their policy agendas enacted into law. The political party that has won enough recent Senate and presidential elections to appoint Justices who share the party's

²²⁴⁵ See *supra* sections II.E.1, pp. 154–58; II.E.2, pp. 159–61.

²²⁴⁶ See HACKER & PIERSON, *supra* note 352, at 242; Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013).

²²⁴⁷ See BISKUPIC, *supra* note 1711, at 63–87; KLEIN, *supra* note 347, at 206–08; Adam Liptak, *Brett Kavanaugh, a Conservative Stalwart in Political Fights and on the Bench*, N.Y. TIMES (July 9, 2018), <https://nyti.ms/2L1PqVo> [<https://perma.cc/2GMD-2BCV>]; Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html> [<https://perma.cc/G9WF-PAYX>].

²²⁴⁸ See Evan Mandery, *Why There's No Liberal Federalist Society*, POLITICO MAG. (Jan. 23, 2019), <https://www.politico.com/magazine/story/2019/01/23/why-theres-no-liberal-federalist-society-224033> [<https://perma.cc/Z2DR-7NYT>].

²²⁴⁹ See Aaron Belkin, *Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball*, 2019 PEPP. L. REV. 19, 47.

²²⁵⁰ See, e.g., KLEIN, *supra* note 347, at 198.

²²⁵¹ See Katie Reilly, *President Trump Escalates Attacks on "Obama Judges" After Rare Rebuke from Chief Justice*, TIME (Nov. 21, 2018, 6:32 PM), <https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts> [<https://perma.cc/NM2U-7KT9>].

worldview is entitled to victories in court. Yet basic principles of democracy do not permit parties to stack the political deck in their favor by suppressing votes, purging voter rolls, gerrymandering legislative districts, and so forth. It would be nice if Supreme Court Justices, regardless of ideology or partisan affiliation, would defend democracy when it is threatened in such a fashion.

Yet given the current extent of ideological polarization and negative partisanship, expecting Republican Justices to intervene against Republican assaults on democracy is Panglossian. Republican and Democratic Justices disagree about values and probably about facts. Republican Justices have treated the unleashing of corporate money into politics as a positive good, they probably believe that voter impersonation fraud is a genuine problem (when it isn't), and they may even believe that race discrimination is mostly a thing of the past.

Who knows whether Republican Justices consciously strategize to help the political party they have supported their entire adult lives? *Bush v. Gore* suggests we should not be too quick to dismiss such a possibility. But whether conscious strategizing or motivated reasoning is doing the work, the bottom line is the same: a Republican Court will not protect democracy from Republican efforts to undermine it or check the authoritarian tendencies of a Republican President in any substantial way.²²⁵²

IV. SOLUTIONS

A. *Entrenching Democracy: An Uphill Battle*

The best way to defend democracy from Republican assaults and President Trump's authoritarian bent is to defeat President Trump's reelection bid, elect Democratic majorities, and then seek to entrench democracy. This will be an uphill battle because the American political system is currently stacked against Democratic voters.²²⁵³

The United States ranks near the bottom of advanced democracies in terms of voter registration and turnout.²²⁵⁴ Obstacles to registration largely explain why people of color, who today vote overwhelmingly Democratic, register at much lower rates than white people.²²⁵⁵ Seventy-one percent of white non-Hispanic American citizens were registered to vote in 2018, but only sixty-four percent of African American

²²⁵² See DIAMOND, *supra* note 28, at 305–06; LEVITSKY & ZIBLATT, *supra* note 35, at 8–9; Huq & Ginsburg, *supra* note 36, at 148.

²²⁵³ See Belkin, *supra* note 2249, at 49.

²²⁵⁴ See DIAMOND, *supra* note 28, at 269.

²²⁵⁵ See ANDERSON, *supra* note 6, at 155; PAGE & GILENS, *supra* note 533, at 203.

citizens, fifty-four percent of Latino American citizens, and fifty-three percent of Asian American citizens were registered.²²⁵⁶

Over the last fifty years, between fifty and sixty percent of eligible Americans generally voted in presidential elections (vastly less than in the late nineteenth century), and over the past decade or so, about forty percent voted in off-year congressional elections, and seldom more than twenty percent voted in primaries or state and local elections.²²⁵⁷ The affluent, the elderly, and whites are the most likely to vote.²²⁵⁸ On class-inflected issues, such as universal healthcare, those most likely to vote are more conservative than nonvoters.²²⁵⁹ Nonvoters tend to be about sixteen points less Republican in their political affiliation than voters in presidential elections, which is why Republicans consistently seek to restrict voter registration and turnout.²²⁶⁰ If the pool of actual voters looked like America, Republicans would have to change their policies or else never win another national election.²²⁶¹

Democratic legislatures should make voter registration and voting easier.²²⁶² Registration can be made automatic for all citizens when they turn eighteen and for older citizens when they interact with government agencies. Same-day voter registration significantly enhances turnout without increasing fraud, contrary to the baseless charges of Republicans.²²⁶³ Felon disenfranchisement, which has enormous racially disparate effects, should be ended.²²⁶⁴ Election Day should be made a holiday. Gubernatorial elections should take place at the same time as presidential elections, when voter turnout is much higher and is more

²²⁵⁶ *Historical Reported Voting Rates*, U.S. CENSUS BUREAU, at tbl. A-1 (Oct. 7, 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html> [https://perma.cc/L9A6-BNY6].

²²⁵⁷ PAGE & GILENS, *supra* note 533, at 57–58; *Voter Turnout in Presidential Elections*, UC SANTA BARBARA, <https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> [https://perma.cc/23DV-7N94].

²²⁵⁸ *Id.* at 55; see also *Historical Reported Voting Rates*, *supra* note 2256, at tbl. A-1.

²²⁵⁹ See PAGE & GILENS, *supra* note 533, at 60.

²²⁶⁰ See *id.*; see also BERMAN, *supra* note 7, at 311; HACKER & PIERSON, *supra* note 352, at 256 & n.52.

²²⁶¹ See PAGE & GILENS, *supra* note 533, at 69.

²²⁶² See, e.g., MANN & ORNSTEIN, *supra* note 996, at 134–43; PAGE & GILENS, *supra* note 533, at 61–62. For an example of legislation that could help accomplish these goals, see For the People Act of 2019, H.R. 1, 116th Cong. (2019).

²²⁶³ See Max Ehrenfreund, *How to Stop Voter Fraud and Increase Turnout at the Same Time*, WASH. POST (Nov. 4, 2014, 7:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/11/04/how-to-stop-voter-fraud-and-increase-turnout-at-the-same-time> [https://perma.cc/Z72P-U37L]; Steve Harrison, *Does Same-Day Voter Registration in NC Increase Fraud Risk? Experts Disagree.*, CHARLOTTE OBSERVER (Aug. 31, 2016, 3:01 PM), <https://www.charlotteobserver.com/news/politics-government/article98902897.html> [https://perma.cc/T5DV-DDJG].

²²⁶⁴ See ERIN KELLEY, BRENNAN CTR. FOR JUST., RACISM & FELON DISENFRANCHISEMENT: AN INTERTWINED HISTORY 1 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Disenfranchisement_History.pdf [https://perma.cc/C6DG-2AH7].

demographically representative. The number of early voting days, polling places, and voting machines should be increased, so people need not wait in long lines to vote. Absentee ballots should be available without excuse. Onerous identification requirements should be eliminated because they reduce turnout on the pretext of reducing fraud.²²⁶⁵ Partisan gerrymandering should be ended. Public financing of elections would help reduce the influence of money in politics until the Court's atrocious campaign finance decisions are overturned.

Democratic-controlled states have already enacted many of these reforms.²²⁶⁶ Republican states have not because Republicans understand that making voting easier would permanently jeopardize their hold on power.²²⁶⁷ If Democrats take control of the national government in the 2020 election, legislating such changes should be their top priority.²²⁶⁸ If past voting patterns are a reliable indicator, no Republicans will support such legislation.²²⁶⁹ Senator McConnell has declared democracy-entrenching legislation to be a Democratic power grab, an assault on federalism, and a violation of the First Amendment.²²⁷⁰ He ridicules public financing of election campaigns as a "stimulus package for campaign consultants."²²⁷¹

Democrats today face antidemocratic structural impediments at every level of government. Democrats are disadvantaged in the competition for control of state legislatures and the House by gerrymandering and geographic clustering.²²⁷² Because Democrats tend to live in and around cities, more of their voters are packed into fewer districts, meaning their votes are "wasted" regardless of whether gerrymandering has

²²⁶⁵ See *supra* section I.C.2, pp. 48–51.

²²⁶⁶ See, e.g., Stephen Wolf, *Voting Rights Roundup: Virginia Democrats Advance a Bundle of Voting Rights and Election Reforms*, DAILY KOS (Feb. 14, 2020, 7:24 PM), <https://www.dailykos.com/stories/1919308> [<https://perma.cc/ZMT6-98SU>]; see also H.R. 1, 116th Cong. (2019) (providing an example of legislation introduced by Democrats in the United States Congress that would institute many of these reforms).

²²⁶⁷ See ANDERSON, *supra* note 6, at 150–53; cf. PAGE & GILENS, *supra* note 533, at 211, 264.

²²⁶⁸ See, e.g., FARIS, *supra* note 1598, at 129.

²²⁶⁹ See *id.* at 126.

²²⁷⁰ See Mitch McConnell, *The Democrat Politician Protection Act*, U.S. SENATE (Jan. 29, 2019), <https://www.republicanleader.senate.gov/newsroom/remarks/the-democrat-politician-protection-act> [<https://perma.cc/2XEB-FETV>]; Felicia Sonmez, *McConnell Says Bill that Would Make Election Day a Federal Holiday Is a "Power Grab" by Democrats*, WASH. POST (Jan. 30, 2019, 5:17 PM), https://www.washingtonpost.com/politics/mcconnell-says-bill-that-would-make-election-day-a-federal-holiday-is-a-power-grab-by-democrats/2019/01/30/57421dd6-24bd-11e9-ad53-824486280311_story.html [<https://perma.cc/HS9K-TUZM>].

²²⁷¹ Mitch McConnell, *H.R. 1: A Democrat Political Power Grab*, U.S. SENATE (Jan. 30, 2019), <https://www.republicanleader.senate.gov/newsroom/remarks/hr-1-a-democrat-political-power-grab> [<https://perma.cc/6R44-WFQZ>].

²²⁷² See ABRAMOWITZ, *supra* note 346, at xviii; DIAMOND, *supra* note 28, at 96–98.

occurred.²²⁷³ Republicans have controlled the Pennsylvania and Ohio Senates without interruption for decades, even while frequently failing to win majorities in statewide elections, mainly because of clustering (with the assistance of gerrymandering).²²⁷⁴

Clustering has grown much more extreme over time. In 1992, Bill Clinton won the popular vote in 1,500 counties, which amounted to nearly half of the counties in the nation.²²⁷⁵ President Obama won the popular vote in 2012 in only about 600 counties, and Hillary Clinton won in fewer than 500 counties in 2016, while nonetheless winning the national popular vote by more than two percentage points.²²⁷⁶ Because of clustering and gerrymandering, in 2012, Democrats won a majority of the popular vote in House races across the nation, but Republicans emerged with a majority of House seats.²²⁷⁷

Because the American political system is supposed to represent people, not physical space, as the Court confirmed in the reapportionment cases, a geographic districting system that systematically dilutes the political power of Democratic voters simply because of where they live is undemocratic.²²⁷⁸ This flaw can be fixed without a constitutional amendment — most easily, through a system of multimember districts with ranked-choice voting.²²⁷⁹ Such a reform would also waste fewer votes, make elections more competitive, and incentivize politicians to appeal to the ideological middle.²²⁸⁰

The U.S. Senate is one of the most malapportioned legislative bodies in the world.²²⁸¹ California has sixty-six times the population of Wyoming, yet both states have two senators.²²⁸² In 1964, the Court ruled that malapportionment of state legislatures violated the Equal Protection Clause but indicated that the malapportionment of the Senate cannot be unconstitutional because it is mandated by the Constitution.²²⁸³ Indeed, this Senate malapportionment is constitutionally entrenched; it may not

²²⁷³ See Parker Richards, *The People v. the U.S. Senate*, THE ATLANTIC (Oct. 10, 2018), <https://www.theatlantic.com/politics/archive/2018/10/senators-kavanaugh-represented-44-percent-us/572623> [<https://perma.cc/J6LZ-L5U2>].

²²⁷⁴ See KLEIN, *supra* note 347, at 240–41.

²²⁷⁵ See *id.* at 40.

