THE SUPREME COURT
2019 TERM

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

Michael J. Klarman

INTRODUCTION ........................................................................................................ 4
I.  THE DEGRADATION OF AMERICAN DEMOCRACY ............................................. 11
    A.  The Authoritarian Playbook ........................................................................... 11
    B.  President Trump's Authoritarian Bent ............................................................. 19
        1.  Attacks on Freedom of the Press and Freedom of Speech ............................ 20
        2.  Attacks on an Independent Judiciary ............................................................. 22
        3.  Politicising Law Enforcement ........................................................................ 23
        4.  Politicising the Rest of the Government ......................................................... 25
        5.  Using Government Office for Private Gain ....................................................... 28
        6.  Encouraging Violence .................................................................................... 32
        7.  Racism .............................................................................................................. 33
        8.  Lies .................................................................................................................. 36
        9.  Eroding Transparency ..................................................................................... 38
       10.  Admiration of Foreign Autocrats .................................................................... 40
       11.  Delegitimizing Elections and the Political Opposition ..................................... 42
    C.  The Republican Party's Assault on Democracy .............................................. 45
        1.  Partisan Gerrymandering ................................................................................. 46
        2.  Voter Identification Laws ............................................................................... 48
        3.  Purging the Voter Rolls ................................................................................... 51
        4.  Other Methods of Impeding Voter Registration .............................................. 55
        5.  Suppressing the Youth Vote ........................................................................... 56
        6.  Other Barriers to Voting .................................................................................. 58
        7.  Undoing Election Results ............................................................................... 60

† This Foreword was written prior to the 2020 election but will be published after it.
(a) Eviscerating the Powers of Democratic Governors ...........................................60
(b) Circumventing Inconvenient Referenda Results ................................................62
(c) Delaying or Canceling Elections .....................................................................64
(d) Subjecting Voters to the Risk of Death for Political Advantage ....................65

8. Conclusion ..........................................................................................................66

D. The Republican Party's Complicity with President Trump ..............................66
1. The Republican Presidential Primaries ...............................................................67
2. The General Election .........................................................................................69
3. The Early Trump Administration ...................................................................71
4. The 2018 Midterm Elections ...........................................................................73
5. The Mueller Report .........................................................................................79
6. Impeachment ....................................................................................................82
7. Post-Impeachment .........................................................................................89

8. Explanations for Republican Complicity and the End of Bureaucratic Constraint .................................................................91
9. The Costs of Complicity ...................................................................................96
   (a) President Trump's Unfitness for Office .........................................................96
   (b) The Coronavirus Pandemic .......................................................................100
10. Conclusion ....................................................................................................105

II. EXPLANATIONS ................................................................................................106
A. The Disappearing White Majority ................................................................107
B. The Disappearing Christian Majority ..............................................................124
C. The Rise of the Neo–Ayn Randians ................................................................135
D. Economic Inequality .......................................................................................148

E. Asymmetric Political Polarization, the Right-Wing Media Ecosystem, Asymmetric Hardball, and Negative Partisanship .................................................................153
   1. Political Polarization ....................................................................................154
   2. Asymmetric Polarization .............................................................................159
   3. The Right-Wing Media Ecosystem ...............................................................161
   4. Other Mechanisms of Political Polarization ...............................................164
      (a) Geographic Clustering ...........................................................................164
      (b) Gerrymandering and Partisan Primaries ...............................................164
      (c) Money in Politics ..................................................................................166
   5. Asymmetric Hardball ...................................................................................167
   6. Negative Partisanship .................................................................................171
   7. The Coronavirus Pandemic Reprised ...........................................................174

F. Conclusion ....................................................................................................177

III. THE SUPREME COURT'S CONTRIBUTION TO THE DEGRADATION OF AMERICAN DEMOCRACY .....................................................................................178
A. Greenlighting the Assault on Democracy in the South: Shelby County v. Holder (2013) .................................................................179
B. Greenlighting Voter Photo Identification Laws: Crawford v. Marion County Election Board (2008) .................................................................................184
E. Gutting Campaign Finance Reform ................................................................. 195
H. Upholding the Muslim Travel Ban: Trump v. Hawaii (2018) ...................... 218
I. How Constitutional Interpretation Works and Why the Court Won’t Save Democracy ................................................................. 224

IV. SOLUTIONS ..................................................................................................................... 231
   A. Entrenching Democracy: An Uphill Battle .................................................... 231
   B. The Dilemma of Constitutional Hardball and the Inescapability of Court Reform ..................................................................................................................... 242
   C. Collateral Benefits of Fixing Democracy ...................................................... 253

CONCLUSION: HOW WILL THE STORY END? ............................................................... 255
   A. Two Accounts ........................................................................................................... 255
      1. Reasons for Pessimism ....................................................................................... 255
      2. Reasons for Optimism ....................................................................................... 257
   B. Contingency .............................................................................................................. 262
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INTRODUCTION

On June 25, 2013, the Supreme Court invalidated the geographic coverage formula of the 1965 Voting Rights Act, effectively abrogating the preclearance requirement in section 5 of the Act. 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. Announcing that “history did not end in 1965” 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.


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,
Republican Governor Rick Perry signed the bill, declaring: “This is what democracy is really all about.”

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*, they enacted a law imposing a strict voter identification requirement that excluded public-university student identification cards and public-employee identification cards. 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. 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.

In framing the bill, Republican legislators, according to a subsequent court finding, “target[ed] African Americans with almost surgical precision.” 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. During the litigation challenging the law, one federal judge asked the state’s lawyers: “Why doesn’t North Carolina want people to vote?” The Obama Administration’s Justice Department would never have precleared such changes. 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

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13 Id.
14 Id. at 259.
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).
21 Berman, supra note 7, at 306.
precincts, where waiting times reached as long as three hours.\textsuperscript{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.\textsuperscript{24} Democracy North Carolina estimated that the law had prevented 30,000 to 50,000 people from voting.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{28} The decline in the United States’ rating exceeded that of other Western democracies.\textsuperscript{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

\textsuperscript{23} See Berman, supra note 7, at 312–13.
\textsuperscript{26} Berman, supra note 7, at 313; see also id. at 287.
\textsuperscript{27} See id. at 360, 311.
\textsuperscript{28} Larry Diamond, Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition, and American Complacency 103 (2019).
enacts racist policies; systematically lies; erodes government transparency; expresses admiration for foreign autocrats; and delegitimizes elections and political opposition.  

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. 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. 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.

Many Americans cannot imagine the erosion of their own democracy. 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. Yet the United States is not immune from world trends of declining democratization. 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.

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

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30 See infra section I.B, pp. 19–45.
34 See MOUNK, supra note 31, at 24–25.
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*, 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.

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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. 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. 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. They are sometimes aided by political parties that profess opposition to authoritarianism while nonetheless joining forces with authoritarians to advance their political objectives. 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.

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40 See Huq & Ginsburg, supra note 36, at 118–19.
42 See LeVitsky & Ziblatt, 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. Fidesz came to power in 2010, when its fifty-three percent of the popular vote translated into sixty-eight percent of parliamentary seats. 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. Authoritarians often draw on the support of rural voters and malapportion the legislature to dilute the power of their urban opponents. They also enfranchise voters whom they believe will support them and disfranchise those whom they suspect will not. Subtle and complex changes in electoral mechanisms often escape the notice of ordinary citizens. Even when autocrats lose elections, they try to manipulate the political system to avoid losing power.

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. Authoritarians often extend their power vertically by replacing local officeholders with party loyalists and exercise iron discipline over their party members. Authoritarians use legislative control to amend constitutions — for example, abolishing term limits on officeholding. 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.

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. The media is often

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44 See id. at 65; LEVITSKY & ZIBLATT, supra note 35, at 87.
45 Scheppele, supra note 31, at 549.
47 Huq & Ginsburg, supra note 36, at 138.
48 See, e.g., Schepple, 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., Schepple, supra note 31, at 550–51.
52 See, e.g., id. at 551.
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/7GO5-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. As the late Senator John McCain warned: “When you look at history, the first thing that dictators do is shut down the press.”

Authoritarians often seek control over public media, sometimes through complex oversight mechanisms that defy transparency. In Poland, the reigning Law and Justice Party pressured public media to stop featuring liberal commentators. 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.

Authoritarians also may pressure private media to support the regime. 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.

Private media can also be seduced with government advertising contracts or intimidated by government threats, such as the selective enforcement of tax laws.