²²⁷⁶ See *id.* at 40–41; Cohn, *supra* note 266.

²²⁷⁷ See Ezra Klein, *House Democrats Got More Votes than House Republicans. Yet Boehner Says He's Got a Mandate?*, WASH. POST (Nov. 9, 2012, 10:15 AM), <https://www.washingtonpost.com/news/wonk/wp/2012/11/09/house-democrats-got-more-votes-than-house-republicans-yet-boehner-says-hes-got-a-mandate> [<https://perma.cc/W5GU-7YLV>].

²²⁷⁸ Cf. FARIS, *supra* note 1598, at 120 (explaining how a fairer system would benefit Democrats).

²²⁷⁹ See DIAMOND, *supra* note 28, at 260–61; FARIS, *supra* note 1598, at 117–18; KLEIN, *supra* note 347, at 253–54.

²²⁸⁰ See DIAMOND, *supra* note 28, at 261–62; FARIS, *supra* note 1598, at 118–21; KLEIN, *supra* note 347, at 254.

²²⁸¹ See PAGE & GILENS, *supra* note 533, at 170–71; Richards, *supra* note 2273.

²²⁸² PAGE & GILENS, *supra* note 533, at 171.

²²⁸³ See *Reynolds v. Sims*, 377 U.S. 533, 568, 574 (1964).

be altered without the consent of every state, which the smaller states will never give.²²⁸⁴

Because of the Senate's malapportionment, sparsely populated states receive more federal government money than their populations warrant,²²⁸⁵ and they tend to secure more favorable outcomes on issues that divide the nation along rural/urban lines, such as gun control.²²⁸⁶ In addition, three Republican Justices — Thomas, Gorsuch, and Kavanaugh — would not have been confirmed by a Senate apportioned according to population.²²⁸⁷ Senate malapportionment also has a significant disparate racial impact given that people of color tend to live in more populous, urbanized states.²²⁸⁸

The Senate's malapportionment also confers a massive political advantage on today's Republican Party. In 2012, while President Obama defeated former Governor Romney by about four percentage points in the national popular vote, Romney ran six points ahead in the nation's twenty-five smallest states, which together have less than one-sixth of the population but choose half of all senators.²²⁸⁹ In 2014, Democrats won a majority of the votes cast in all Senate elections, but Republicans secured a majority of fifty-four to forty-six in the Senate.²²⁹⁰ In 2016, Trump lost the national popular vote by more than two percentage points but won the popular vote in thirty states.²²⁹¹

Moreover, every Senate race in the 2016 election was won by the candidate from the same party that carried the state in that year's presidential contest.²²⁹² That was the first time this has occurred since senators

²²⁸⁴ U.S. CONST. art. V; see also Richards, *supra* note 2273.

²²⁸⁵ See PAGE & GILENS, *supra* note 533, at 171; Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 41–42 (1997).

²²⁸⁶ See PAGE & GILENS, *supra* note 533, at 228–29.

²²⁸⁷ See Richards, *supra* note 2273; see also Ian Millhiser, *The United States Senate Is a Failed Institution*, THINKPROGRESS (Apr. 6, 2017, 2:53 PM), <https://archive.thinkprogress.org/antidemocratic-history-of-senate-do5688f441b8/> [<https://perma.cc/CWC5-GCG3>]; RUSSELL WHEELER, BROOKINGS INST., SHOULD WE RESTRUCTURE THE SUPREME COURT? (2020), <https://www.brookings.edu/policy2020/votervital/should-we-restructure-the-supreme-court> [<https://perma.cc/H5GZ-YEGX>].

²²⁸⁸ See Baker & Dinkin, *supra* note 2285, at 43–46.

²²⁸⁹ See ABRAMOWITZ, *supra* note 346, at 128; HACKER & PIERSON, *supra* note 352, at 257.

²²⁹⁰ See HACKER & PIERSON, *supra* note 352, at 257.

²²⁹¹ See Cohn, *supra* note 266; Emily Schultheis & Julia Boccagno, *Trump v. Clinton: What the Popular Vote in Each State Shows*, CBS NEWS (Dec. 19, 2016, 5:49 AM), <https://www.cbsnews.com/news/trump-v-clinton-what-the-popular-vote-in-each-state-shows-electoral-college> [<https://perma.cc/A7HU-YU82>].

²²⁹² See Drew DeSilver, *Most Senate Elections Reflect States' Presidential Votes*, PEW RSCH. CTR. (Sept. 1, 2020), <https://pewrsr.ch/ztGqoVW> [<https://perma.cc/C55U-W4CF>].

began to be directly elected in 1914 and reflects extreme political polarization and the nationalization of elections.²²⁹³ Barring a significant political shift, after another election cycle or two, Democrats may never again control the Senate. By 2040, seventy percent of Americans are projected to live in the fifteen most populous states.²²⁹⁴ If sparsely populated states continue to vote mostly Republican, then the thirty percent of Americans who pick seventy percent of the senators would virtually guarantee Republican control, which would be a legitimacy crisis of massive proportions. For example, such a Senate might never again confirm a Democratic President's nominee to the Supreme Court.²²⁹⁵

If Democrats regain control of the Senate, they will obviously need to abolish the filibuster with regard to legislation.²²⁹⁶ They already had to abolish it in 2013 for appointments to lower federal courts in the face of unprecedented Republican obstruction, leading Republicans to abolish it for Supreme Court nominations in 2017²²⁹⁷ (although Majority Leader McConnell would almost surely have done this regardless of what Democrats had done earlier). With the filibuster in place, Republicans would almost certainly block any Democratic bills that attempt to entrench democracy.²²⁹⁸ The principal argument against Democrats' abolishing the filibuster is that eventually Republicans will regain control of the Senate and there will be no filibuster rule left to constrain them.²²⁹⁹ However, that argument is persuasive only if one assumes that Republicans will not abolish the filibuster as soon as doing so would be advantageous to them, regardless of what Democrats had previously done. Given the GOP's recent history of asymmetric hardball, Democrats would be foolish to believe this.²³⁰⁰

However, democratizing the Senate will require more than ending the filibuster. The malapportionment of the Senate dates from the Founding, when small states at the Philadelphia Convention exacted equal representation in the Senate as their price for supporting the Constitution.²³⁰¹ They never had particularly good arguments for why

²²⁹³ ABRAMOWITZ, *supra* note 346, at 66–68; KLEIN, *supra* note 347, at 208; Enten, *supra* note 1451.

²²⁹⁴ Philip Bump, *By 2040, Two-Thirds of Americans Will Be Represented by 30 Percent of the Senate*, WASH. POST (Nov. 28, 2017, 12:23 PM), <https://www.washingtonpost.com/news/politics/wp/2017/11/28/by-2040-two-thirds-of-americans-will-be-represented-by-30-percent-of-the-senate> [https://perma.cc/C56C-8MSE].

²²⁹⁵ See KLEIN, *supra* note 347, at 208.

²²⁹⁶ See PAGE & GILENS, *supra* note 533, at 166–69; see also MANN & ORNSTEIN, *supra* note 996, at 165.

²²⁹⁷ See FARIS, *supra* note 1598, at 44–46; PAGE & GILENS, *supra* note 533, at 169.

²²⁹⁸ See PAGE & GILENS, *supra* note 533, at 167.

²²⁹⁹ See FARIS, *supra* note 1598, at 45–46.

²³⁰⁰ See *supra* section II.E.5, pp. 167–71.

²³⁰¹ KLARMAN, *FRAMERS' COUP*, *supra* note 340, at 153–54, 192.

one state with less than ten percent of the population of another deserved equal voting power in the Senate.²³⁰² Probably their best argument was that the Constitution preserved some aspects of the old Confederacy, and sovereign states bound together in a league should enjoy equal political power.²³⁰³

Whether that argument carried any weight was debatable in 1787,²³⁰⁴ but it certainly did not survive the Civil War. An alternative argument, that people living in sparsely populated states must be protected against having their interests swamped in a legislative body apportioned according to population,²³⁰⁵ is a strange form of a minority rights argument. Protecting racial and religious minorities from oppression can be reconciled with the principle of majority rule,²³⁰⁶ but if people living in rural areas deserve special minority protections, then it is not clear what is left of that principle. Perhaps majorities of the people ought not to have *all* of the political power, but they must, in general, enjoy at least a *majority* of it.

The Senate must be reformed to make it more democratic. If Democratic Senate candidates win millions of more votes than Republican Senate candidates win across the country,²³⁰⁷ then Democrats ought to control the Senate.²³⁰⁸ Yet small states will not easily relinquish their unfair advantage, nor will Republican state legislatures support a constitutional amendment to fairly reapportion the Senate.

A fairer apportionment of the Senate can be accomplished in either of two ways. The first formally complies with the Constitution but solves the malapportionment problem only indirectly, and the second violates the terms of the Constitution but addresses malapportionment directly and fairly.

First, once Democrats regain control of the national government, they must create additional states, such as the District of Columbia and Puerto Rico (assuming a majority of its residents support statehood in a referendum).²³⁰⁹ Two of the reasons these jurisdictions are not already states are

²³⁰² See *id.* at 188–91.

²³⁰³ See *id.* at 188–89.

²³⁰⁴ *Id.* at 184–88.

²³⁰⁵ See, e.g., Rich Lowry, *The Left's Foolhardy Attack on the Senate*, NAT'L REV. (Oct. 9, 2018, 6:30 AM), <https://www.nationalreview.com/2018/10/left-attacks-senate-constitutional-system> [<https://perma.cc/5J5E-D97F>].

²³⁰⁶ See *supra* note 2117 and accompanying text.

²³⁰⁷ See *U.S. Senate Election Results 2018*, N.Y. TIMES (May 15, 2019, 2:08 PM), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-senate-elections.html> [<https://perma.cc/M3NY-8GJY>] (reporting that in the 2018 election, Democratic Senate candidates received approximately eighteen million more votes than Republican Senate candidates did, but Democrats lost two seats and Republicans retained a Senate majority of fifty-three to forty-seven).

²³⁰⁸ Cf. KLEIN, *supra* note 347, at 240–41 (characterizing the fact that Democrats win more votes yet do not control the White House or Congress as “unjust”).

²³⁰⁹ See FARIS, *supra* note 1598, at 49–50, 52–53, 64–68; Belkin, *supra* note 2249, at 42, 49.

partisanship and racism.²³¹⁰ In the second half of the nineteenth century, Republicans regularly created new states to expand their advantage in the Senate and the Electoral College.²³¹¹ Democrats would be more justified to do the same today because they would not simply be pursuing partisan advantage, but also seeking to undo the unfair disadvantage created by the Senate's malapportionment.²³¹² As an alternative or in addition, Democrats could divide a large state such as California into multiple states, so long as California agreed to the change.²³¹³ While adding senators from new states does not directly redress the Senate's malapportionment, it would counter the current partisan effects of that malapportionment.²³¹⁴ Obviously, Republicans would strenuously oppose any such effort, and Democrats would need to abolish the filibuster to succeed.

The second way to pursue a fairer Senate apportionment would be simply to ignore the constitutional provision mandating two senators for every state as a particularly egregious example of dead-hand control.²³¹⁵ The Senate could then be reapportioned through statute or perhaps a national referendum. Ignoring a clear constitutional provision would trouble many Americans, but the Court has done this itself more than once when societal consensus strongly backed the move, such as by applying equal protection principles to the federal government despite the Fourteenth Amendment's plainly applying only to "State[s]"²³¹⁶ and applying the First Amendment to the Executive and the judiciary even though its reach is plainly limited to "Congress."²³¹⁷

Moreover, there are other contexts in which most Americans would surely agree that antidemocratic rules entrenched against change by a previous generation should not constrain today's majorities. In 1861, Congress passed, and the nation would probably have approved had the Civil War not intervened, a constitutional amendment to forever bar the

²³¹⁰ FARIS, *supra* note 1598, at 52–54, 63–65.

²³¹¹ See Heather Cox Richardson, *When Adding New States Helped the Republicans*, THE ATLANTIC (Sept. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/when-adding-new-states-helped-republicans/598243> [<https://perma.cc/WUC9-RDLS>].

²³¹² See TODD N. TUCKER, ROOSEVELT INST., *FIXING THE SENATE: EQUITABLE AND FULL REPRESENTATION FOR THE 21ST CENTURY 15–17*, 23 (2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Fixing-The-Senate_report-201903.pdf [<https://perma.cc/FB72-HYL6>].

²³¹³ See FARIS, *supra* note 1598, at 74; TUCKER, *supra* note 2312, at 26–27.