Control of the media enables authoritarians to lie about their accomplishments and suppress criticism. 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.” 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. 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.
58 See, e.g., Diamond, supra note 28, at 60, 64; Mounk, supra note 31, at 126–27.
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.
agenda. It is to exhaust your critical thinking, to annihilate truth.\footnote{Jay Rosen, \textit{The Christmas Eve Confessions of Chuck Todd}, \textit{PRESSTHINK} (Dec. 26, 2019, 1:40 AM), https://pressthink.org/2019/12/the-christmas-eve-confessions-of-chuck-todd [https://perma.cc/4KH5-3V5Q].} Authoritarians even seek to obliterate historically inconvenient facts by rewriting the past.\footnote{Cf. \textit{GEORGE ORWELL}, \textit{1984}, at 33–35 (1977) (describing such obfuscation of history in a fictional totalitarian society).} 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.\footnote{\textsc{MOUNK}, supra note 31, at 127.}

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.”\footnote{Huq & Ginsburg, supra note 36, at 132 (quoting Javier Corrales, \textit{The Authoritarian Resurgence: Autocratic Legalism in Venezuela}, 26 \textit{J. DEMOCRACY} 37, 39 (2015) (describing a law enacted by the Venezuelan government)).} Occasionally, authoritarians simply murder troublesome journalists. In 2018, Saudi assassins murdered and dismembered the body of \textit{Washington Post} columnist Jamal Khashoggi in the Saudi consulate in Istanbul as an object lesson to regime critics.\footnote{See David D. Kirkpatrick & Malachy Browne, \textit{Naming Names, Turks Turn Up Heat on Saudis in Consulate Case}, \textit{N.Y. TIMES} (Oct. 10, 2018), https://nyti.ms/2A27488 [https://perma.cc/9HZR-K5EX]; Sulzberger, supra note 57.}

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.\footnote{See, e.g., Huq & Ginsburg, supra note 36, at 126; Scheppel, supra note 31, at 552.} 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.\footnote{See Scheppel, supra note 31, at 550–51, 573 & n.100.} Fidesz also packed the lower courts by lowering the retirement age for judges, producing vacancies in nearly half of those courts’ leadership positions.\footnote{See id. at 553.}

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 Hindunationalist regime of Prime Minister Narendra Modi.\footnote{See Rana Ayyub, Opinion, \textit{The Destruction of India’s Judicial Independence Is Almost Complete}, \textit{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/FDK5-9QHJ].} That court has authorized the incarceration of the Prime Minister’s critics\footnote{See id.} and ruled
against Muslims in a high-profile dispute over land arising from the 1992 destruction of a mosque by Hindu nationalists. Autocrats also attack other independent agencies of government. They stack electoral commissions with loyalists and undermine the authority of government ethics watchdogs. More generally, authoritarians curtail the power of nonpolitical civil servants, who represent potential obstacles to the rapid accumulation and misuse of state power. The commitment of professional bureaucrats to science, expertise, and truth frequently sets them at odds with the political priorities of an autocratic regime. 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.

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. One favored technique of undermining an independent civil service is cronyism — installing political allies and party loyalists in powerful government positions. 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/2p5scEe [https://perma.cc/W3BQ-LAY4].


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

82 See id. at 150.

83 Id. at 130.

84 See Schepple, 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; Schepele, 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; Schepele, 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. In European history, Jews were often the target. Even today, Fidesz focuses its ire on American billionaire George Soros, 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.

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. 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. 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. Prime Minister Modi has accused opposition leaders of being backed by the nation’s arch enemy Pakistan, a majority-Muslim country, and the home minister has called immigrants from Bangladesh, another majority-Muslim country, “termites.”

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. When neo-fascist groups marched in Warsaw in 2017 carrying signs saying “White Europe” and flags with white supremacist symbols, the Polish

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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/2MEGby4 [https://perma.cc/HRR9-WXUH].
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/2EdSUA [https://perma.cc/774F-GMNQ].
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.” \textsuperscript{106} Across different countries, defenders of liberalism and pluralism who protest the vilification of minorities are often denounced by authoritarians as “politically correct.” \textsuperscript{107}

Authoritarian regimes are often, but not always, more corrupt than democracies. \textsuperscript{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. \textsuperscript{109} Those not converted into regime loyalists through the carrot of enrichment can often be convinced by the stick of intimidation. \textsuperscript{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.” \textsuperscript{111} Most businessmen complied, but one who did not faced the threat of arrest and was investigated for fraud. \textsuperscript{112} Such examples often have powerful incentive effects on everyone else.

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


\textsuperscript{109} See \textit{DIAMOND}, \textit{supra} note 28, at 61, 65; \textit{LEVITSKY & ZIBLATT, supra note} 35, at 81.

\textsuperscript{110} See, \textit{e.g.}, \textit{DIAMOND, supra} note 28, at 65; see also \textit{LEVITSKY & ZIBLATT, supra} note 35, at 83.

\textsuperscript{111} \textit{LEVITSKY & ZIBLATT, supra note} 35, at 85.

\textsuperscript{112} Id.

\textsuperscript{113} See Scheppele, \textit{supra} note 31, at 547–48, 571, 578; see also Huq & Ginsburg, \textit{supra note} 36, at 93–99.

\textsuperscript{114} \textit{DIAMOND, supra} note 28, at 52; \textit{LEVITSKY & ZIBLATT, supra} note 35, at 3; Huq & Ginsburg, \textit{supra note} 36, at 100–02.

\textsuperscript{115} See \textit{LEVITSKY & ZIBLATT, supra} note 35, at 4; \textit{MOUNK, supra note} 31, at 188.

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

\textsuperscript{117} Scheppele, \textit{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, 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

1. Attacks on Freedom of the Press and Freedom of Speech. — During the 2016 campaign, Trump called for “open[ing] up” libel laws, 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. 

Since becoming President, Trump has dismissed hundreds of media stories as “fake news,” such as The New York Times’s investigation of his family’s tax-avoidance schemes and The Wall Street Journal’s revelations of his hush-money payments to an adult-film star. He regularly calls the mainstream media the true “enemy of the people” — a term invoked in the twentieth century to justify mass executions in Nazi Germany 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. At one campaign event, the Secret Service had to escort NBC...
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/2017/12/09/2fba467de-d4b-11e7-b1a8-62589434a581_story.html [https://perma.cc/5KUR-KP34].


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

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.\footnote{151}{Jose A. Del Real & Katie Zezima, \textit{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-H0JK]; Adam Liptak, \textit{Chief Justice Defends Judicial Independence After Trump Attacks “Obama Judge”}, N.Y. TIMES (Nov. 21, 2018), https://nyti.ms/2cDBposL [https://perma.cc/6JE8-SZXB].} 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.”\footnote{152}{Liptak, \textit{supra} note 151.}

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.\footnote{153}{2 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 123–26 (2019).} 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.\footnote{154}{Meagan Flynn & Brittany Shammas, \textit{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].}

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
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 President\(^{160}\) 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

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\(^{157}\) See LEVITSKY & ZIBLATT, supra note 35, at 78.


\(^{160}\) 2 MUELLER, supra note 153, at 51.

\(^{161}\) Id. at 50.

\(^{162}\) Id. at 49–51, 50 n.286.

\(^{163}\) Id. at 65–64.

\(^{164}\) Id. at 51, 91.

\(^{165}\) Id. at 111.
have Attorney General Sessions reopen the Justice Department’s criminal investigation into Hillary Clinton’s emails. 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. 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. Eventually, every FBI leader who had participated in the investigation of President Trump’s 2016 campaign was forced out of the Bureau.

Since his impeachment acquittal, President Trump has continued to flagrantly violate the norm of Justice Department independence from the White House. In February 2020, President Trump denounced as unfair the seven-to-nine year sentence prosecutors sought against his friend and advisor Roger Stone. Attorney General William Barr then intervened to reduce the prosecutors’ recommendation, leading the prosecutors to resign from the case. 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, which he has since done. 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. In May, the

166 Id. at 107, 109.
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].
172 Sullivan, supra note 171.
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 midterm 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

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.  

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.

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. 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.

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 presidential election. 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.

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

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183 See id. at 69; see also id. at 71–72; Packer, supra note 168.
184 2 MUELLER, supra note 153, at 55–57.
186 Id.
188 See supra note 85 and accompanying text.
proceedings.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{196}

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


\textsuperscript{194} See, e.g., Nakashima et al., supra note 193.


\textsuperscript{196} Id.

Administration has chosen government officials primarily for loyalty rather than expertise or competence. 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. 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. 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.

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

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

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200 See id.


203 No modern President has ever derived direct financial benefit from his position as President Trump has.

The Mueller Report reveals that throughout most of Trump’s presidential campaign, he and his lawyer Michael Cohen pursued a deal for
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].
of dollars more a night than the average price charged by similar luxury
hotels in the city.  

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 sup-
posed to dislike them? I like them very much.” The Trump
Administration remained largely silent while Saudi Arabia was accused
of effectively kidnapping the Prime Minister of Lebanon and exacerbat-
ing one of the world’s worst humanitarian crises in Yemen. In
November 2018, in the face of confident conclusions from U.S. intelli-
gence 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. 

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

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212 Cristina Alesci & Curt Devine, Exclusive: Data Show Trump’s DC Hotel Was Pricier and
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/UYU-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/2018/10/11/0870df24-cd67-11e8-a360-8587f3ac0bf1_story.html [https://perma.
cce/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/2j3juyj [https://perma.cc/8YGJ-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/aDDhj8 [https://perma.cc/AP7y-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-

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/3sQzdR [https://perma.cc/7WSV-
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),
hhttps://wapo.st/2ELdgFN [https://perma.cc/AGZT-UU7W].
had supported the United States’ mission against the Islamic State (ISIS) in Syria.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{224} Moreover, there is reason to suspect that the Administration’s


\textsuperscript{219} DeYoung et al., \textit{supra} note 217.


\textsuperscript{221} Id.; David A. Fahrenthold & Joshua Partlow, \textit{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-9e23-691ee41a0a5f_story.html [https://perma.cc/6RWV-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).


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

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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.
231 Id.
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

236 See id.; Peters, supra note 234.
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/3deo4RX [https://perma.cc/77L4-PJ4N].
239 See id.
242 See supra notes 96–107 and accompanying text.
is racist or Islamophobic. 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. 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.” 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. After serving many years of their sentences, the defendants were exonerated by DNA evidence, but Trump continued to question their innocence.

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. In June 2015, Trump launched his presidential campaign by denouncing Mexican immigrants, who he insisted were “bringing drugs . . . [and] crime” into the country. 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


244 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 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

251 Id.
252 See Sanneh, supra note 248.
253 RUCKER & LEONNIG, supra note 131, at 154.
255 RUCKER & LEONNIG, supra note 131, at 187.
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-
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. 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” 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.