²³¹⁴ See FARIS, *supra* note 1598, at 74–75.

²³¹⁵ Cf. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1072–73, 1083–84, 1086–87 (1988) (suggesting the possibility of amending the Constitution by methods that do not comply with the formal requirements of Article V to address issues such as Senate malapportionment).

²³¹⁶ U.S. CONST. amend. XIV.

²³¹⁷ David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 3 (2015).

national government from interfering with slavery in existing states.²³¹⁸ By its terms, this amendment would have been unamendable.²³¹⁹ Should a future generation have considered itself bound by such an amendment had it been enacted? If not, why treat the antidemocratic Senate differently?

The Electoral College system also produces antidemocratic results today. Twice in the last five presidential elections, the candidate winning the national popular vote did not become President.²³²⁰ Because Republicans benefited both times from this constitutional quirk,²³²¹ and indeed are systematically more likely to benefit from it under current political conditions,²³²² they will resist reform of the Electoral College system, even though two-thirds of Americans would prefer that Presidents be elected by popular vote.²³²³

The Electoral College was difficult to justify in 1787 and is impossible to convincingly defend today. The Framers in Philadelphia were deeply divided over how the President should be selected.²³²⁴ For most of the convention, they provisionally allocated that power to Congress, much as the British Parliament selected the prime minister and most state legislatures selected governors.²³²⁵ However, congressional selection of the President would have undermined the Executive's ability to check Congress, which was one of the reasons they wanted a strong Executive.²³²⁶

One alternative to congressional selection was direct popular election, but three objections were raised to that method of presidential selection. First, the Framers simply did not believe the people were capable of performing so important a task.²³²⁷ As George Mason explained, allowing the people to choose the President would be like referring "a trial of colors to a blind man."²³²⁸ Second, southern delegates would never have agreed to that alternative, as their slaves would have counted

²³¹⁸ KLARMAN, FRAMERS' COUP, *supra* note 340, at 625.

²³¹⁹ *See id.*

²³²⁰ *See* Tara Law, *These Presidents Won the Electoral College — But Not the Popular Vote*, TIME (May 15, 2019, 4:58 PM), <https://time.com/5579161/presidents-elected-electoral-college> [<https://perma.cc/N3WE-67Y8>].

²³²¹ *See id.*; *see also* Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections: 1836–2016*, at 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26247, 2019).

²³²² *See* Vinod Bakthavachalam & Reed Hundt, Opinion, *How Trump Is Running to Snatch Victory from the Jaws of Defeat, Again*, N.Y. TIMES (Feb. 12, 2020), <https://nyti.ms/2UKoZZa> [<https://perma.cc/D8AF-ZXCJ>].

²³²³ *Id.*

²³²⁴ *See* KLARMAN, FRAMERS' COUP, *supra* note 340, at 226.

²³²⁵ *See id.* at 226–27, 230.

²³²⁶ *See id.* at 227.

²³²⁷ *See id.* at 228.

²³²⁸ *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 31 (Max Farrand ed., 1911) (statement of George Mason)).

for nothing in choosing the President, unlike the arrangement they had secured for apportioning the House, where slaves would count as three-fifths of free persons.²³²⁹ Third, small states objected because they would count for little in a system of direct popular election.²³³⁰

The Electoral College was an unwieldy compromise. Direct popular election was avoided, as state legislatures were empowered to choose or allow voters to choose electors, who would then exercise independent judgment in selecting the President.²³³¹ Because apportionment of the Electoral College reflected the total of a state's representatives and senators, southern states would have their slaves counted because slaves counted in apportioning the House,²³³² and small states would have a greater voice than under a strictly population-based apportionment because every state had two senators.

The Electoral College quickly became outmoded. Jacksonian democracy forced almost all states to allow the people to directly choose presidential electors, and the party system, which the Framers had not anticipated, quickly ended the practice of presidential electors exercising independent judgment.²³³³ Slavery was ended by the Civil War, and the Supreme Court has long mandated the principle of one person, one vote in most other electoral contexts.²³³⁴

What is left of the Framers' Electoral College design is malapportionment and winner-take-all rules in almost all the states, both of which can produce antimajoritarian results.²³³⁵ Malapportionment in the Electoral College is less severe than in the Senate but still impossible to justify. California has sixty-six times the population of Wyoming but only eighteen times as many presidential electors.²³³⁶ The state winner-take-all rules generate random results that sometimes prevent the popular vote winner from becoming President. Hillary Clinton won the popular vote by 2.1%;²³³⁷ in a sensible system, she would be President. Political analysts have shown that President Trump could easily win in the Electoral College in 2020 while losing the popular vote by as many as five million

²³²⁹ See *id.* at 228, 276–77.

²³³⁰ See *id.* at 228.

²³³¹ See U.S. CONST. art. II, § 1, cl. 2; *id.* art. II, § 1, cl. 3.

²³³² See *id.* art. I, § 2, cl. 3.

²³³³ See KLARMAN, FRAMERS' COUP, *supra* note 340, at 622–23; LEVITSKY & ZIBLATT, *supra* note 35, at 40.

²³³⁴ See *Reynolds v. Sims*, 377 U.S. 533, 555–56, 555 n.29, 558 (1964).

²³³⁵ See Jesse Wegman, Opinion, *What if We Just Counted Up All the Votes for President and Saw Who Won?*, N.Y. TIMES (Mar. 13, 2020), <https://nyti.ms/38SB8lr> [<https://perma.cc/KDF9-X86Z>].

²³³⁶ See Dale R. Durran, *Whose Votes Count the Least in the Electoral College?*, THE CONVERSATION (Mar. 13, 2017, 8:19 PM), <https://theconversation.com/whose-votes-count-the-least-in-the-electoral-college-74280> [<https://perma.cc/692G-7YAZ>].

²³³⁷ See Nate Cohn, *Trump's Electoral College Edge Could Grow in 2020, Rewarding Polarizing Campaign*, N.Y. TIMES (July 19, 2019), <https://nyti.ms/2Y7SdX9> [<https://perma.cc/Z4BY-X4E4>].

votes, simply because many swing states have disproportionately large white working-class populations, which are President Trump's base.²³³⁸

The arguments made by Republicans in defense of the Electoral College are unconvincing. It may be true that in a popular vote contest, candidates will ignore smaller states, but today they ignore large states such as California and New York, which are mostly not competitive at the presidential level.²³³⁹ To the argument that a "tie" requiring a recount, as in Florida in 2000, would be a disaster at the national level, the response is that the popular vote in a presidential election has rarely been that close, while the current Electoral College system has produced two disputed elections, in 1876 and 2000, and five Presidents' failing to secure even a plurality of the popular vote.²³⁴⁰ In addition, the Electoral College system wastes vast numbers of votes and reduces voter interest and turnout because most states are not competitive at the presidential level.²³⁴¹

To be clear, the Electoral College system need not inevitably advantage Republicans. In 2004, President George W. Bush won the popular vote by two percentage points but nearly lost in the Electoral College.²³⁴² Had that happened, Democrats aggrieved by the 2000 result and Republicans aggrieved by the 2004 result might have allied to amend an outmoded system for selecting the President. But that did not happen, Trump was elected President in 2016 while losing the popular vote, and Republicans enjoy a clear advantage in the Electoral College at the present historical moment.²³⁴³ Democrats have a strong case for its unfairness, but Republicans will almost certainly reject any reform effort in the near future.²³⁴⁴

Even if Democrats were able to overcome all of the obstacles just described and take simultaneous control of Congress and the presidency, any democracy-entrenching legislation would still have to survive the scrutiny of Republican Justices who have repeatedly upheld Republican measures to degrade democracy and even concocted a few of their own. Moreover, some democracy-suppressing measures cannot be undone by

²³³⁸ See KLEIN, *supra* note 347, at xiv; David Wasserman, *How Trump Could Lose by 5 Million Votes and Still Win in 2020*, NBC NEWS (July 19, 2019, 1:32 PM), <https://www.nbcnews.com/politics/2020-election/how-trump-could-lose-5-million-votes-still-win-2020-n1031601> [<https://perma.cc/6GNT-NLP5>].

²³³⁹ See Wegman, *supra* note 2335.

²³⁴⁰ See JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* 10–11, 110–14 (2020).

²³⁴¹ Wegman, *supra* note 2335.

²³⁴² See KLARMAN, *FROM THE CLOSET*, *supra* note 520, at 112; FED. ELECTION COMM'N, 2004 ELECTION RESULTS 5–6 (2005), <https://www.fec.gov/resources/cms-content/documents/2004tables.pdf> [<https://perma.cc/44WU-MSPP>].

²³⁴³ See Ezra Klein, Opinion, *Why Democrats Still Have to Appeal to the Center, but Republicans Don't*, N.Y. TIMES (Jan. 24, 2020), <https://nyti.ms/2GIz0Co> [<https://perma.cc/U3S2-SFJ5>].

²³⁴⁴ See DIAMOND, *supra* note 28, at 271–72; Klein, *supra* note 2343.

legislation. A partisan gerrymander can be remedied by a fair redistricting, but undoing the damage done by the Court's campaign finance decisions requires either a constitutional amendment or a change in the Court's composition.²³⁴⁵ A constitutional amendment to alter an entrenching mechanism is almost impossible to enact; corporations and conservative billionaires would spend vast sums to block it, and Republicans in Congress and state legislatures would surely kill it.²³⁴⁶ A crucial change in the Court's composition was about to happen in 2016, when Majority Leader McConnell intervened to steal a Supreme Court seat for the first time in American history.

*B. The Dilemma of Constitutional Hardball
and the Inescapability of Court Reform*

One of the most vexing political conundrums is how to respond to norm violations by one's adversaries. If Republicans suppress votes or delay and cancel elections, how should Democrats respond when they assume power? To decline to play reciprocal hardball is to disarm unilaterally, which rarely works out well for the disarming party.²³⁴⁷ However, to respond with reciprocal hardball seems likely to produce a vicious retaliatory cycle, such as the one that eventually culminated in a bloody American civil war.²³⁴⁸ Moreover, scholars of democratic decline have argued that reciprocal hardball can play into the hands of authoritarians by alienating moderates, unifying autocratic forces, and even providing a pretext for government repression.²³⁴⁹

This is a tough nut to crack. Many Democrats believe that trying to beat Republicans at their own game would be a mistake, both because measures such as suppressing the other side's voters seem morally wrong and because Democrats are not likely to be good at this game.²³⁵⁰ The Democratic coalition is more ideologically and demographically diverse than the Republican coalition, which makes it more fractious.²³⁵¹ In

²³⁴⁵ See MANN & ORNSTEIN, *supra* note 996, at 152; PAGE & GILENS, *supra* note 533, at 187–89.

²³⁴⁶ See, e.g., Jessica Taylor, *Reality Check on Campaign-Finance Reform: It Would Be Difficult and Slow*, NPR (Sept. 9, 2015, 10:40 AM), <https://www.npr.org/sections/itsallpolitics/2015/09/09/438673739/reality-check-on-campaign-finance-reform-it-would-be-difficult-and-slow> [https://perma.cc/E2G5-K39S].

²³⁴⁷ LEVITSKY & ZIBLATT, *supra* note 35, at 213–14; MANN & ORNSTEIN, *supra* note 996, at 192; Joshua Braver, *Court-Packing: An American Tradition?*, 62 B.C. L. REV. (forthcoming 2021) (manuscript at 41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483927 [https://perma.cc/5K45-QE4S].

²³⁴⁸ LEVITSKY & ZIBLATT, *supra* note 35, at 217; Braver, *supra* note 2347 (manuscript at 41, 56).

²³⁴⁹ LEVITSKY & ZIBLATT, *supra* note 35, at 215–16.

²³⁵⁰ See, e.g., Klein, *supra* note 2343; *Is It Time for Democrats to Fight Dirty?*, THE INTERCEPT: DECONSTRUCTED (Oct. 17, 2019, 6:03 AM), <https://theintercept.com/2019/10/17/is-it-time-for-democrats-to-fight-dirty> [https://perma.cc/9V4D-DZVU].

²³⁵¹ See *supra* notes 1485–1501 and accompanying text.

addition, fewer Democrats have the authoritarian personality type that enables Republicans to deploy such tactics without alienating supporters.²³⁵² President Obama probably had no choice but to negotiate with congressional Republicans, even though they acted in bad faith, because much of his constituency demanded a show of bipartisanship.²³⁵³

In New Jersey and Virginia, Democrats who recently took control of the state government have declined to engage in reciprocal gerrymandering, partly because of resistance from factions within the party that prioritize “good government” ideals over partisanship.²³⁵⁴ Still, whatever the correct solution in general is to the conundrum of asymmetric hardball, entrenching democracy in America will probably require Supreme Court reform.