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

Some of President Trump’s more notorious lies in office include that President Obama wiretapped Trump Tower during the campaign, that Trump did not authorize hush-money payments to adult-film actress Stormy Daniels, and that a whistleblower had misrepresented what “false or misleading claims” during his presidency. 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” 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.

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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 live 276 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

274 Rogers, supra note 272.
275 Id.
As discussed further below, President Trump also has a dependable right-wing media ecosystem to back up his lies and to denigiate 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

9. 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
After Democrats won control of the House in 2018, President Trump threatened a “warlike posture” if they investigated him. 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. 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. 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.

Government whistleblowers and inspectors general promote transparency and accountability by facilitating the exposure of government waste, fraud, and misconduct. 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. President Trump’s repeated attacks on the whistleblower, which likely played a role in death threats made against his lawyers, will surely discourage future whistleblowers from coming forward, which is probably

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288 RUCKER & LEONNIG, supra note 131, at 312.
291 RUCKER & LEONNIG, supra note 131, at 110.
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

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301 See Eleanor Albert, North Korea’s Power Structure, COUNCIL ON FOREIGN RELS. (June 17, 2020), https://on.cfr.org/2z8kb30 [https://perma.cc/ND6R-PV8W].
as “funny.” While President Trump was lauding Prime Minister Modi as a “terrific man” and a great supporter of “religious freedom” after a visit to Delhi, violence erupted as Prime Minister Modi’s supporters attacked opponents of India’s discriminatory citizenship law, resulting in at least forty deaths.

The Trump Administration has also generally abandoned the tradition of American governments’ supporting democratic principles through foreign policy. 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. Previous administrations intervened to protect even foreign journalists, political dissidents, and democratic protestors from incarceration or torture.

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. President Trump’s former ambassador to Germany, Richard Grenell, has openly supported right-wing political parties in Europe. 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

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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).


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.\footnote{See Sulzberger, supra note 57.} A.G. Sulzberger, publisher of \textit{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 \textit{Times}’s journalists faced imminent arrest in Egypt.\footnote{Id.} Perhaps in part because they are unconcerned about criticism or sanctions from the United States, foreign autocrats feel liberated to suppress independent journalism.\footnote{See id.; Tharoor, supra note 29.} Foreign autocrats attacking journalists have adopted President Trump’s vocabulary.\footnote{Sulzberger, supra note 57.} 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.\footnote{Id.} 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.”\footnote{Id.}


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.”\footnote{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].}

Partly as a result of such statements, seventy-three percent of Republicans believed that the election could be “stolen” from Trump.\footnote{See Levitsky & Ziblatt, supra note 35, at 61.}

Approximately fifty percent of Republicans said they would not regard Hillary Clinton as a legitimate President if elected.\footnote{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-idUSKCN1sL2O2 [https://perma.cc/W8XW-MJY7].}

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.”\footnote{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].}

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.”\footnote{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-idUSKCN1QGtZB [https://perma.cc/RU5F-Bt8BN].}

American intelligence officials have reported that Russia is already interfering in the 2020 election to help President Trump, just as it did in 2016.\footnote{Goldman et al., supra note 193.}

Even before President Trump pressured Ukraine’s leader to dig up dirt on the Bidens, he had said he would accept foreign assistance
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?

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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].
331 Levitsky & Ziblatt, supra note 35, at 196; see also Anderson, supra note 6, at 64–65.
death one second at a time, 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.

C. The Republican Party’s Assault on Democracy

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

The American political system’s commitment to democracy has historically been uneven. 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. The Jacksonians extended suffrage to nearly all white male citizens while often curtailing it for black men. After the Civil War, Republicans expanded the franchise to black men, but not to women as suffragists were demanding. During and after Reconstruction, southern whites effectively nullified the voting rights of blacks. Throughout American history, political parties have manipulated electoral rules to entrench themselves

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

1. 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

345 See, e.g., Anderson, supra note 6, at 27.
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).
353 Klaman, Framers’ Coup, supra note 340, at 556, 559.
power have gerrymandered legislative districts to their advantage. 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.

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. 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. In the 2016 congressional elections in North Carolina, Democrats won roughly half of the votes cast but only three of the thirteen House seats. 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. A Brennan Center for Justice study estimated that Republican gerrymandering probably netted the party between thirteen and nineteen extra congressional seats in 2016. “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.

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.


DAMOND, supra note 28, at 96.


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

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.\footnote{Anderson, supra note 6, at 52–71.} 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.\footnote{See infra notes 391–401 and accompanying text.}

The Republican Party’s obsession with voter impersonation fraud began in 2000 after a very close U.S. Senate contest in Missouri.\footnote{See Berman, supra note 7, at 214–17.} 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.\footnote{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).} 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.\footnote{Berman, supra note 7, at 215.} 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.\footnote{Id.} However, the court of appeals quickly overturned that order and closed the polls.\footnote{Id. at 216.}

Republican Senator John Ashcroft lost his race for reelection by only 49,000 votes and alleged fraud and corruption in St. Louis.\footnote{Id. at 216.} Missouri’s other Republican Senator Kit Bond charged that “Democrats in the city of St. Louis are trying to steal the election.”\footnote{Id.} 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.\footnote{Id.} 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.\footnote{Id.} In the words of one voting rights expert, “a new right-wing voter fraud movement was born.”\footnote{Id.} Fox News broadcast fraudulent stories of pervasive...
voter fraud, and, over time, Republican voters came to believe there was a real problem.\footnote{375}{See \cite{Anderson1}, supra note 6, at 53–54.}

In 2005, Georgia and Indiana became the first states to enact voter photo identification laws.\footnote{376}{\cite{Berman1}, supra note 7, at 222–29, 253–54.} Previously, Georgians could vote using any of seventeen different forms of identification, including a student identification card or a Social Security card.\footnote{377}{M.V. Hood III & Charles S. Bullock III, \textit{Worth a Thousand Words?: An Analysis of Georgia’s Voter Identification Statute}, 36 AM. POL. RSCH. 555, 559 & n.5 (2008).} 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.\footnote{378}{\textit{Id.} at 560; see \cite{Berman1}, supra note 7, at 223.} 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.\footnote{379}{\cite{Berman1}, supra note 7, at 224.} 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.\footnote{380}{\textit{Id.} at 560; see \cite{Berman1}, supra note 7, at 223.} 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.\footnote{381}{\textit{Id.}.} 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.”\footnote{382}{\textit{Id.}} The Bush Justice Department precleared the law over the objection of career lawyers in the Civil Rights Division.\footnote{383}{\textit{Id.}}

Despite Republicans’ best efforts to find it, almost no evidence of voter impersonation fraud has emerged.\footnote{384}{See \cite{Anderson1}, supra note 6, at 65; \cite{Berman1}, supra note 7, at 229.} 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.\footnote{385}{Justin Levitt, \textit{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/X13upc [https://perma.cc/U9MP-FRJB].} 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
not a single one was for voter impersonation fraud, which is the only type that a photo identification requirement could possibly prevent.\textsuperscript{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.\textsuperscript{387} Most states under Republican control have enacted voting restrictions such as voter photo identification laws.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{393} As of 2015, such offices did not exist in nearly one-third of Texas counties, especially those with large Latino populations.\textsuperscript{394} The nearest DMV office could be as far as 250 miles away.\textsuperscript{395} Eight hundred thousand registered Texas voters lacked the requisite identification to vote under the law.


\textsuperscript{388} See BERMAN, supra note 7, at 260–61.

\textsuperscript{389} Id. at 308.

\textsuperscript{390} See id. at 290.


\textsuperscript{392} BERMAN, supra note 7, at 266.

\textsuperscript{393} Id.

\textsuperscript{394} Id.

\textsuperscript{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 re-locate or die, voter rolls become inaccurate.406 Good electoral practice and federal law require periodically removing ineligible voters from the

396 Id. at 308.
399 BERMAN, supra note 7, at 309–10.
400 Id. at 310.
401 See LEVITSKY & ZIBLATT, supra note 35, at 185.
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/2URBuF0 [https://perma.cc/NgM8-7MEU].
406 See ANDERSON, supra note 6, at 72–74.
However, Republicans have used drastically overbroad criteria for purging the rolls, with the purpose and effect of removing voters who disproportionately lean Democratic. 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.

In 1993, the National Voter Registration Act, 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. As a quid pro quo for expanding voter access, Republicans demanded that the law require routine maintenance of voter rolls. However, the law provides strict guidelines as to who may be removed from the rolls and how. The Act forbids using registrants’ failure to vote in recent elections as a reason for removing them from the rolls. Yet, in the last two decades, Republican secretaries of state have begun removing registrants for precisely that reason. 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.

The first of the controversial modern voter purges seems to have occurred in Florida before the 2000 election. 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. Within weeks, the state legislature enacted a law requiring a private company to purge the rolls each year. 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.

407 See id. at 73–74.
408 See id.
409 See Berman, supra note 7, at 90–91.
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. 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.

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. 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.

Voter purges disproportionately impact people of color, the poor, and young people — all of whom are relatively more transient. 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.

Brian Kemp, Georgia’s Secretary of State (now Governor), was a maestro of the voter purge. Between October 2012 and November 2014, Kemp eliminated 732,800 names from the voter rolls and then purged another 591,548 two years later. Kemp’s office defended his actions as “voter list maintenance . . . to safeguard . . . the integrity of the ballot box . . . and prevent fraud.” However, The Washington Post reported that no cases of voter impersonation fraud had been successfully prosecuted in Georgia between 2012 and 2016.

Georgia’s voter roll maintenance was combined with an exact-match registration system that produced massive error rates. 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.
431 See ANDERSON, supra note 6, at 80–81.
data mismatches.\textsuperscript{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.\textsuperscript{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.\textsuperscript{434} The program was supposed to identify people registered to vote in two or more states.\textsuperscript{435} Its database collected voter records, including names, dates of birth, and the last four digits of Social Security numbers.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{439}

The Crosscheck system was massively inaccurate.\textsuperscript{440} Because not all states using it required the same information for voter registration, there were enormous possibilities for error.\textsuperscript{441} For example, most states did not require Social Security numbers for voter registration, and Ohio did not even require voters’ middle names.\textsuperscript{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.\textsuperscript{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.\textsuperscript{444}

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

\textsuperscript{432} Id. at 81.
\textsuperscript{433} Id.
\textsuperscript{434} Id. at 85–87. On the program’s suspension, see Roxana Hegeman, \textit{Multistate Voter Database Suspended in Lawsuit Settlement}, \textit{Associated Press} (Dec. 10, 2019), https://apnews.com/2c82eb782e5758bb81c121e453fbee8 [https://perma.cc/LD2L-XT3Z].
\textsuperscript{435} ANDERSON, \textit{supra} note 6, at 85.
\textsuperscript{436} Id.
\textsuperscript{437} Id. at 86; Hegeman, \textit{supra} note 434.
\textsuperscript{438} ANDERSON, \textit{supra} note 6, at 86.
\textsuperscript{439} Id.
\textsuperscript{440} Id. at 86–88.
\textsuperscript{441} Id. at 87.
\textsuperscript{442} Id.
\textsuperscript{443} See id.
\textsuperscript{444} Id. at 87–88.
2018.\textsuperscript{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.\textsuperscript{446}

\textit{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{450} whose margin of victory was well over nine million votes.\textsuperscript{451}

In 2010, Republican legislatures began imposing new obstacles to mass voter registration drives.\textsuperscript{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.\textsuperscript{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.\textsuperscript{454} African Americans and Latinos in Florida had been twice as likely to register through such efforts as white people had been.\textsuperscript{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.\textsuperscript{456}


\textsuperscript{447} BERMANN, \textit{supra} note 7, at 256.

\textsuperscript{448} Id.

\textsuperscript{449} Id. at 257.

\textsuperscript{450} See id. at 256–57.


\textsuperscript{452} BERMANN, \textit{supra} note 7, at 257, 261.

\textsuperscript{453} Id. at 261–62.

\textsuperscript{454} Id. at 262.

\textsuperscript{455} Id.

\textsuperscript{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. Supressing 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].


\(^{463}\) Id.


\(^{465}\) Wines, supra note 462.

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.\footnote{Wines, supra note 462.}

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.\footnote{Anderson, supra note 6, at 91–92.} Most of those supposedly illegal voters turned out to be college students entitled to vote under state law.\footnote{Id. at 92.} 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.\footnote{Wines, supra note 462.} Among other steps, establishing domicile would require obtaining a state driver’s license and car registration at the cost of hundreds of dollars.\footnote{Id.} 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.\footnote{Anderson, supra note 6, at 9–10, 153.}

In 2011 in Wisconsin, Republicans severely restricted the use of student identification cards for voting.\footnote{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].} 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.\footnote{Wines, supra note 462.} The law also mandated that identification cards used for voting expire within two years\footnote{Id.} 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.\footnote{Id.; see also Nancy Thomas, Inger Bergom, Ishara Casellas Connors, Prabhat Gautam, Adam Gismondi & Alena Roshko, 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/P3HN-CYDH].} 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.\footnote{Wines, supra note 462.} President
Trump won Wisconsin by fewer than 23,000 votes; the University of Wisconsin system alone enrolls about 170,000 students.

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. In 2004, early voting was considered a bipartisan reform, and Governor Jeb Bush of Florida called it a “great” idea. Early voting proved especially attractive to African American voters. 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.

Following the Democrats’ success with early voting operations, Florida Republicans shortened the early voting period from fourteen days to eight. 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. Both states also prohibited voting on the Sunday before the election, a day on which black churches had hosted “Souls to the Polls” events. 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.”

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. The bill’s sponsor explained that while he had supported early voting when it was first introduced, now he felt it had become “maybe

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478 ANDERSON, supra note 6, at xv.
480 See BERNMAN, supra note 7, at 262.
481 Id.
482 See id. at 262–63.
483 ANDERSON, supra note 6, at 118.
484 See BERNMAN, supra note 7, at 263.
485 Id.
486 Id.
487 Id.
tainted in one direction. After Democrats won the Wisconsin gubernatorial election in 2018, Republicans used a lame-duck session to reduce the number of early voting days. Early voting can also be truncated by reducing the number of sites where it takes place. 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. 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. 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. Early voting in one of those counties dropped by twenty-six percent after this law was enacted. By contrast, Republican-friendly Hamilton County established two additional early voting sites, resulting in a sixty-three percent increase in early voting.

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. Franklin County, which is home to Columbus, has more than 274,000 African American residents, Pickaway only 1,881. 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.”

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.
491 ANDERSON, supra note 6, at 151.
492 See id.
493 See id. at 151–52.
494 Id. at 151.
495 Id. at 152.
497 ANDERSON, supra note 6, at 118.
498 Id. at 118–19.
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.\textsuperscript{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.\textsuperscript{501}

The 2004 presidential election came down to Ohio.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{505} President George W. Bush won the state by 118,000 votes.\textsuperscript{506} On average, African Americans in Ohio waited in line for fifty-two minutes to vote, while whites waited only eighteen minutes.\textsuperscript{507}

7. \textit{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) \textit{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.\textsuperscript{508}

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

\textsuperscript{500} See BERMAN, supra note 7, at 269–70.
\textsuperscript{501} See ANDERSON, supra note 6, at 77.
\textsuperscript{503} BERMAN, supra note 7, at 220–21.
\textsuperscript{504} Id. at 221.
\textsuperscript{505} Id.
\textsuperscript{506} Id.
\textsuperscript{507} Id.
\textsuperscript{508} See LEVITSKY & ZIBLATT, supra note 35, at 77.
\textsuperscript{509} Richard Fausset, Pat McCrory, North Carolina Governor, Concedes After Acrimonious Race, N.Y. TIMES (Dec. 5, 2016), https://nyti.ms/2gLhqBf [https://perma.cc/MSNA-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 shrunk 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


516 Todd Richmond, Wisconsin Democrats Fear GOP Redistricting End-Around, ASSOCIATED PRESS (Nov. 28, 2018), https://apnews.com/1f63cbe1f3e3f3315f338b8299 [https://perma.cc/3WL6-NJRH].
state legislative districts in the nation, \textsuperscript{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.\textsuperscript{518}

(b) Circumventing Inconvenient Referenda Results. — Populist autocrats often favor referenda.\textsuperscript{519} Republicans supported them in past decades when they reliably produced anti-gay policies.\textsuperscript{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,\textsuperscript{521} expanding Medicaid,\textsuperscript{522} and ending partisan gerrymandering.\textsuperscript{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 \textsuperscript{1.4} million citizens with felony convictions who had completed their sentences.\textsuperscript{524} In response, Republicans passed a law requiring those people to pay all court costs,


\textsuperscript{519} See \textit{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).

\textsuperscript{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].


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

\textsuperscript{523} See, e.g., Dave Zweifel, \textit{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_f6f05955-5095-5d00-ab7b-5419c1d1f0d0.html [https://perma.cc/F68U-W3KU].

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

In 2018, Missouri voters approved by initiative, as did voters in several other states,\textsuperscript{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.\textsuperscript{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.\textsuperscript{529} This shift would disadvantage Democratic candidates, whose supporters cluster around St. Louis and Kansas City.\textsuperscript{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.\textsuperscript{531} To mislead voters, Republicans added to the amendment trivial ethics and lobbying restrictions on state lawmakers.\textsuperscript{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.\textsuperscript{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.\textsuperscript{534}

\textsuperscript{525} Id.
\textsuperscript{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].
\textsuperscript{529} See id.
\textsuperscript{531} See Wolf, supra note 528.
\textsuperscript{532} See id.
\textsuperscript{533} BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT 267–68 (2020).
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. By enacting these proposals through legislation, Republicans managed to keep the initiatives off the ballot. Then, after the election, the lame-duck Republican governor signed a Republican bill that eviscerated the reforms in the earlier law. Legislative override of a voter initiative would have required a supermajority that Republicans could not have easily generated after the election.

(c) Delaying or Canceling Elections. — In January 2018, a Democrat won a stunning upset in a special election for a Wisconsin state senate seat. 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. 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.” 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 seats — 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.
In May 2020, Georgia Governor Brian Kemp canceled an election to fill a seat on the state supreme court. 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. 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.

(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. 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. 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. 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.

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. When a federal district judge extended the deadline for the receipt
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. In several states, Republicans are blocking Democratic efforts to expand absentee voting and vote-by-mail in the face of the pandemic.

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. 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.”

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.

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.
1. The Republican Presidential Primaries. — A little over forty percent of Republican voters supported Trump during the presidential primaries in 2016. 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 election and partly because they justifiably doubted that he was really a Republican. 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. 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.

In parliamentary democracies, party insiders generally choose the parties’ candidates for prime minister. The Framers of the U.S. Constitution designed the Electoral College system to ensure that elites directly picked the President. While that system quickly evolved to nullify the independent role of presidential electors, party insiders continued to choose presidential candidates. 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. 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. After street riots erupted around the Democratic Party convention in Chicago in 1968, party officials introduced democratic reforms in the presidential selection process to


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. See id. at 48–50.