The American system of separated powers creates multiple veto points that empower well-organized minorities, especially those seeking to block action.²³⁵⁵ Even if Democrats took simultaneous control of Congress and the presidency, they would confront a Republican Court majority that could potentially block every Democratic reform measure.²³⁵⁶ As already noted, the Republican Court came within a whisker of invalidating healthcare reform that Democrats had been trying to enact since the 1940s.²³⁵⁷ Democratic reform efforts — both those that bolster democracy and those that ameliorate economic inequality — cannot be left to turn on the Chief Justice’s calculations as to which concessions are necessary to protect the Court’s stature and his own historical reputation.

The Court is part of an interlocking system and cannot be excluded from a democracy-entrenching reform effort. To illustrate the point: In 2000, an Electoral College system that twenty years later has become even more stacked against Democrats, with the assistance of Republican Justices, produced a President, George W. Bush, who did not win a plurality of the popular vote.²³⁵⁸ He then appointed two more Republican Justices, Roberts and Alito, who quickly upheld stringent voter identification laws that suppress enough Democratic votes to influence election

²³⁵² See *supra* notes 1489–1491 and accompanying text.

²³⁵³ See MANN & ORNSTEIN, *supra* note 996, at 192.

²³⁵⁴ David Leonhardt, Opinion, *Bye-Bye, Jersey Gerrymander*, N.Y. TIMES (Dec. 18, 2018), <https://nyti.ms/2GB8IIS> [<https://perma.cc/BYE5-FLV5>]; Jesse Wegman, Opinion, *A World Without Partisan Gerrymanders? Virginia Democrats Show the Way*, N.Y. TIMES (Mar. 28, 2020), <https://nyti.ms/2xvFu4V> [<https://perma.cc/KR2B-Y4J4>]; see Fishkin & Pozen, *supra* note 1577, at 922.

²³⁵⁵ HACKER & PIERSON, *supra* note 352, at 341; MANN & ORNSTEIN, *supra* note 996, at 102; PAGE & GILENS, *supra* note 533, at 150–51, 154.

²³⁵⁶ See PAGE & GILENS, *supra* note 533, at 56, 150–53, 176–77.

²³⁵⁷ See *supra* notes 2236–2243 and accompanying text.

²³⁵⁸ See Klarman, *Bush v. Gore*, *supra* note 2040, at 1721.

outcomes in narrowly divided states like Wisconsin.²³⁵⁹ Taking advantage of campaign finance rulings by Republican Justices, conservative billionaires spent millions of dollars to elect a Republican legislature in the state, which massively gerrymandered legislative districts to prevent Democrats from taking control even when winning a majority of the popular vote.²³⁶⁰ Republican Supreme Court Justices then concluded that partisan gerrymandering is a nonjusticiable political question.²³⁶¹

Wisconsin Republicans also enacted a right-to-work law that undermined the political clout of labor unions and Democrats.²³⁶² Democratic legislatures do not enact such laws,²³⁶³ but the Republican Justices have essentially made such measures constitutionally mandatory with regard to public sector labor unions.²³⁶⁴ The Republican Wisconsin legislature, confronting a Democratic governor who did not have to overcome partisan gerrymandering to win office, blocked his effort to postpone an election in April 2020 for a seat on the state supreme court. By confronting voters with the choice of facing possible death from COVID-19 or being disfranchised, Republicans apparently hoped to reduce voter turnout and enhance their prospect of retaining the court seat. That seat would probably determine the outcome of a lawsuit demanding that state courts order Democratic election officials to purge more than 200,000 registered voters, as the Republican Justices had ruled federal law permits.²³⁶⁵ That purge would improve President Trump's reelection chances in Wisconsin, which he won by only a fraction of a percentage point in 2016, when black and youth turnout fell dramatically, partly because of the state's restrictive

²³⁵⁹ See *supra* section III.B, pp. 184–87.

²³⁶⁰ See Ari Berman, *How the GOP Rigs Elections*, ROLLING STONE (Jan. 24, 2018, 2:44 PM), <https://www.rollingstone.com/politics/politics-news/how-the-gop-rigs-elections-121907> [<https://perma.cc/LE7J-M7FK>].

²³⁶¹ See *supra* section III.D, pp. 190–94.

²³⁶² See COHEN, *supra* note 1331, at 220; Sean McElwee, *How the Right's War on Unions Is Killing the Democratic Party*, THE NATION (Jan. 22, 2018), <https://www.thenation.com/article/archive/right-to-work-laws-are-killing-democrats-at-the-ballot-box> [<https://perma.cc/KFN8-NAR6>]; James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* 4, 12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24259, 2018); see also Roland Zullo, *Union Membership and Political Inclusion*, 62 INDUS. & LAB. RELS. REV. 22, 34 (2008).

²³⁶³ See, e.g., COHEN, *supra* note 1331, at 220; McElwee, *supra* note 2362.

²³⁶⁴ See, e.g., *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2486 (2018).

²³⁶⁵ See *supra* sections I.C.7(d), pp. 65–66; III.C, pp. 187–90.

voter identification law.²³⁶⁶ Wisconsin is one of the states most likely to determine the outcome of the 2020 presidential election.²³⁶⁷

The conservative majority on the state supreme court then blocked Democratic Governor Tony Evers's effort to postpone the election without legislative support, and the Republican Supreme Court Justices overturned a federal district judge's ruling that would have protected voters from being disfranchised by extending the deadline for the post-marking and receipt of absentee ballots, many of which the state had only recently mailed to voters.²³⁶⁸ Republican legislators reportedly also investigated ways to exclude the Democratic Governor from the post-2020 legislative redistricting, which could enable Republicans to maintain legislative control long after ceasing to win a majority of votes.²³⁶⁹ Republican legislators are probably counting on the conservative state supreme court justices to overturn an old precedent requiring gubernatorial involvement in redistricting.²³⁷⁰

This is probably not a conspiracy, just a system of interlocking parts. If the system requires reform, which it obviously does, none of the flawed pieces can be omitted from the reform effort.

Republican Justices who could rule the ACA's individual mandate beyond the reach of Congress's commerce power, as well as block the Florida manual recount in 2000 under the Equal Protection Clause, could conjure a constitutional argument against virtually any progressive policy that Democrats might enact. A wealth tax could be invalidated as a direct tax not apportioned among the states.²³⁷¹ Stricter gun control legislation could be ruled invalid under the conservative Justices' recently renovated understanding of the Second Amendment.²³⁷² Aggressive federal action on climate change, healthcare, or economic inequality would be vulnerable to attack by neo-Ayn Randian

²³⁶⁶ See Ari Berman, *Rigged: How Voter Suppression Threw Wisconsin to Trump*, MOTHER JONES (Nov./Dec. 2017), <https://www.motherjones.com/politics/2017/10/voter-suppression-wisconsin-election-2016> [https://perma.cc/B2TQ-GP9U]. But see Philip Bump, *The Case that Voter ID Laws Won Wisconsin for Trump Is Weaker than It Looks*, WASH. POST (Oct. 20, 2017, 4:37 PM), <https://www.washingtonpost.com/news/politics/wp/2017/10/20/the-case-that-voter-id-laws-won-wisconsin-for-trump-is-weaker-than-it-looks> [https://perma.cc/A4CR-GCG8].

²³⁶⁷ Nate Silver, *It's Way Too Soon to Count Trump Out*, FIVETHIRTYEIGHT (Aug. 12, 2020, 6:30 AM), <https://fivethirtyeight.com/features/its-way-too-soon-to-count-trump-out> [https://perma.cc/GNV8-73XY] (characterizing Wisconsin as one of the states that will play a key role in determining the outcome of the 2020 election).

²³⁶⁸ See *supra* section I.C.7(d), pp. 65–66.

²³⁶⁹ See Wines, *supra* note 527.

²³⁷⁰ State *ex rel.* Reynolds v. Zimmerman, 126 N.W.2d 551 (Wis. 1964); cf. Richmond, *supra* note 516 (describing Wisconsin Democrats' concerns that Republicans may circumvent the 1964 ruling).

²³⁷¹ See Daniel Hemel & Rebecca Kysar, Opinion, *The Big Problem with Wealth Taxes*, N.Y. TIMES (Nov. 7, 2019), <https://nyti.ms/34BajjN> [https://perma.cc/REX5-E8KP].

²³⁷² See generally District of Columbia v. Heller, 554 U.S. 570 (2008) (striking down a handgun ban and trigger-lock requirement under the Second Amendment).

Justices who almost certainly disfavor the policies and have the full panoply of malleable constitutional arguments at their disposal to legally rationalize decisions invalidating such policies.

Any Democratic democracy-entrenching legislation would be similarly vulnerable. Four of the five Republican Justices have already indicated that empowering impartial districting commissions to draw congressional district lines may violate Article I's requirement that state legislatures set regulations for the time, place, and manner of congressional elections.²³⁷³ As the Court has already rejected constitutional challenges to partisan gerrymandering and voter photo identification laws, the conservative Justices might rule that Congress lacks the power under section 5 of the Fourteenth Amendment to curtail such practices in state elections.²³⁷⁴ For the same reason, the Republican Justices might invalidate congressional measures to require states to permit same-day voter registration or a certain number of early voting days in state elections. All campaign finance reforms would have to run the gauntlet of aggressive First Amendment review by Republican Justices, several of whom have indicated they are more inclined to broaden than to narrow existing constitutional restrictions on such measures.²³⁷⁵

The Court's size is not fixed by the Constitution. During the nineteenth century, Congress frequently altered the size of the Court, often in pursuit of partisan advantage.²³⁷⁶ The last such change was made in 1869, when the Court was expanded from seven to nine, to enable Republican President Ulysses S. Grant to fill seats that had been removed by legislation so that Democratic President Andrew Johnson could not fill them.²³⁷⁷ Since then, an informal norm has developed against changing the Court's size.²³⁷⁸ President Franklin D. Roosevelt challenged that norm, unsuccessfully, in 1937, after the Court had invalidated a dozen New Deal measures in eighteen months.²³⁷⁹

Today, a law changing the Court's size would almost certainly be constitutional, which is not quite the same thing as saying that Republican Justices would uphold it. The principal argument against Democrats' expanding the Court's size should they secure the necessary national political control is that Republicans would surely retaliate the moment they

²³⁷³ See *supra* note 1856 and accompanying text.

²³⁷⁴ Cf. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down the Religious Freedom Restoration Act as unconstitutional on the grounds that Congress exceeded its enforcement power under the Fourteenth Amendment).

²³⁷⁵ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 480–83 (2010) (Thomas, J., concurring in part and dissenting in part); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405–06 (2000) (Kennedy, J., dissenting).

²³⁷⁶ See generally Braver, *supra* note 2347 (manuscript at 12–39) (providing a comprehensive account of changes in the Court's size during the nineteenth century).

²³⁷⁷ See *infra* notes 2408–2411 and accompanying text.

²³⁷⁸ LEVITSKY & ZIBLATT, *supra* note 35, at 131–32; Braver, *supra* note 2347 (manuscript at 37).

²³⁷⁹ See generally JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010).

were in a position to do so. There are three responses to that argument: First, today's Republican Party was the first to pack the Court in 2016. Second, Republicans will pack the Court when they believe doing so is to their advantage, regardless of what Democrats do. Third, if Democrats succeed at entrenching democracy, then the Republican Party will have to reinvent itself to win elections, and the American political system may then be able to transcend tit-for-tat hardball, as even many Republicans come to acknowledge that they broke democracy and Democrats simply fixed it.

The strongest argument for Democrats to expand the Court's size when they have the opportunity to do so is that they would simply be "unpacking" the Court. In February 2016, Justice Scalia died suddenly.²³⁸⁰ Less than twenty-four hours later, Majority Leader McConnell announced that the Senate would refuse to hold confirmation hearings on whomever President Obama nominated to replace Justice Scalia because the winner of the November presidential election should make that choice.²³⁸¹

Senator McConnell's announcement was so norm-defying that many Democrats initially assumed he would eventually back down, and even some Republicans were shocked by his strategy.²³⁸² However, threats of being primaried and targeted with millions of dollars in dark money advertising quickly rallied all Republican senators behind the Majority Leader.²³⁸³ Even after President Obama nominated Judge Garland — one of the most ideologically moderate, well-qualified, and oldest plausible Democratic nominees for the Court — no Republican broke ranks.²³⁸⁴ When Trump unexpectedly won the presidential election, Democrats' opportunity to take control of the Court for the first time since the 1960s had disappeared.