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. See Bill Barrow, Dems Pledge to Limit Superdelegates, but Don’t Say How, ASSOCIATED PRESS (Mar. 10, 2018), https://apnews.com/3fc78fo356984f19b0efeb294c0f9dd [https://perma.cc/J4CB-AXVL].

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. See Levitsky & Ziblatt, supra note 35, at 7, 35–36, 43–47.

Yet none of them could have secured a major party nomination because of strong elite opposition. 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. 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. Two months after Trump announced his candidacy in June 2015, bookmakers put the odds of his becoming President at one hundred to one.

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. More importantly, Trump received as much as two billion dollars’ worth of earned media coverage during the primaries, 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

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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/3fc78fo356984f19b0efeb294c0f9dd [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.
decade by stoking racial grievances, attacking Democrats as traitors, and encouraging an authoritarian bent among Republicans. When establishment donors and prominent conservative pundits were unable to put a dent in Trump’s candidacy, party leaders tried to block his nomination. 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.” Yet such attacks had little discernible adverse impact on Trump-inclined voters and may even have redounded to his advantage. Moreover, once Trump had acquired democratic legitimacy by winning primary contests, the party could not plausibly have intervened to unbind his convention delegates. 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. 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. 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. 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.


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


578 See Harry Enten, GOP Voters Are Rallying Behind Trump as if He Were Any Other Candidate, FIVETHIRTEIGHT (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/NzDS-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.
587 See KLEIN, supra note 347, at 177; Hook, supra note 335.
institutions, it might have made a difference. Instead, Republican endorsements normalized Trump, turning the election into a fairly standard two-party competition. Under current conditions of extreme political polarization and negative partisanship, combined with a narrowly divided electorate and an undemocratic Electoral College system, Trump narrowly prevailed.

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. 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. However, such constraints have badly eroded over time. 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.

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. 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. Representative Devin Nunes, Chair of the House Intelligence Committee, colluded with the White House to undermine the Russia investigation that he was supposedly overseeing. Republicans also voiced little concern about false statements to Congress by Attorney

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. 134–38; 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 386, at 96–97.
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/2lkGwB [https://perma.cc/9ZWM-NPS7].
603 See id.
604 FRUM, supra note 386, 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.  

Republican leaders who might have criticized the President’s transgressive behavior instead made excuses for him. 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. 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 government and “learning the job.”  

However, the first year of President Trump’s presidency also featured many institutional actors abiding by traditional norms that constrain the Executive. 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. 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. Later, despite constant public criticism and insults from the President, Attorney General Sessions refused to unrecuse himself.  

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. Rosenstein was a career Justice Department lawyer who was named Deputy Attorney General early in the Administration. In May 2017, President Trump decided to fire FBI Director Comey, probably at least in part because

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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.  
613 See 2 MUELLER, supra note 153, at 3, 5, 51, 61, 107, 109–11.  
614 See, e.g., id. at 67, 70.  
Comey refused to publicly exonerate the President of complicity with Russian interference in the election.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{623} But Senator Corker chose to retire in 2018 rather than endure a primary

\textsuperscript{616} See 2 MUELLER, supra note 153, at 4, 61–62.

\textsuperscript{617} See Ruiz, supra note 615.

\textsuperscript{618} 2 MUELLER, supra note 153, at 70.


\textsuperscript{621} See Packer, supra note 168.


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

625 Freking, supra note 624.
628 Id.
629 Id.
630 Id.
632 Martin & Haberman, supra note 627.
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 establishment — 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

637 See infra notes 778–782 and accompanying text.
638 See Packer, supra note 168.
639 See id.
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.
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-invoke-5th-n1033881 [https://perma.cc/BT2Z-5X3K].

\(^{653}\) See Barr Letter, supra note 643, at 3.


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


\(^{657}\) 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.
663 See Packer, supra note 168.
665 See, e.g., Stanley-Becker, supra note 662.
667 RUCKER & LEONNIG, supra note 131, at 177–78.
Tillerson and replaced him with CIA Director Mike Pompeo. 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.” However, after Trump’s election, Pompeo lobbied for a national security job and became CIA Director and then Secretary of State.

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. Secretary of State Pompeo then lied to the press as to whether he had been asked by State Department personnel to defend Ambassador Yovanovitch. 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.

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.

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

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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.
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=6674635 [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.
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. 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.”

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.

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. 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. Thirty-two minutes after the tape was released, WikiLeaks posted the hacked emails of Clinton campaign chair John Podesta. The Podesta emails quickly diverted some of the negative media attention generated by the Access Hollywood video. 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.

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.

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/2mjZjWJI; see also 1 MUELLER, supra note 153, at 49.
677 Id. at 138–40; id. 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; id. at 51–60.
684 RUCKER & LEONNIG, supra note 131, at 408.
ordering the termination of a federal criminal investigation, are not im-
munized 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 jus-
tice 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 repeat-
edly 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 de-
manding 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


702 Id. at 88.
703 Id. at 88–90.
704 Id. at 176.
to the White House. 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.” 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. First, impeachment was appropriate for government officials who placed their own private interests ahead of the public good. 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. Third, elections were a point of special vulnerability to foreign influence. 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? 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. There is no doubt that he was guilty as

708 Id.
709 Id.
710 Id.
712 H.R. Res. 611, 105th Cong., 144 CONG. REC. 27,828–29 (1998); see Glass, supra note 711.
charged.\footnote{713} Many Democrats severely criticized his behavior.\footnote{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[.]”\footnote{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.\footnote{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.”\footnote{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.\footnote{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,\footnote{719} but only one Republican, Senator Mitt Romney, voted to remove President Trump,\footnote{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.\footnote{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

\footnote{716} Michael J. Klarman, Essay, Constitutional Fetishism and the Clinton Impeachment Debate, 85 Va. L. Rev. 631, 645 (1999) [hereinafter Klarman, Constitutional Fetishism].
\footnote{717} See id. at 645 & n.56; see also The Federalist No. 65, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 2003).
\footnote{718} Klarman, Constitutional Fetishism, supra note 716, at 656.
\footnote{719} Glass, supra note 711.
\footnote{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/2TVJb0d [https://perma.cc/F3W6-XPTK].
Committee’s impeachment proceedings against President Clinton.\textsuperscript{722} Moreover, they complained that the President was not permitted to call witnesses.\textsuperscript{723}

This process argument was unpersuasive at best. Independent Counsel Ken Starr had investigated President Clinton for over four years.\textsuperscript{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.\textsuperscript{725} There was no analogous investigation of President Trump’s Ukraine affair. Attorney General Barr’s Justice Department had blocked any criminal investigation,\textsuperscript{726} and Special Counsel Mueller had investigated something entirely different.\textsuperscript{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.\textsuperscript{728}

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


\textsuperscript{723} Letter from Pat A. Cipollone, supra note 722.


\textsuperscript{727} \textit{2 Mueller, supra note 153, at 1–2.}


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

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.
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/2RIFJ1v [https://perma.cc/EGP3-T93M].
738 HOUSE REPORT, supra note 701, at 11; see also id. at 82, 86, 112.
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-

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741 See id.

742 See HOUSE REPORT, supra note 701, at 83.

743 Id.

744 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.”).

745 See Cohen, supra note 270.


747 Id.

748 See id.
iority of allegations” in his complaint had been independently confirmed. Senator Rand Paul actually outed him on the floor of the Senate, 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. 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. 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. When the Framers discussed examples of impeachable offenses, they frequently invoked behavior that plainly was not criminal. 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.

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.
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).
patriotic duty, and vote to remove him from office. Instead, the Ukraine affair confirmed that political polarization and negative partisanship are so great that the parties share almost no common ground. 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. 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.” President Trump quickly made such Republicans appear foolish, announcing that the lesson he had learned was that the Democrats are “crooked.”

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. 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. 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.


Fandos & Edmondson, supra note 170.

Id.


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.\footnote{765 See id.; Rampton et al., supra note 762.}

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,\footnote{766 See 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/379KJkI [https://perma.cc/A576-PR3B].} as were others whose actions during the Ukraine affair, which often consisted of simply doing their jobs, had displeased the White House.\footnote{767 See 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].} 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.\footnote{768 See Baker, supra note 189.}

Congressional Republicans expressed virtually no meaningful criticism of President Trump’s post-acquittal actions.\footnote{769 See Max Boot, supra note 766.} 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.”\footnote{770 Fandos & Edmondson, supra note 170.} 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.\footnote{771 Id.} 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.”\footnote{772 Id.}

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
he served as a board member. 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. 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. 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 2016 — a charge that U.S. intelligence officials have determined to be Russian disinformation.8

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. 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.” President Trump has enjoyed approval ratings among Republicans of nearly ninety percent and above for much of his presidency, and fifty-three percent of Republicans think President Trump has been a better President than Abraham Lincoln. In 2019,

774 See id.
778 See Martin & Haberman, supra note 627.
779 Id. (quoting Representative Patrick McHenry).
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

783 See Sabrina Tavernise, Post Impeachment, a Key Republican Suburban Area Rallies Around Trump, N.Y. TIMES (Feb. 8, 2020), https://nyti.ms/2w40237T [https://perma.cc/6LQy-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.
792 See RUCKER & LEONNIG, supra note 131, at 70.
the Russia investigation and fire Special Counsel Mueller.\footnote{See id. at 70–71.} Around this time, White House Counsel McGahn was also on the verge of resigning rather than continuing to do the President’s “crazy shit.”\footnote{See id.} Chief of Staff Priebus and White House Chief Strategist Steve Bannon talked him out of it.\footnote{See id.} 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 Mueller\footnote{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”).} — 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.\footnote{See id.; Bauer, supra note 791.}

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.\footnote{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=65241793 [https://perma.cc/K9J3-AMP4]; Packer, supra note 168.} 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.\footnote{Daniel W. Drezner, The Toddler in Chief: What Donald Trump Teaches Us About the Modern Presidency 11–12 (2020).} Perhaps their long careers in the military disinclined them to speak pejoratively of their Commander in Chief.\footnote{See Rucker & Leonnig, supra note 131, at 136–37.} In December 2018, former Secretary of State Tillerson gave his first extensive public remarks about President Trump since being fired nine months earlier.\footnote{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/CPB9-R2AC].} 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.”\footnote{Id. (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2018, 3:02 PM), https://twitter.com/realDonaldTrump/status/1071132883681132096 [https://perma.cc/VW5A-MGYZ]).}

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.”\footnote{Id. (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2018, 3:02 PM), https://twitter.com/realDonaldTrump/status/1071132883681132096 [https://perma.cc/VW5A-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. President Trump is probably more feared than admired by Republican politicians, many of whom privately criticize him in strong terms. 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. By contrast, Republican politicians who defend President Trump, no matter how absurd their arguments, become instant Republican heroes. Congressman 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.