Just before the election, three Republican senators, and by no means the most conservative ones, clarified that even if Hillary Clinton were to win the election, so long as Republicans maintained control of the Senate, they would seek to block any Court nomination she made for the

²³⁸⁰ Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://nyti.ms/1XqvGem> [<https://perma.cc/4PST-YHDA>].

²³⁸¹ Mark Landler & Peter Baker, *Battle Begins over Naming Next Justice*, N.Y. TIMES (Feb. 13, 2016), <https://nyti.ms/1mzswHJ> [<https://perma.cc/M726-9SGS>].

²³⁸² See HULSE, *supra* note 1611, at 18, 57.

²³⁸³ See COHEN, *supra* note 1331, at 216; HULSE, *supra* note 1611, at 133–34; Margaret Sessa-Hawkins & Andrew Perez, *Dark Money Group Received Massive Donation in Fight Against Obama's Supreme Court Nominee*, MAPLIGHT (Oct. 24, 2017), <https://maplight.org/story/dark-money-group-received-massive-donation-in-fight-against-obamas-supreme-court-nominee> [<https://perma.cc/EZ3P-YQTR>].

²³⁸⁴ See COHEN, *supra* note 1331, at 216–17; HULSE, *supra* note 1611, at 120–23; KLEIN, *supra* note 347, at 198–99.

entirety of her term in office.²³⁸⁵ These statements gave the lie to Senator McConnell's pretext for blocking the Judge Garland nomination. Republican hardball had escalated to a new level: a Democratic President might not be allowed to fill a Court vacancy with a Democratic Justice so long as Republicans controlled the Senate.²³⁸⁶

Senator McConnell's stratagem was unprecedented: the theft of a Supreme Court seat.²³⁸⁷ Even though Democrats have now won the popular vote in six of the last seven presidential elections and are heavily favored to win it again in 2020,²³⁸⁸ a combination of the vicissitudes of the Electoral College system, the ability of most Justices to time their retirements, and Majority Leader McConnell's Machiavellian maneuver has produced the most conservative Supreme Court since the 1930s.²³⁸⁹ That Court is about to become even more conservative following the death of Justice Ginsburg and the hypocritical abandonment by Majority Leader McConnell of his 2016 "principle" that the Senate ought not consider a Supreme Court nomination in a presidential election year.²³⁹⁰ Democracy is not supposed to work this way.

Six times in American history, a President has nominated a Justice who then received no confirmation hearing in the Senate.²³⁹¹ On three of those occasions, a lame-duck President made the nomination.²³⁹² Senator McConnell's rationale for blocking the nomination of Judge Garland makes sense in that context: a President whose successor has already been elected ought not to be making a lifetime Court appointment.²³⁹³

The other three occasions all occurred in 1866 or before.²³⁹⁴ Each involved an "accidental" President — a Vice President assuming power

²³⁸⁵ HULSE, *supra* note 1611, at 151; LEVITSKY & ZIBLATT, *supra* note 35, at 166; David A. Graham, *What Happens if Republicans Refuse to Replace Justice Scalia?*, THE ATLANTIC (Nov. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081> [<https://perma.cc/MAL8-KHU9>].

²³⁸⁶ FARIS, *supra* note 1598, at 84; Robin Bradley Kar & Jason Mazzone, Essay, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 86 (2016).

²³⁸⁷ See FARIS, *supra* note 1598, at 85; KLEIN, *supra* note 347, at 199; Kar & Mazzone, *supra* note 2386, at 58.

²³⁸⁸ See Nate Silver, *Biden Has Made Some Modest Gains After the Debate*, FIVETHIRTYEIGHT (Oct. 5, 2020, 2:53 PM), <https://fivethirtyeight.com/features/biden-has-made-some-modest-gains-after-the-debate> [<https://perma.cc/RL4R-DC6G>].

²³⁸⁹ See COHEN, *supra* note 1331, at xv–xix. On today's Court being the most conservative since the 1930s, see Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FIVETHIRTYEIGHT (Mar. 29, 2012, 8:06 PM), <https://fivethirtyeight.com/features/supreme-court-may-be-most-conservative-in-modern-history> [<https://perma.cc/R2GG-3QU2>].

²³⁹⁰ See Peter Baker & Maggie Haberman, *McConnell Vows Vote on Ginsburg Replacement as Her Death Upends the 2020 Race*, N.Y. TIMES (Sept. 22, 2020), <https://nyti.ms/33K8Kky> [<https://perma.cc/Q4NT-Q5J2>].

²³⁹¹ Kar & Mazzone, *supra* note 2386, at 72.

²³⁹² *Id.* at 68.

²³⁹³ See *id.* at 71.

²³⁹⁴ *Id.* at 63–66.

upon the President's death in office.²³⁹⁵ Two of the three involved Presidents who had been largely repudiated by the political party that had nominated them to be Vice President.²³⁹⁶ At the time the Senate blocked the Court nominations of Presidents John Tyler and Andrew Johnson, these Presidents were fundamentally at odds with the parties that had put them in office.²³⁹⁷ Senate refusals to confirm their nominees reflected internal party disputes and thus entailed minimal risk of retaliatory escalation by the opposition party.²³⁹⁸ These episodes are therefore weak precedents for Senator McConnell's ploy.²³⁹⁹

Moreover, several Presidents have made Court nominations and had them confirmed by the Senate in the last year of their terms.²⁴⁰⁰ As recently as 1988, a Democratic Senate confirmed President Reagan's nomination of then-Judge Anthony Kennedy in an election year.²⁴⁰¹ Senator McConnell's refusal to allow hearings on the Judge Garland nomination was literally unprecedented, and his insistence that there was a "longstanding tradition" of the Senate's not considering Supreme Court nominations during a presidential election year was rated "false" by PolitiFact.²⁴⁰² In 2019, Senator McConnell confirmed that his rationale was contrived, telling a conservative audience, much to its delight, that the Senate would certainly confirm a Trump nominee to fill a Court vacancy arising in 2020²⁴⁰³ — a promise that the Majority Leader is in the process of delivering upon as this Foreword goes to press.

In essence, Senator McConnell managed to shrink the size of the Court to eight for one year, then increase it back to nine after Trump became President. Twice before in American history, such a ruse has been attempted.²⁴⁰⁴ In 1801, a Federalist Congress and President, during a lame-duck session, passed a law to shrink the Court, at its next vacancy, from six to five to prevent incoming Democratic-Republican President Thomas Jefferson from filling the first vacancy to arise.²⁴⁰⁵

Naturally, the Jeffersonians restored the Court's size to six as soon as they assumed power.²⁴⁰⁶ This response was entirely justified, and

²³⁹⁵ *Id.* at 64–66.

²³⁹⁶ *See id.* at 65–66; Braver, *supra* note 2347 (manuscript at 33, 38–39).

²³⁹⁷ *See* Braver, *supra* note 2347 (manuscript at 38–39).

²³⁹⁸ *See id.* (manuscript at 37–39).

²³⁹⁹ *See* Kar & Mazzone, *supra* note 2386, at 66.

²⁴⁰⁰ *See, e.g.,* COHEN, *supra* note 1331, at 217; Kar & Mazzone, *supra* note 2386, at 74.

²⁴⁰¹ Kar & Mazzone, *supra* note 2386, at 75.

²⁴⁰² Lauren Carroll, *Mitch McConnell Exaggerates "Tradition" of Not Confirming Election Year Supreme Court Nominees*, POLITIFACT (Mar. 22, 2016), <https://www.politifact.com/factchecks/2016/mar/22/mitch-mcconnell/mitch-mcconnell-exaggerates-tradition-not-confirmi> [<https://perma.cc/GWW2-ZMNB>]; *see also* COHEN, *supra* note 1331, at 217.

²⁴⁰³ *See* KLEIN, *supra* note 347, at 200.

²⁴⁰⁴ *See* Braver, *supra* note 2347 (manuscript at 25).

²⁴⁰⁵ *Id.*

²⁴⁰⁶ *See id.* (manuscript at 28).

even Federalists did not protest very much.²⁴⁰⁷ Jeffersonians were able to undo the Federalists' "packing" of the Court only because Jefferson won the 1800 election. Hillary Clinton was not so fortunate. That she lost the election, however, does not make the theft of Justice Scalia's seat any less wrong; it just necessitates a different remedy.

The other episode of Court shrinking followed by expansion was during the presidency of Andrew Johnson, a Tennessee War Democrat placed on the 1864 ticket as a bipartisan gesture at a time when President Lincoln's reelection was very much in doubt.²⁴⁰⁸ After President Lincoln's assassination, President Johnson repudiated congressional Reconstruction and advocated the preservation of white supremacy.²⁴⁰⁹ Consequently, Senate Republicans were not about to allow President Johnson to appoint Justices, so they shrank the Court, upon its next vacancies, from ten to seven.²⁴¹⁰ Once Republican Ulysses S. Grant became President in 1869, they restored the Court to nine Justices.²⁴¹¹ This was a clear instance of Court packing, but hardly a strong precedent for Senator McConnell's ploy given that President Obama was legitimately elected and not an enemy to the party that had put him in office. In any event, Reconstruction was 150 years ago and an era of unprecedented turmoil.

Most elements of Republican hardball, such as voter suppression, can be redressed by Democrats' winning elections and passing new statutes. But the theft of a Supreme Court seat cannot be undone in the same way. Justices enjoy lifetime tenure; Justice Gorsuch, President Trump's appointment to replace Justice Scalia, cannot be "repealed." Before Justice Ginsburg's death in September 2020, Democrats could have secured control of the Court, to which Justice Scalia's death during Obama's presidency entitled them, only by expanding the Court by two, giving them a six-to-five majority. After Justice Ginsburg's death — and assuming that Judge Barrett's nomination to the Court is successful — a Democratic President and Senate in 2021 would have to consider whether expanding the size of the Court by four would be justified, which may depend partly on whether filling a Supreme Court vacancy in the forty-five days before a presidential election seems defensible and on whether a party's winning the popular vote for the presidency in seven of the last eight elections entitles it to control of the Court (for the first time in fifty years).

A similar solution may also be necessary at the lower federal court level. The parties have been fighting over judicial nominees to the

²⁴⁰⁷ See *id.* (manuscript at 29).

²⁴⁰⁸ See *id.* (manuscript at 32, 38).

²⁴⁰⁹ See, e.g., ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 183–84 (1960).

²⁴¹⁰ See Braver, *supra* note 2347 (manuscript at 33–34).

²⁴¹¹ *Id.* (manuscript at 34).

federal appellate courts since the 1980s,²⁴¹² yet Majority Leader McConnell's decision to block every such nomination but two during the last two years of Obama's presidency was unprecedented.²⁴¹³ As a result, when Trump became President in 2017, he had dozens of appellate court vacancies to fill and more than 100 federal court vacancies altogether.²⁴¹⁴

To be clear, Senator McConnell broke no clear constitutional rules by blocking President Obama's appellate court nominees to preserve vacancies for a Republican President to fill;²⁴¹⁵ he simply played a different brand of hardball. Similarly, for Democrats, once in power, to respond by expanding the size of the federal judiciary to "unpack" it would clearly not violate the written Constitution,²⁴¹⁶ though that does not mean the Court would uphold it. Whether or not reciprocal hardball is generally advisable, it is the only adequate remedy for Republican court packing.

The second response to the argument that if Democrats expand the size of the Court, Republicans will simply respond in kind once restored to power is that it relies on a mistaken assumption: that Republicans would not pack the Court the first time they perceive it as advantageous to do so *regardless* of what Democrats have done. That assumption is naive.²⁴¹⁷

Over the last three decades, Republicans have been playing most of the hardball. They already have stolen a Supreme Court seat and packed the lower federal judiciary. In addition, Professor Steven Calabresi, one of the cofounders of the conservative Federalist Society, has called for Congress to double or triple the number of federal appeals

²⁴¹² See HULSE, *supra* note 1611, at 7; MANN & ORNSTEIN, *supra* note 996, at 93.

²⁴¹³ FARIS, *supra* note 1598, at 21.

²⁴¹⁴ Philip Rucker & Robert Barnes, *Trump to Inherit More than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html [<https://perma.cc/M7AZ-S46L>].

²⁴¹⁵ See Ilya Somin, Opinion, *The Constitution Does Not Require the Senate to Give Judicial Nominees an Up or Down Vote*, WASH. POST (Feb. 17, 2016, 11:45 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/the-constitution-does-not-require-the-senate-to-give-judicial-nominees-an-up-or-down-vote> [<https://perma.cc/7LSG-MDTU>].

²⁴¹⁶ See Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal> [<https://perma.cc/WZF3-N88T>].

²⁴¹⁷ See FARIS, *supra* note 1598, at 36, 46.

court judges,²⁴¹⁸ and Republicans at the state level have already embarked upon court-packing schemes.²⁴¹⁹

The third response to the objection that Democratic Court reform will simply incite a retaliatory spiral is that the successful entrenchment of democracy may spawn a new political epoch in which Republicans are no longer radical outliers, and hardball can be deescalated.²⁴²⁰ In such a world, Republicans might acknowledge that stealing the seat vacated by the death of Justice Scalia was wrong and Democrats were entitled to control the Court at that moment. This scenario may sound Panglossian, given recent Republican behavior, but a few electoral cycles of defeat can force a political party to reevaluate and better align its policies with majority opinion.²⁴²¹

To be sure, there is no denying that autocrats use court packing to undermine judicial independence.²⁴²² This fact should make one wary but is not a dispositive argument against Democratic Court reform. President Roosevelt tried to increase the Court's size in 1937, but that did not make him an autocrat, even though his opponents liked to portray him as one.²⁴²³ President Roosevelt did not delegitimize elections, denounce the press as the enemy of the people, suppress Republican votes, or assault truth and transparency in government. Moreover, today's Democrats have a stronger argument to expand the Court than President Roosevelt did. He was unhappy with the Court's invalidation of numerous New Deal measures,²⁴²⁴ but Republicans had not stolen a Court seat from him.

Whether Democrats expand the Court's size may matter less than that they credibly threaten to do so. President Roosevelt's Court-packing proposal failed ignominiously in the Senate, but it accomplished its principal goal of convincing swing Justices to begin upholding economic regulation against constitutional challenge.²⁴²⁵ In the spring of 1937, the Court in rapid succession upheld a state minimum wage

²⁴¹⁸ DIAMOND, *supra* note 28, at 105; Linda Greenhouse, Opinion, *A Conservative Plan to Weaponize the Federal Courts*, N.Y. TIMES (Nov. 23, 2017), <https://nyti.ms/2jSCwAD> [<https://perma.cc/QN6Q-YRMW>].

²⁴¹⁹ See Christopher Ingraham, *GOP Has Been Aggressively Trying to Pack Supreme Courts at State Level, Study Says*, WASH. POST (Oct. 13, 2020, 10:49 AM), <https://www.washingtonpost.com/business/2020/10/13/court-packing-state-supreme> [<https://perma.cc/M75M-FX8C>]; *supra* note 518 and accompanying text.

²⁴²⁰ SITARAMAN, *supra* note 1292, at 206–07; see FARIS, *supra* note 1598, at 98–99.

²⁴²¹ KLEIN, *supra* note 347, at 253–54.

²⁴²² See *supra* p. 14; see also Braver, *supra* note 2347 (manuscript at 48).

²⁴²³ WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940, at 234–36 (1963); SHESOL, *supra* note 2379, at 302–03.

²⁴²⁴ LEUCHTENBURG, *supra* note 2423, at 231–32.

²⁴²⁵ See *id.* at 236–38.

law,²⁴²⁶ the National Labor Relations Act,²⁴²⁷ and the Social Security Act.²⁴²⁸ Constitutional historians have disagreed about whether and to what extent there was a “switch in time that saved nine,”²⁴²⁹ but the bottom line is that President Roosevelt won the war even though he lost the battle over Court expansion.

As already noted, in the ACA and census cases, Chief Justice Roberts apparently changed his mind at the last moment,²⁴³⁰ voted against ideological conviction, and handed the liberals two important victories.²⁴³¹ This past Term he seems to have done the same thing three more times, but without the last-minute change of heart: the case involving the Trump Administration’s suspension of President Obama’s Deferred Action for Childhood Arrivals program,²⁴³² the Louisiana abortion case,²⁴³³ and the Title VII cases.²⁴³⁴ Perhaps the Chief was just playing the part of the proverbial umpire calling balls and strikes, but the smart money is betting that his concern for the Court’s legitimacy and his own historical reputation were the determinative factors.²⁴³⁵ Democrats should not settle for a world in which the success of their democracy-entrenching and other reform efforts depend on the Chief’s calculations as to how much conservative policymaking the Court can get away with, but at least this would be a start.

C. Collateral Benefits of Fixing Democracy

Fixing democracy is desirable not only for its own sake, but also because it is probably necessary for ameliorating unsustainable levels of

²⁴²⁶ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

²⁴²⁷ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937).

²⁴²⁸ *Helvering v. Davis*, 301 U.S. 619, 640 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 583, 585, 598 (1937).

²⁴²⁹ Compare Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 238 (1994), with Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1896–97, 1970, 1973–74 (1994).

²⁴³⁰ See Joan Biskupic, *Behind Closed Doors During One of John Roberts’ Most Surprising Years on the Supreme Court*, CNN (July 27, 2020, 4:28 PM), <https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html> [<https://perma.cc/KMV7-MJLK>]; Adam Liptak, *John Roberts Was Already Chief Justice. But Now It’s His Court.*, N.Y. TIMES (June 30, 2020), <https://nyti.ms/2YJOApz> [<https://perma.cc/9PJ5-GX2S>].

²⁴³¹ See *supra* pp. 217–18, 228–29.

²⁴³² *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901, 1915 (2020) (plurality opinion) (holding that the Trump Administration’s rescission of the Deferred Action for Childhood Arrivals program was arbitrary and capricious).

²⁴³³ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2131, 2133 (2020) (plurality opinion) (invalidating a Louisiana law requiring doctors performing abortions to have admitting privileges at a local hospital).

²⁴³⁴ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1743 (2020) (holding that an employer violates Title VII of the Civil Rights Act of 1964 by discriminating against employees for being homosexual or transgender persons).

²⁴³⁵ See Liptak, *supra* note 2430.

economic inequality.²⁴³⁶ The neo-Ayn Randians have played an out-sized role in producing our current democratic dysfunction: they care more about protecting their recent economic gains than about preserving democracy.²⁴³⁷ This makes them implausible agents of democratic reform. Fixing democracy requires reducing their disproportionate political power. A more democratic political system will likely produce a more equal economic system, which in turn will support greater democracy — a virtuous circle.

Fixing democracy would enable many reforms that are supported by popular majorities and blocked only by Republicans serving a neo-Ayn Randian agenda.²⁴³⁸ A more responsive democracy would have more gun control, lower healthcare costs, increased educational spending, and sensible immigration reform.²⁴³⁹ Such policies would help working-class Americans and reduce the racial and religious resentment that demagogues exploit to win political victories for neo-Ayn Randian economic policies.²⁴⁴⁰

Without such economic reforms, democracy may not survive much longer in any event.²⁴⁴¹ As the Founders understood, extreme economic inequality is probably inconsistent with the conditions required for democracy to survive.²⁴⁴² Even in a more rational campaign finance regime than our own, economic inequality will inevitably seep into the political arena, where the affluent will use their clout to secure policies further enriching themselves.²⁴⁴³ We are trapped in a downward spiral in which growing economic inequality erodes democracy, leading to the enactment of more policies that further exacerbate economic inequality, which then further erodes democracy.²⁴⁴⁴ To break the spiral, democratic reform logically must come first.²⁴⁴⁵

²⁴³⁶ See DIAMOND, *supra* note 28, at 254; cf. PAGE & GILENS, *supra* note 533, at 19 (describing a historical pattern in which democracy declines when there are high levels of economic inequality).

²⁴³⁷ See *supra* pp. 145–46.

²⁴³⁸ Cf. PAGE & GILENS, *supra* note 533, at 48–50 (arguing that the disproportionate power of wealthy individuals and businesses inhibits the passage of popular economic policies).

²⁴³⁹ See *id.* at 53–54.

²⁴⁴⁰ Cf. LEVITSKY & ZIBLATT, *supra* note 35, at 228 (describing the “racially charged rhetoric” employed by opponents of means-tested social programs).

²⁴⁴¹ See PAGE & GILENS, *supra* note 533, at 48–50, 90; SITARAMAN, *supra* note 1292, at 5–6.

²⁴⁴² See HACKER & PIERSON, *supra* note 352, at 112; SITARAMAN, *supra* note 1292, at 162.

²⁴⁴³ Cf. PAGE & GILENS, *supra* note 533, at 262 (noting that past campaign finance reforms were “undermined, in unanticipated ways, by people who have found new methods for pursuing their old objectives”).

²⁴⁴⁴ *Id.* at 50; see also BARTELS, *supra* note 1413, at 345; COHEN, *supra* note 1331, at 164.

²⁴⁴⁵ SITARAMAN, *supra* note 1292, at 210–12.

CONCLUSION: HOW WILL THE STORY END?

Writing an article about the degradation of American democracy that is scheduled to be published almost precisely on Election Day 2020 is an interesting and intimidating experience: the story will look a lot different depending on whether President Trump wins reelection. If he loses, especially by a lot, some critics will attribute this Article to the author's "Trump Derangement Syndrome"²⁴⁴⁶ and argue that President Trump's defeat demonstrates that American democracy requires no significant reform.

That conclusion would be a mistake. President Trump is largely a symptom of much deeper problems.²⁴⁴⁷ That he was ever in a position to be elected President reveals how badly broken the American political system has become.

In addition, whether President Trump wins reelection will largely depend on the same sort of fortuitous events that enabled him to become President in the first place. All historians must confront one enormous obstacle in capturing the contingency of past events: they and their readers know how the story turned out. Of course Federalists would win the battle for ratification of the Constitution.²⁴⁴⁸ Of course the North would win the Civil War.²⁴⁴⁹ Except, it turns out, the outcomes of these events were deeply contingent, and knowing how the story ended is a hindrance, not a help, to writing good history. So while the election's outcome may make some of this Article's conclusions appear foolish, not knowing the outcome is useful because it highlights its contingency. Whether or not President Trump wins, the fact that he could plausibly do so demonstrates how fragile American democracy has become.

A. *Two Accounts*

1. *Reasons for Pessimism.* — Plenty of reasons exist to be pessimistic about the future of American democracy. Polls show that younger Americans care less about democracy than their elders do.²⁴⁵⁰ Moreover, while younger Americans are increasingly tolerant of racial, religious, and ethnic diversity, the world has little experience of democracy thriving in such a diverse nation.²⁴⁵¹ For most of its history, America was a white Christian nation. The last fifty years, in which national demographics have changed with extraordinary rapidity, are the same years in which American democracy has become dysfunctional. Making

²⁴⁴⁶ See Friedersdorf, *supra* note 333.

²⁴⁴⁷ See *supra* sections I.C, pp. 45–66; I.D, pp. 66–106.

²⁴⁴⁸ See KLARMAN, FRAMERS' COUP, *supra* note 340, at 596–600.

²⁴⁴⁹ JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 857–58 (1988).

²⁴⁵⁰ See, e.g., NORRIS & INGLEHART, *supra* note 1376, at 430.

²⁴⁵¹ See *supra* p. 107.

democracy work in such a heterogeneous nation will be an enormous challenge.²⁴⁵²

Even worse, after expending great and fruitless effort in pursuit of economic and political reform, many Americans might eventually give up in despair. As already noted, this is precisely what neo-Ayn Randian politicians such as former Speaker of the House Gingrich and Senate Majority Leader McConnell have hoped to accomplish — inducing Americans to sour on government as a force for good.²⁴⁵³ Low voter turnout and voters' inability to identify and punish those responsible for democratic dysfunction had the effect of rewarding Republicans for their unprecedented obstructionism in the off-year elections of 1994, 2010, and 2014.²⁴⁵⁴ Americans need to pay more attention to politics, but the few genuine swing voters remaining today are mostly low-information voters.²⁴⁵⁵ If these voters simply blame both parties or the party controlling the presidency for government's failure to enact popular policies, then Republicans will pay no price for their ideological extremism and contempt for democracy.²⁴⁵⁶

Another reason for pessimism is how quickly and substantially entrenched norms of democracy have unraveled during President Trump's first Administration. Institutions and actors that had defended democratic norms during President Trump's first year in office have been significantly compromised or removed entirely by the fourth year even as the President's transgressions have grown more brazen.²⁴⁵⁷ Would anyone have believed in 2017 that President Trump could purge the FBI's leadership, massively obstruct the Russia investigation, put lackeys in charge at the Justice Department and the intelligence agencies, fire inspectors general, pressure a foreign leader to dig up dirt on his political opponent, and cozy up to foreign autocrats while the Republican Party has been, for the most part, silently complicit?