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. Understandably reluctant to vote against policies they support ideologically, these Republican politicians contributed vital legitimacy to the Administration by failing to break with it. 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

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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/XBqR-LzR3].
809 See id.
811 See, e.g., Applebaum, supra note 810; Krugman, Tricked 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


813 Duehren et al., supra note 808.


815 See Packer, supra note 168.

816 See id.

817 See id.


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.”

To an extent that would have seemed inconceivable in 2016, President Trump has made the Republican Party and the executive branch his hirelings.

   (a) President Trump’s Unfitness for Office. — While ordinary voters may not fully recognize President Trump’s unfitness for office, Republican politicians certainly do. Before becoming President, Trump had been a critic of vaccines and a “birther.” He had called global warming a Chinese hoax aimed at rendering American manufacturing noncompetitive and promoted the view that windmills cause cancer. During one Republican primary debate, he assured the television audience that he had an adequately sized penis. He accused a female journalist who asked him hard questions in a primary debate of having been menstruating. He implied that one of his female competitors for the nomination was too unattractive to be President. Trump has the impulse control, and the fondness for nasty nicknames, of a young child.

In the White House, President Trump spends four to eight hours a day in front of a television. He often makes policy, sometimes through

822 Id.
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.
tweets, based on what he has just seen on Fox News. This can be problematic because, among other reasons, Fox is not meticulous about the accuracy of its stories. 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. 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” after he indicated support for a budget deal that did not include funding for the Mexican border wall. 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.

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. 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. 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. 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.

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.
835 See RUCKER & LEONNIG, supra note 131, at 349–50.
836 See Mayer, supra note 281.
838 Drezner, supra note 829, at 389.
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.
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://www.nytimes.com/2020/03/18/uspolitics/trump-coronavirus.html [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”).
846 RUCKER & LEONNIG, supra note 131, at 165.
everything from Middle East policy to Mexico trade negotiations to the coronavirus response. 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. 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. He selected Cabinet officials partly based on whether they looked the part.

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. 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.” President Trump apparently fears that acknowledging such interference would delegitimize his victory in the 2016 election. More importantly, President Trump is not taking the steps necessary to prevent a repetition of Russian interference in 2020. 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. He has failed in his oath to defend the nation from foreign enemies.

852 See RUCKER & LEONNIG, supra note 131, at 17.
853 1 MUELLER, supra note 153, at 1.
854 See RUCKER & LEONNIG, supra note 131, at 275.
855 See 2 MUELLER, supra note 153, at 23.
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

859 See, e.g., Zenko, supra note 848.
862 See Sanger et al., supra note 860.
863 See Monaco & Gupta, supra note 861.
865 See id.
In addition, an effective disaster response requires officeholders who have the experience and expertise to think creatively about government action. 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. 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.

Once the pandemic hit, the Administration’s response was disastrous. 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. 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.

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. However, President Trump did not order a quarantine of American citizens returning from China, 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.

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866 See Pod Save America, supra note 850, at 17:50–19:30.
868 Id.
870 See id.
873 See Leonhardt, supra note 872.
 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.  

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).  

“It’s going to disappear . . . like a miracle.” (February 27). A vaccine will be available “very quickly.” (February 29).  

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. Private labs were initially barred from developing their own tests. On March 6, President Trump lied, insisting that “[a]nybody that wants a test can get a test” around a time when the nation had tested only 4,300 people altogether. At that point, South Korea, which has one-sixth the population of the United States, was conducting up to 10,000 tests a day. 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. A study from Columbia University found that if social distancing guidelines had 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.  

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

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875 See Leonhardt, supra note 872; Serwer, supra note 198.  
876 Id.  
877 Id.  
878 See, e.g., id.  
879 Id.  
880 See id.  
881 Id.  
883 See id.  
884 See Pod Save America, supra note 850, at 4:55–6:35.  
Engineers to build new hospitals.\textsuperscript{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.\textsuperscript{887} Indeed, two days later, Secretary of State Pompeo tweeted that the United States was sending tons of personal protective equipment to China.\textsuperscript{888} President Trump did not declare a state of emergency until March 13.\textsuperscript{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.\textsuperscript{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.\textsuperscript{891} President Trump then began holding, and dominating, daily press conferences with his coronavirus task force.\textsuperscript{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,\textsuperscript{893} ignited political battles with Democratic

\textsuperscript{886} See Susan E. Rice, \textit{Opinion, Trump Is the Wartime President We Have (Not the One We Need)}, \textit{N.Y. Times} (Apr. 7, 2020), https://nyti.ms/2JNPCsy [https://perma.cc/DQ7U-6SRN]; Serwer, \textit{supra} note 198.


\textsuperscript{888} Mike Pompeo (@SecPompeo), \textit{Twitter} (Feb. 7, 2020, 12:41 PM), https://twitter.com/secpompeo/status/1225836989393534976 [https://perma.cc/Q43Z-ZZ3G].

\textsuperscript{889} See Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020); Serwer, \textit{supra} note 198.


\textsuperscript{891} See id.


\textsuperscript{893} Donald J. Trump (@realDonaldTrump), \textit{Twitter} (Apr. 25, 2020, 11:06 AM), https://twitter.com/realdonaldtrump/status/1254064154694076163 [https://perma.cc/2FMY-54UL]; see Bump & Parker, \textit{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 Democratic presidential candidate Joe Biden for wearing a mask and

896 See Baker & Haberman, supra note 895; Bump & Parker, supra note 892.
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/2Q07K65 [https://perma.cc/LL2D-6YPH].
denounced a reporter wearing one at the President’s press conference for being “politically correct.”

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.” He added: “[W]hat the hell do you have to lose? 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.

President Trump then urged his science advisors to look into the possibility of directly injecting disinfectants into the bloodstream and using ultraviolet rays internally.

Throughout the President’s disastrous pandemic performance, Republican officeholders voiced almost no public criticism. Instead, many of them “echo[ed] the servile praise of conservative media outlets and Trump [Administration] officials.”

10. Conclusion. — The Constitution’s Framers assumed that Congress would check an unfit, corrupt, or power-hungry President. But their assumptions were grounded in a world without modern political parties. 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 party —
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.
918 See DIAMOND, supra note 28, at 23–28; cf. KLEIN, supra note 147, 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.\textsuperscript{919} As the United States has become more racially diverse, the racial divide between Democrats and Republicans has also widened.\textsuperscript{920} The world has almost no experience with true multiracial democracy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{923}

For most of its history, the United States has had a large and politically dominant white majority.\textsuperscript{924} The African American share of the population has ranged from about ten to just under twenty percent,\textsuperscript{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.\textsuperscript{926} Up until recent decades, other racial groups comprised minuscule percentages of the population,\textsuperscript{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.\textsuperscript{928} America’s recently burgeoning racial and ethnic diversity is largely a consequence of the Immigration and Nationality Act of 1965.\textsuperscript{929}

\textsuperscript{919} Cf. ABRAMOWITZ, supra note 346, at xviii, 8–9 (discussing how racial differences drove partisanship and the rise of President Trump).
\textsuperscript{920} Id. at 8–9.
\textsuperscript{921} LEVITTSKY & ZIBLATT, supra note 35, at 227, 231.
\textsuperscript{922} MOUNK, supra note 31, at 162–63.
\textsuperscript{923} See id. at 164.
\textsuperscript{924} See id. at 168–69.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{928} ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 70 (1998).
\textsuperscript{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. Most of them still lived in the South, where they were generally disfranchised. Whites were about ninety-three percent of Democratic voters and ninety-seven percent of Republican voters. Up until the mid-twentieth century, the major parties did not fundamentally disagree on issues of race. Both parties had liberal and conservative wings, on race and in general. African Americans voted roughly two to one Democratic in presidential elections in the 1950s, mostly because they had benefited from New Deal economic policies. 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. 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. 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.

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. Rockefeller, the liberal governor of New York, enjoyed strong support among black leaders. Goldwater, the conservative senator from Arizona, was one of only six Republican senators to vote against that year’s landmark Civil Rights Act. Senator Goldwater believed that

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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; Klaman, Jim Crow, supra note 233, at 110–11.
937 Abramowitz, supra note 346, at 19, 22, 24.
938 See id. at 22–23, 28.
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

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944 See Berman, supra note 7, at 146–47; see also Kabaservice, supra note 939, at 101; Lowndes, supra note 942, at 63, 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, 72 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

955 See, e.g., ABRAMOWITZ, supra note 346, at 8–9, 25, 31, 33–34, 39.
957 See MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 6–7 (2007) [hereinafter KLARMAN, UNFINISHED BUSINESS].
959 See KLARMAN, JIM CROW, supra note 233, at 264, 464; KLARMAN, UNFINISHED BUSINESS, supra note 957, at 141–42, 191, 217–18.
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. In 1966, no blacks attended the South Carolina Republican convention, which featured a large Confederate flag. The Los Angeles Times wrote: “The party of Lincoln has become the party of the white man in much of Dixie.”

As the Republican presidential candidate in 1968, Richard Nixon made a deal with Senator Thurmond to consummate the party’s hold on southern whites. 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. With the segregationist Wallace running on Nixon’s right flank as an independent, Nixon campaigned on thinly disguised racial themes such as the promotion of “law and order” and opposition to “forced busing.”

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. Nixon and Wallace together won just under seventy percent of the votes in the states of the former Confederacy. 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. President Nixon also nominated conservative southerners to the Supreme Court seat vacated by Justice Fortas. For decades since President Nixon’s election, the Republican Party has made “subtle and not-so-subtle appeals to racial fears and prejudice” on issues such as crime, welfare programs, and race-based affirmative action.

963 Berman, supra note 7, at 71.
964 Id.
966 Lowndes, supra note 942, at 111–12; Perlstein, supra note 965, at 284, 300.
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.
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. In 1972, southern whites who self-identified as conservative favored the Democratic Party by a margin of five percentage points. By 1988, they favored the Republican Party by a margin of forty-one points.

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. The 1974 off-year elections were a disaster for Republicans, and President Nixon’s successor, President Gerald Ford, was narrowly defeated in the 1976 presidential election. Second, Jimmy Carter, the former Governor of Georgia, proved an ideal presidential candidate to hold together the Democratic coalition in 1976. Although Carter ran for President as a New South governor who whistled a different tune on race, he was also a Southern Baptist and Sunday School teacher, as well as the first born-again Christian to occupy the White House. 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.

Ronald Reagan, in alliance with southern evangelical leaders such as Jerry Falwell, accelerated the conversion of southern whites into ardent Republicans. 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. 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. Before an almost entirely white audience, Reagan,

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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.
985 See ABRAMOWITZ, supra note 346, at 30, 32, 34–37; BLACK & BLACK, supra note 953, at 142.
987 BERM, supra note 7, at 18, 124.
988 Id. at 121–24; BLACK & BLACK, supra note 953, at 216.
an opponent of the 1960s civil rights legislation, defended “states’ rights,” a traditional rallying cry among southern segregationists.

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. 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. 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.

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, and in 1988, Democrats still controlled every governorship and state legislative chamber in the former states of the Confederacy. One important development enabling Republicans to improve their performance in those fora was the majority-minority voting district. In 1986, the Supreme Court interpreted the 1982 amendments to section 2 of the Voting Rights Act 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.
994 See Berman, supra note 7, at 188.
995 See Abramowitz, supra note 346, at 42.
majority of the district’s population. Republicans quickly realized that maximizing the number of majority-minority districts in the South would benefit Republican candidates in the surrounding districts. 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.

The Republican strategy of maximizing majority-minority districts paid off handsomely. 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.

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. In that year’s southern congressional elections, Democrats won ninety-one percent of black votes but only thirty-five percent of white votes. 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. Over the following twenty years, Republicans seized control of all the legislatures in the former Confederate states.

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. Whites were nearly ninety percent of all Americans in the 1950s. By 1990, they were just over eighty percent. In 2020, they are estimated to be just under sixty percent.

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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.
1007 See Abramowitz, supra note 346, at 8, 40–50.
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.\textsuperscript{1011} In the 1950s, nonwhites were just five percent of the national electorate, but in the mid-1980s, they comprised eighteen percent,\textsuperscript{1012} mostly because the Voting Rights Act enfranchised millions of southern blacks.\textsuperscript{1013} People of color were seven percent of Democratic voters in the 1950s, but they were twenty-nine percent by the mid-1980s.\textsuperscript{1014} These demographic changes have only accelerated over the last two decades.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1017} Today, immigrants and their children are one in every four Americans, and they are mostly Latino and Asian.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1020} In 2004, the U.S. Census Bureau projected that the nation would no longer be majority white by 2050, a benchmark later advanced

\textsuperscript{1011}See Abramowitz, supra note 346, at 8.
\textsuperscript{1012}Id. at 38.
\textsuperscript{1013}See id. at 30, 126.
\textsuperscript{1014}Id. at 38.
\textsuperscript{1016}Abrajano & Hajnal, supra note 1015, at 1.
\textsuperscript{1017}Jardina, supra note 787, at 10, 158; see also Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.
\textsuperscript{1018}Abrajano & Hajnal, supra note 1015, at 1, 29.
\textsuperscript{1020}See Klein, supra note 347, at 106.
Whites will probably become a minority of the electorate a decade or two after that benchmark date. As one demographer observed: “No other country has experienced such rapid racial and ethnic change.”

Signs of these demographic shifts are everywhere — in the streets, at sporting events, on television, and in the form of a biracial President. 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.

Demographic changes such as these and projections of even more dramatic ones to come are disturbing to many white Americans. Members of traditionally dominant social groups often normalize their group identities. 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.

Throughout American history, large-scale immigration that alters the ethnic or racial composition of the population has generated political and social backlash. 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. A wave of German and Irish Catholic immigration around 1850 birthed the anti-immigrant Know Nothing Party, which enjoyed some electoral success. Large numbers of Chinese immigrants on the West Coast inspired electoral competition between Democrats and

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1022 Abramowitz, supra note 346, at 50.


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.


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.\footnote{1032}{DANIELS, supra note 928, at 35–36, 44–45, 54–56.}

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.\footnote{1033}{See ABRAMOWITZ, supra note 346, at xviii.} In the 1980s, white Democrats and white Republicans did not differ much in levels of racial resentment,\footnote{1034}{See id. at 130.} and Democrats and Republicans did not hold notably different views toward immigration-related legislation.\footnote{1035}{See ABRAJANO & HAJNAL, supra note 1015, at 13–14.}

Since then, however, racially conservative whites have flocked to the Republican Party.\footnote{1036}{See ABRAMOWITZ, supra note 346, at 8–9; see also ABRAJANO & HAJNAL, supra note 1015, at 13–14.} Today, very negative views toward illegal immigration strongly predict support for the Republican Party.\footnote{1037}{See ABRAJANO & HAJNAL, supra note 1015, at 194.} At the same time, people of color have become an increasingly large share of Democratic voters.\footnote{1038}{See id. at 6; ABRAMOWITZ, supra note 346, at 9.} Between 1992 and 2012, the nonwhite share of Democratic voters increased from twenty-one to forty-five percent.\footnote{1039}{See ABRAJANO & HAJNAL, supra note 1015, at 1015.} Moreover, the whites who remained in the Democratic Party have become even more liberal on racial issues,\footnote{1040}{See Klein, supra note 347, at 68, 70–71, 73–74, 110.} 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.\footnote{1041}{See ABRAJANO & HAJNAL, supra note 1015, at 31, 40.}

This cycle of political change is self-reinforcing.\footnote{1042}{See ABRAMOWITZ, supra note 346, at 130.} 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.\footnote{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).} By 2013, Latinos were thirty-eight percent of California’s population and nineteen percent of its state legislators, most of them Democrats.\footnote{1044}{See Klein, supra note 347, at 34–46.} 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.\footnote{1045}{See ABRAJANO & HAJNAL, supra note 1015, at 194.} More than forty percent of the current Democratic caucus in the U.S.
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

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 Abramajano & 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

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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 BERM, supra note 7, at 247; FED. ELECTION COMM’N, supra note 451, at 5.
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.\textsuperscript{1064} Negative views toward undocumented immigrants also correlated with support for McCain, especially among white independent voters.\textsuperscript{1065}

Studies have shown that attitudes toward race increasingly shaped attitudes on most political questions during Obama’s presidency.\textsuperscript{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.\textsuperscript{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,\textsuperscript{1068} even though, during his first term, President Obama explicitly discussed race less than any previous Democratic President since Franklin D. Roosevelt.\textsuperscript{1069}

President Obama would not have been reelected in 2012 without the strong support of nonwhite voters.\textsuperscript{1070} Republican candidate Mitt Romney won among independents, which McCain had failed to do four years earlier.\textsuperscript{1071} Romney won by larger margins among older voters and white Catholic voters than McCain had and by an overwhelming margin among white evangelicals.\textsuperscript{1072} President Obama’s share of the white vote declined from forty-three percent in 2008 to thirty-nine percent in 2012.\textsuperscript{1073} Among white voters, Romney won by twenty percentage points, marking an unprecedented rejection among white voters of a successful Democratic presidential candidate.\textsuperscript{1074}

Yet President Obama won the national popular vote in 2012 by almost four percentage points.\textsuperscript{1075} For the first time, blacks turned out to vote in a presidential election at a higher rate than whites turned out.\textsuperscript{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.\textsuperscript{1077}

\textsuperscript{1064} See id.; MICHAEL TESLER, POST-RACIAL OR MOST-RACIAL?: RACE AND POLITICS IN THE OBAMA ERA 18 (2016).
\textsuperscript{1065} ABRAJANO & HAJNAL, supra note 1015, at 101–02.
\textsuperscript{1066} KLEIN, supra note 347, at 109; see id. at 107–09; SIDES ET AL., supra note 585, at 25–31.
\textsuperscript{1067} KLEIN, supra note 347, at 109.
\textsuperscript{1068} Id. at 109–10; SIDES ET AL., supra note 585, at 30–31.
\textsuperscript{1069} KLEIN, supra note 347, at 110.
\textsuperscript{1070} ABRAMOWITZ, supra note 346, at 50.
\textsuperscript{1071} ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA 100 (2016).
\textsuperscript{1072} Id.
\textsuperscript{1073} JARDINA, supra note 787, at 218.
\textsuperscript{1074} See ABRAMOWITZ, supra note 346, at 128.
\textsuperscript{1075} Id.
\textsuperscript{1076} BERMAN, supra note 7, at 11.
\textsuperscript{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. President Obama defeated Romney by five million votes among voters under the age of thirty. 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. 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. 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. Donald Trump may have taken notice.