Even more alarming, most Americans seem to not recognize the severity of the threat posed by this unraveling of democratic norms. Firing an inspector general is a lot less salient than throwing a *New York Times* reporter in jail, much the same way as a Republican purge of the voter rolls attracts less attention than Alabama troopers busting John Lewis's skull on the Edmund Pettus Bridge. In addition, the transgressions of President Trump and Republicans are sequential and cumulative; there

²⁴⁵² LEVITSKY & ZIBLATT, *supra* note 35, at 231.

²⁴⁵³ See *supra* pp. 143, 167–70.

²⁴⁵⁴ See MANN & ORNSTEIN, *supra* note 996, at 25–27, 196.

²⁴⁵⁵ See *id.* at 190.

²⁴⁵⁶ See *id.* at 190, 196; *supra* pp. 168–69.

²⁴⁵⁷ See Steven Levitsky and Daniel Ziblatt: *Revisiting “How Democracies Die,”* CHRIS RIBACK'S CONVERSATIONS (Feb. 17, 2020), <https://politicalwire.podbean.com/e/steven-levitsky-and-daniel-ziblatt-revisiting-how-democracies-die> [<https://perma.cc/J253-KM28>].

is no singular moment at which the nation ceases to be a democracy.²⁴⁵⁸ This is the metaphor of the frog slowly boiling to death, and most Americans seem to be suffering a similar fate.

Even many Democratic politicians, who should know better, evince little awareness of how severe the threat to democracy has become. During the presidential primaries, former Vice President Joe Biden regularly suggested that once President Trump was out of office, Republicans would suddenly become reasonable again.²⁴⁵⁹ Did Biden somehow miss the eight years of his own vice presidency? Some Democratic senators have been unwilling to commit even to abolishing the filibuster,²⁴⁶⁰ much less to making essential democratic changes in the Senate's membership or apportionment formula. The idea of Court expansion still sounds radical to many Democrats.²⁴⁶¹

Finally, it is extremely difficult to reform a dysfunctional political system when the system benefits one of the major parties and that party is powerful enough to block most changes.²⁴⁶² Republicans will not suddenly become altruistic about political power and agree to amend the Constitution to reapportion the Senate, directly elect the President, and reform campaign finance, nor will they concede that they illegitimately packed the Court and Democrats have earned the right to control it at the present moment.

Fixing America's dysfunctional politics will require huge changes in the Republican Party, which will happen only in the face of major electoral setbacks, which the system is rigged against.²⁴⁶³ Moreover, some parts of the system may be all but impossible to fix: in a nation with a strong commitment to freedom of speech, which is a good thing, the "Fox News effect" is here to stay.²⁴⁶⁴

2. *Reasons for Optimism.* — There are also reasons to be optimistic about the future of American democracy, which is much more consolidated than is democracy in Poland or Hungary, and thus less susceptible

²⁴⁵⁸ Huq & Ginsburg, *supra* note 36, at 166.

²⁴⁵⁹ Matthew Yglesias, *Republicans' Smear Campaign Against Joe Biden Is Devastating to His Theory of Politics*, VOX (Nov. 8, 2019, 9:00 AM), <https://www.vox.com/2019/11/8/20953290/biden-republicans-epiphany-impeachment> [<https://perma.cc/J5RJ-GCHW>].

²⁴⁶⁰ Alexander Bolton, *Filibuster Reform Gains Steam with Democrats*, THE HILL (June 29, 2020, 6:00 AM), <https://thehill.com/homenews/senate/504806-filibuster-reform-gains-steam-with-democrats> [<https://perma.cc/36KK-Y8MR>].

²⁴⁶¹ *Where Democrats Stand: Would You Support Adding Justices to "Pack" the Supreme Court?*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-packing/> [<https://perma.cc/7YH5-9GKJ>].

²⁴⁶² See SITARAMAN, *supra* note 1292, at 205–07, 210–12.

²⁴⁶³ See KABASERVICE, *supra* note 939, at 388, 401–02; PAGE & GILENS, *supra* note 533, at 261.

²⁴⁶⁴ See KLEIN, *supra* note 347, at 250.

to authoritarian reversion.²⁴⁶⁵ Even after nearly four years of Trump's presidency, he probably still cannot get away with imprisoning *Washington Post* journalists, critical law professors, or political rivals such as Hillary Clinton and Joe Biden. While President Trump's critics are justifiably concerned that he might refuse to concede the legitimacy of a narrow election defeat,²⁴⁶⁶ the idea of his simply canceling the 2020 election seems farfetched.

One precondition for democratic reform is that enough Americans recognize the political system is broken.²⁴⁶⁷ The success enjoyed by antiestablishment candidates, such as Donald Trump and Bernie Sanders, suggests that vast numbers of Americans recognize that both their political and economic systems require dramatic reform, not incremental change.²⁴⁶⁸ While many of their diagnoses and reform proposals fundamentally differ, eighty percent of Americans, across party lines, agree that *Citizens United* should be overturned and the influence of money on politics reduced.²⁴⁶⁹ Yet change is difficult in a system stacked against it.

Another reason for optimism is that Americans have been here before — and survived.²⁴⁷⁰ In the 1790s, Federalists and Jeffersonians feared and hated one another.²⁴⁷¹ The period from the 1870s to the 1910s was one of deeply partisan politics and mass disfranchisement.²⁴⁷² It was also the first Gilded Age, an era of rampant economic inequality, which eventually produced a backlash against concentrated wealth, political corruption, and unchecked power.²⁴⁷³ Progressive Era reformers secured women's suffrage, direct election of senators, the initiative and referendum, and antitrust laws.²⁴⁷⁴ Later, New Dealers secured Social Security, the empowerment of organized labor, fair labor standards, and banking and securities law reforms.²⁴⁷⁵

²⁴⁶⁵ Cf. Huq & Ginsburg, *supra* note 36, at 108–10 (stating that authoritarian reversion “generally occurs in recently established and relatively impoverished democracies,” *id.* at 108, and that the risk of such reversion in the United States is not high).

²⁴⁶⁶ See Elise Viebeck & Robert Costa, *Trump's Assault on Election Integrity Forces Question: What Would Happen if He Refused to Accept a Loss?*, WASH. POST (July 22, 2020, 4:08 PM), https://www.washingtonpost.com/politics/trumps-assault-on-election-integrity-forces-question-what-would-happen-if-he-refused-to-accept-a-loss/2020/07/22/d2477150-caae-11ea-b0e3-d55bda07d66a_story.html [<https://perma.cc/WP2S-W5W8>].

²⁴⁶⁷ PAGE & GILENS, *supra* note 533, at 264.

²⁴⁶⁸ See *id.* at 264–66.

²⁴⁶⁹ *Id.* at 266.

²⁴⁷⁰ See, e.g., KLEIN, *supra* note 347, at 267–68; Huq & Ginsburg, *supra* note 36, at 168.

²⁴⁷¹ See ELKINS & MCKITRICK, *supra* note 1030, at 4; LEVITSKY & ZIBLATT, *supra* note 35, at 102.

²⁴⁷² PAGE & GILENS, *supra* note 533, at 4, 25–26.

²⁴⁷³ DIAMOND, *supra* note 28, at 255; PAGE & GILENS, *supra* note 533, at 4–5, 240–41.

²⁴⁷⁴ DIAMOND, *supra* note 28, at 255.

²⁴⁷⁵ PAGE & GILENS, *supra* note 533, at 246–47.

In addition, many previous social reform movements — such as abolitionism, women’s suffrage, and the civil rights movement — faced formidable obstacles to change, including the constant threat and reality of physical violence.²⁴⁷⁶ These earlier movements also initially enjoyed less popular support than today’s pro-democracy movement does.

Another reason for optimism is that American politics often moves like a pendulum. President Trump probably would not be President today were it not for the increase in racial resentment ignited by the nation’s first African American President.²⁴⁷⁷ Yet Trump’s presidency has generated a massive counterbacklash among constituencies that increasingly despise this President and what he stands for — people of color, women, the college-educated, and young people.²⁴⁷⁸ Millions of Americans have been stunned to watch President Trump and his Republican enablers assault one democratic norm after another and have responded by organizing extraordinary political resistance,²⁴⁷⁹ which produced a huge Democratic victory in the 2018 midterm elections.²⁴⁸⁰ A similar cycle of backlash and counterbacklash produced the landmark civil rights legislation of the 1960s, and, a hundred years earlier, produced emancipation, a measure of civil equality for African Americans, and black suffrage.²⁴⁸¹

Another reason for optimism is that President Trump’s approval rating has never topped fifty percent — unprecedented among modern American Presidents²⁴⁸² — and has hovered between forty and forty-

²⁴⁷⁶ See, e.g., KLARMAN, JIM CROW, *supra* note 233, at 421–42; HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 200–06 (2008); Sarah Pruitt, *The Night of Terror: When Suffragists Were Imprisoned and Tortured in 1917*, HIST. (Apr. 17, 2019), <https://www.history.com/news/night-terror-brutality-suffragists-19th-amendment> [https://perma.cc/8CYF-T9XX]; Joshua D. Rothman, *When the War on the Press Turns Violent, Democracy Itself Is at Risk*, WASH. POST (Aug. 1, 2017, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2017/08/01/when-the-war-on-the-press-turns-violent-democracy-itself-is-at-risk> [https://perma.cc/GJJ3-8R6Z].

²⁴⁷⁷ See *supra* pp. 119–20, 121–23.

²⁴⁷⁸ See DIAMOND, *supra* note 28, at 255; FRUM, *supra* note 586, at 223–25; MOUNK, *supra* note 31, at 259.

²⁴⁷⁹ See MOUNK, *supra* note 31, at 259–60; SITARAMAN, *supra* note 1292, at 210.

²⁴⁸⁰ See Khorri Atkinson, *Democrats Won the House with the Largest Midterms Margin of All Time*, AXIOS (Nov. 27, 2018), <https://www.axios.com/2018-midterm-elections-democrats-won-house-biggest-margin-a56a1049-8823-4667-8d81-2c67ef3f36f4.html> [https://perma.cc/A8A4-YB9X].

²⁴⁸¹ On the backlash dynamic that led to the 1960s civil rights legislation, see KLARMAN, JIM CROW, *supra* note 233, at 385–442. On the post–Civil War accomplishments, see generally FONER, *supra* note 342 (examining the origins and enactment of the Reconstruction Amendments).

²⁴⁸² See *How Popular Is Donald Trump?*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/trump-approval-ratings> [https://perma.cc/T7C8-V73Q] (comparing President Trump’s approval ratings with the approval ratings of the past twelve Presidents).

five percent for most of his term.²⁴⁸³ Most successful authoritarian leaders, such as Prime Minister Orbán, President Erdogan, or Prime Minister Modi, are much more popular than President Trump.²⁴⁸⁴

President Trump's approval rating among young people is much lower still, providing a reason to be optimistic about the future. According to one 2019 poll, only about twenty-seven percent of people aged eighteen to twenty-nine approved of President Trump's job performance, and young people's view of the Republican Party is not much better.²⁴⁸⁵ A younger, more diverse, more tolerant, more secular generation of voters is on the verge of acquiring political power if apathy and Republican voter suppression can be overcome.²⁴⁸⁶ This is the "coalition of the ascendant" that twice elected Obama to the presidency and may soon entrench democracy and produce a brighter American future.²⁴⁸⁷

California's experience confirms the plausibility of this optimistic scenario.²⁴⁸⁸ In the early 1990s, California Republicans invested in an anti-immigrant strategy to ward off what many of them identified as unfavorable demographic trends.²⁴⁸⁹ Proposition 187, promoted by Republican Governor Pete Wilson as he sought reelection in 1994, barred undocumented immigrants from many public services.²⁴⁹⁰ Although the proposition was obviously unconstitutional under a recent Court decision,²⁴⁹¹ Governor Wilson and California Republicans nonetheless put it on the ballot to bolster turnout from anti-immigrant voters.²⁴⁹²

The strategy worked in the short term but has virtually destroyed the California Republican Party in the longer term. Voters enacted

²⁴⁸³ *Presidential Job Approval Center*, GALLUP, <https://news.gallup.com/interactives/185273/r.aspx> [<https://perma.cc/2ASU-H5RD>].

²⁴⁸⁴ See, e.g., LEVITSKY & ZIBLATT, *supra* note 35, at 191; Jeffrey Gettleman & Sameer Yasir, *Modi's Popularity Soars as India Weathers the Pandemic*, N.Y. TIMES (May 16, 2020), <https://nyti.ms/366lMcU> [<https://perma.cc/AW4D-GRH8>]; Patrick Kingsley, *As West Fears the Rise of Autocrats, Hungary Shows What's Possible*, N.Y. TIMES (Feb. 10, 2018), <https://nyti.ms/2BkEP6e> [<https://perma.cc/8AQ2-BW5P>].

²⁴⁸⁵ See Eugene Scott, *Trump Is Struggling to Connect with Young Voters. Here's Why*, WASH. POST (May 24, 2019, 3:59 PM), <https://www.washingtonpost.com/politics/2019/05/24/trump-is-struggling-connect-young-voters-heres-why> [<https://perma.cc/BS63-G793>]; Emily Badger & Claire Cain Miller, *How the Trump Era Is Molding the Next Generation of Voters*, N.Y. TIMES (Apr. 1, 2019), <https://nyti.ms/2FMZ12e> [<https://perma.cc/C34M-2AYD>].

²⁴⁸⁶ Cf. KLEIN, *supra* note 347, at 111 (noting that "political power runs a decade behind demographics," with the effects of a more diverse electorate likely to manifest themselves at the polls starting around 2024); NORRIS & INGLEHART, *supra* note 1376, at 277–78 (describing how discrepancies in voter turnout mean that older generations are "systematically over-represented in conventional party politics and elections").

²⁴⁸⁷ BERMAN, *supra* note 7, at 247 (quoting journalist Ronald Brownstein).

²⁴⁸⁸ See MOUNK, *supra* note 31, at 177–78.

²⁴⁸⁹ See *id.*; see also ABRAJANO & HAJNAL, *supra* note 1015, at 40.

²⁴⁹⁰ See ABRAJANO & HAJNAL, *supra* note 1015, at 40, 115; MOUNK, *supra* note 31, at 178.

²⁴⁹¹ See *Plyler v. Doe*, 457 U.S. 202, 210, 230 (1982).

²⁴⁹² See MOUNK, *supra* note 31, at 178.

Proposition 187, and courts quickly enjoined it.²⁴⁹³ The state's rapid demographic change continued, and Republicans paid an enormous price for their xenophobia and racism. Today, Democrats control forty-five of the state's fifty-three House seats, both Senate seats, state legislative supermajorities, and the governorship.²⁴⁹⁴ Latinos make up thirty-eight percent of California's population and nineteen percent of its state legislators.²⁴⁹⁵ The legislature regularly supports immigrant-friendly policies, such as providing undocumented immigrants with in-state college tuition and access to driver's licenses.²⁴⁹⁶ Similar demographic change across the nation might produce similar political effects, rejuvenating American democracy and forcing Republicans to relinquish their racial and religious resentment, homophobia, sexism, neo-Ayn Randism, climate change denialism, and hostility to democracy.

The United States is probably more similar to California than to Hungary or Poland, neither of which has many immigrants but both of which have partially embraced right-wing authoritarianism fueled by anti-immigration sentiment. Nationhood in Europe has historically been conceived in terms of ethnicity, geography, common culture, common language, and shared history.²⁴⁹⁷ Europeans do not tend to regard themselves as children of immigrants or value racial and ethnic diversity in the way that most Americans do.²⁴⁹⁸ Despite the best efforts to the contrary of President Trump and his white nationalist immigration advisor Stephen Miller,²⁴⁹⁹ the majority of Americans continue to hold favorable views of immigration.²⁵⁰⁰

²⁴⁹³ See Press Release, ACLU, CA's Anti-immigrant Proposition 187 Is Voided, Ending State's Five-Year Battle with ACLU, Rights Groups (July 29, 1999), <https://www.aclu.org/press-releases/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-rights> [https://perma.cc/22BX-DURG].

²⁴⁹⁴ See *Party Control of California State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_California_state_government [https://perma.cc/TK5C-W93X]; *United States Congressional Delegations from California*, BALLOTPEDIA, https://ballotpedia.org/United_States_congressional_delegations_from_California [https://perma.cc/M4DU-NWWG]; see also Patrick McGreevy, *Democrats Win Back a Supermajority in California's Legislature*, L.A. TIMES (Nov. 12, 2018, 9:15 PM), <https://www.latimes.com/politics/la-pol-ca-democrats-supermajority-california-legislature-20181112-story.html> [https://perma.cc/6DES-X8HP].

²⁴⁹⁵ ABRAJANO & HAJNAL, *supra* note 1015, at 194.

²⁴⁹⁶ *Id.*

²⁴⁹⁷ See JARDINA, *supra* note 787, at 265.

²⁴⁹⁸ See *id.*

²⁴⁹⁹ See Michael Edison Hayden, *Stephen Miller's Affinity for White Nationalism Revealed in Leaked Emails*, S. POVERTY L. CTR. (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails> [https://perma.cc/4ZFF-FX48].

²⁵⁰⁰ *Immigration*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx?version=print> [https://perma.cc/45L6-5U5K] (noting that seventy-seven percent of Americans in May 2020 "think immigration is a good thing").

One final reason for optimism is that a pro-democratic agenda might be easier to mobilize a broad range of interest groups around than an identity-based movement, such as civil rights, gay rights, or Black Lives Matter. As noted, money in politics and other structural democratic deficits in the American political system block reform across a wide array of issues — including gun control, healthcare reform, and environmental legislation — on which majority support exists.²⁵⁰¹ If supporters of these individual reforms could unite in pursuit of democratic reforms that would facilitate realization of their separate agendas, the movement might become unstoppable.

When conditions are favorable, big change can happen suddenly. In 1858, the *Chicago Daily Tribune* predicted that nobody then alive would live to see the end of slavery in the United States, which came just seven years later.²⁵⁰² In the late 1930s, many African American leaders doubted that their grandchildren would live to see the end of American racial segregation, but *Brown* was decided about fifteen years later.²⁵⁰³ As George Orwell once explained: “Whoever is winning at the moment will always seem to be invincible” — until they cease to be.²⁵⁰⁴ Serious democratic reform could be just around the corner.

B. Contingency

How this story ends may depend, to an uncomfortable degree, on dumb luck. Because American voters are so polarized and narrowly divided, highly contingent short-term factors can shift election outcomes, with enormous effects on public policy (not to mention world history).²⁵⁰⁵ Trump’s victory in 2016 was so narrow that he probably would not be President today were it not for Russian interference, Director Comey’s interference, and Michael Cohen’s arranging hush-money payments to Stormy Daniels less than two weeks before the election.²⁵⁰⁶

But, of course, contingency giveth and contingency taketh away. In February 2020, President Trump appeared reasonably likely to win reelection, mostly on the basis of a strong economy and stock market.²⁵⁰⁷

²⁵⁰¹ See *supra* pp. 208–09.

²⁵⁰² See *Republican Party and the Abolitionists.*, CHI. DAILY TRIB., May 15, 1858; see also FONER, *supra* note 342, at 55–58.

²⁵⁰³ See KLARMAN, JIM CROW, *supra* note 233, at 170.

²⁵⁰⁴ MOUNK, *supra* note 31, at 150.

²⁵⁰⁵ See ABRAMOWITZ, *supra* note 346, at xvii.

²⁵⁰⁶ See, e.g., SIDES ET AL., *supra* note 585, at 148–49, 198–200; NORRIS & INGLEHART, *supra* note 1376, at 13.

²⁵⁰⁷ See, e.g., Neil Irwin, *The Election Year Economy Is Everything Trump Could Hope For*, N.Y. TIMES (Feb. 7, 2020), <https://nyti.ms/389ipSO> [<https://perma.cc/K2H9-GV5X>]; Zack Jones, *Trump 2020 Presidential Reelection Odds Improve Following Iowa Caucus Results*, FORBES (Feb. 11, 2020, 2:01 PM), <https://www.forbes.com/sites/zackjones/2020/02/11/trump-2020-presidential-reelection-odds-improve-following-iowa-caucus-fiasco/#33125ab3deo8> [<https://perma.cc/8YRX-5X3J>].

Then the coronavirus hit, roughly 200,000 Americans died (as of the end of September),²⁵⁰⁸ tens of millions lost their jobs in a few weeks, and President Trump's response was catastrophic. Then a white Minneapolis police officer murdered a black man, George Floyd; the nation erupted in racial protest; and President Trump's response was racist, authoritarian, and appalling to most Americans. Trump became President in 2016 through fortuity, and if he loses in 2020, it will be at least as much because of fortuity as because Americans rejected his authoritarianism and Republican complicity.²⁵⁰⁹

There is another way in which President Trump's fate is uncomfortably contingent. Support for and opposition to President Trump are highly correlated with certain demographic factors. People of color strongly oppose him while white Christian evangelicals overwhelmingly support him.²⁵¹⁰ Less well-educated white men tend overwhelmingly to favor President Trump, while urban dwellers, well-educated women, and secular Americans thoroughly repudiate him.²⁵¹¹

As two prominent comparative government scholars have observed, if America were like West Virginia, which Trump won by forty-two percentage points, his reelection would be virtually certain.²⁵¹² However, if America were instead like Massachusetts, which Trump lost by twenty-seven points, he never would have gotten near the presidency.²⁵¹³ Because the nation is a blend of the two states, no outcome is predetermined: President Trump could easily win or lose his reelection bid, as could the Republican Party continue to hold onto power despite its unpopular neo-Ayn Randian agenda and increasingly antidemocratic bent. It is more than a little disconcerting that the fate of American democracy depends less on the citizenry's chosen commitment to it and more on demographic facts such as how rural, religious, well-educated, and ethnically and racially diverse the American population happens to be at this particular historical moment.²⁵¹⁴

Finally, if American democracy survives the Trump presidency intact, it will be mostly because President Trump has been such an ineffective,

²⁵⁰⁸ See *Daily Updates of Totals by Week and State*, *supra* note 328.

²⁵⁰⁹ Cf. LEVITSKY & ZIBLATT, *supra* note 35, at 192 (“[President Trump’s] popularity will depend on the state of the economy, as well as on contingent events.”).

²⁵¹⁰ See *supra* notes 1426–1431 and accompanying text; see also ABRAMOWITZ, *supra* note 346, at 169–70; cf. NORRIS & INGLEHART, *supra* note 1376, at 161 (noting that 2016 election voting patterns across low-income households were “sharply divided by race”).

²⁵¹¹ See, e.g., ABRAMOWITZ, *supra* note 346, at 13; NORRIS & INGLEHART, *supra* note 1376, at 21; *supra* notes 1097–1100 and accompanying text.

²⁵¹² See LEVITSKY & ZIBLATT, *supra* note 35, at 191; *Presidential Election Results: Donald J. Trump Wins*, *supra* note 1539.

²⁵¹³ See *Presidential Election Results: Donald J. Trump Wins*, *supra* note 1539.

²⁵¹⁴ Cf. ABRAJANO & HAJNAL, *supra* note 1015, at 211–16 (discussing how increasing diversity may shape the American political system).

self-defeating autocrat.²⁵¹⁵ For example, if President Trump had responded to the coronavirus pandemic with reasonable policies and competent leadership, he might have garnered widespread praise and heightened approval ratings, as so many governors have done.²⁵¹⁶ Yet President Trump seems incapable of thinking beyond the immediate moment, taking responsibility, telling the truth, respecting science, demonstrating empathy, or suppressing any absurd idea that comes into his head (such as injecting bleach as a possible method of fighting the coronavirus). President Trump's incompetence and malevolence is more likely to cost him reelection than is his contempt for democracy. Plenty of younger Republican politicians with equally autocratic instincts but a lot more intelligence, discipline, and political skill are waiting in the wings and taking notes.²⁵¹⁷

²⁵¹⁵ See KLEIN, *supra* note 347, at 196; Henry Olsen, Opinion, *This Is Trump's Last Chance, and He Probably Doesn't Even Know It*, WASH. POST (July 16, 2020, 1:26 PM), <https://www.washingtonpost.com/opinions/2020/07/16/this-is-trumps-last-chance-he-probably-doesnt-even-know-it> [<https://perma.cc/X2EZ-HV4Y>].

²⁵¹⁶ See Pod Save America, *supra* note 850, at 17:25–17:55; see also Amber Phillips, *Governors Who Took Strict Measures on Coronavirus Are Seeing Better Political Outcomes*, WASH. POST (July 31, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/07/31/governors-took-strict-measures-coronavirus-are-seeing-better-political-outcomes> [<https://perma.cc/L53U-HYZH>].

²⁵¹⁷ Cf. LEVITSKY & ZIBLATT, *supra* note 35, at 207 (arguing that the threat to democracy will outlast the Trump presidency).