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. 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. Trump eventually chose as campaign manager a leader of the white nationalist alt-right movement, Steve Bannon.

High racial resentment among Republicans set the stage for Trump’s emergence as the frontrunner during the primaries. Seventy-two percent of registered Republican voters still doubted President Obama’s American citizenship in the summer of 2016, 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 25.
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.
by nearly a two-to-one margin. In the primaries, no other measured variable came close to racial resentment in predicting support for Trump. 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.

During the 2016 general election, of course, the strongest predictor of voting behavior was party identification. Yet differences between the racial resentment scores of the two parties’ white voters had never been greater. 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. 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. 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.

White working-class voters proved critical to President Trump’s victory. 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). 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. Among white working-class men, Trump defeated Hillary Clinton by forty-eight percentage points.

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. Yet the evidence better supports the hypothesis that racial resentment drove Trump’s success with

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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.\textsuperscript{1102} Higher education correlates strongly with lower racial resentment and prejudice.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1105} Much of that pessimism seems rooted in dissatisfaction with the nation’s changing racial demographics.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1109} Heading into the 2018 midterms, he sought to mobilize his base by suggesting that he would revoke birthright citizenship by executive order, which the Fourteenth Amendment plainly does not permit.\textsuperscript{1110} President Trump’s Justice Department essentially ended the pursuit of consent decrees against police departments

\textsuperscript{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.
\textsuperscript{1103} See ABRAMOWITZ, supra note 346, at 157; JARDINA, supra note 787, at 94, 96.
\textsuperscript{1104} See DIAMOND, supra note 28, at 31; JARDINA, supra note 787, at 94, 140–41.
\textsuperscript{1105} ABRAMOWITZ, supra note 346, at 14.
\textsuperscript{1106} See id.; KLEIN, supra note 347, at 106, 114–15.
\textsuperscript{1107} See JARDINA, supra note 787, at 7–8, 42, 144.
\textsuperscript{1108} ABRAMOWITZ, supra note 346, at 171.
\textsuperscript{1110} See Julie Hirshfeld 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. 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.”

President Trump’s 2020 reelection campaign has stoked racial controversy at every turn. 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. He has called a Black Lives Matter sign a “symbol of hate,” labeled racial justice protestors “ANARCHISTS,” defended statues of Confederate war heroes, and told Americans “living their Suburban Lifestyle Dream” that he would protect them from “having low income housing built in [their] neighborhood.”

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.

Historically, religion has played an important role in American society, and Americans still tend to be more religious than residents of other Western nations. Most conservative white evangelical Protestants believe that the United States was founded as a Christian nation, a position the Supreme Court embraced in 1892. At the Founding, the United States was an overwhelmingly Protestant nation, and around 1850, as the first big waves of Irish Catholic immigration began,

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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/3iK55cm [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/2Y3MV54 [https://perma.cc/S4K9-CMS3].
1117 See Haberman, supra note 1113.
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.\textsuperscript{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.\textsuperscript{1123} Catholics and Jews were generally tolerated but not accommodated.\textsuperscript{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.\textsuperscript{1125} Jews and Catholics gradually assimilated, but the Protestant establishment remained hegemonic well into the twentieth century.\textsuperscript{1126}

In the 1920s, the Protestant establishment divided in response to challenges posed by modernity to religious fundamentalism.\textsuperscript{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.\textsuperscript{1128} Fundamentalists emphasized a literal reading of the Bible and protested the teaching of evolution in public schools.\textsuperscript{1129} Both groups assumed the United States was a Christian nation.\textsuperscript{1130}

Religiosity in general, and Christianity in particular, appeared to thrive in the post–World War II years.\textsuperscript{1131} Many Americans seemed to derive great comfort from the thought that God was on their side in the Cold War against atheistic communism.\textsuperscript{1132} President Eisenhower declared: “Without God there could be no American form of government, nor an American way of life.”\textsuperscript{1133} Congress added “under God” to the Pledge of Allegiance and put “In God We Trust” onto currency.\textsuperscript{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.\textsuperscript{1135} Around this time, nearly eighty percent of all


\textsuperscript{1123} See Klarman, Rethinking, supra note 1122, at 47.

\textsuperscript{1124} See, e.g., id. at 49–50.

\textsuperscript{1125} Id.

\textsuperscript{1126} See id. at 49–57.

\textsuperscript{1127} See JONES, supra note 1071, at 12, 31–32; WILLIAMS, supra note 984, at 2, 12–14.

\textsuperscript{1128} FEA, supra note 1119, at 105.

\textsuperscript{1129} Id. at 105–07.

\textsuperscript{1130} Id. at 106.

\textsuperscript{1131} Id. at 47–48.

\textsuperscript{1132} Id. at 46–48; WILLIAMS, supra note 984, at 18–28.

\textsuperscript{1133} FEA, supra note 1119, at 47–48.

\textsuperscript{1134} Id. at 48.

\textsuperscript{1135} ABRAMOWITZ, supra note 346, at 27; FEA, supra note 1119, at 48.
voters were married white Christians, split evenly between the parties. Abortion and gay rights were not yet major subjects of political debate.

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, 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. 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. The following year, the Court struck down laws that mandated Bible reading in public schools. Later rulings protected pornography under the First Amendment and invalidated most schemes to provide public financial assistance to private religious schools. 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.

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. Divorce rates skyrocketed. Legislatures and then courts liberalized abortion access. Second-wave feminism challenged traditional gender roles. The civil rights movement and the women’s rights movement spawned a gay rights movement.

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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)).
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.
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. Beginning in the 1960s and 1970s, however, evangelical Protestants criticized strong separationists as advocates of "secular humanism" who were undermining Christian values.

In the mid-1970s, Christian evangelicals and Catholic conservatives mobilized a right-to-life movement in response to Roe v. Wade. Previously, the Catholic Church had been the most vocal opponent of abortion liberalization, and most evangelicals had not taken a strong position. 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.

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. In the 1970s, however, he argued that evangelical political participation was necessary to prevent secular humanism from destroying America’s Christian identity. 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. In 1979, Falwell established a fundraising organization, the Moral Majority, to encourage people of faith to pursue political power for those same ends. 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.

The political mobilization of conservative Christians did not occur entirely apart from racial considerations. In the 1950s, about ninety

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1149 Klarman, Rethinking, supra note 1122, at 47–48.
1150 FEA, supra note 1119, at 56; 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.
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.
percent of private school students attended Catholic parochial schools, and Protestants had long opposed public funding for such institutions. However, in the wake of *Brown*, hundreds of private Protestant segregationist academies opened in the South. As non-profit organizations, they enjoyed tax-exempt status. 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. 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. In 1983, the Court sustained the IRS’s policy against a First Amendment challenge.

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. Over that same time period, political divisions among whites increasingly reflected religiosity. 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.

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. Reagan was an unlikely champion of evangelicals, given his divorce and remarriage, and his support as governor for an abortion liberalization


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1162 See Jeffries & Ryan, supra note 1161, at 240.


1164 Balmer, *supra note* 1159.


1167 See id. at 55–57.

1168 Id. at 12.

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. Falwell and other evangelical leaders shaped the Republican Party’s 1980 platform, which supported a constitutional amendment to protect the lives of “unborn children,” championed women as homemakers, and opposed the rescission of tax exemptions enjoyed by racially discriminatory educational institutions.

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. 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. 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.

The Moral Majority elected Republicans to national office, and the Christian Coalition, another conservative Christian organization, focused on local elections, especially for school boards. 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. 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.

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.”

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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.
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, Bush won roughly seventy percent of the votes of white evangelicals in the general election. 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.

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. 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. Officially sanctioned prayer in public school is still unconstitutional, and pornography is omnipresent on the internet. Homosexuality has been normalized to a great extent in American culture, and gay marriage is a constitutional right.

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. Many new immigrants were Muslims, Hindus, Buddhists, or adherents of other religions. 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.

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. A similar decline among white evangelicals came a generation later, as they fell from twenty-one percent of the population in 2008 to fifteen

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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.
1186 FEA, supra note 1110, at 64, 148.
1189 FEA, supra note 1110, 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. Protestants of all denominations and races fell from sixty-three percent of the population in 1974 to forty-seven percent in 2014.

Likewise, the share of the population occupied by white Catholics fell from twenty-two percent in 1990 to thirteen percent in 2014. 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. 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.

The generational breakdown of these numbers is cause for even greater alarm among Christian conservatives. 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. 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.

Many young evangelicals are repudiating their elders’ culture-war agenda (more than they are abandoning their belief in God). 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.” A generation of young evangelicals grew up in a religious community deeply opposed to gay equality and a broader culture strongly

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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.
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-5SKU]. 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. Fifty-three percent of white evangelicals aged eighteen to twenty-nine now support gay marriage. Thirty-one percent of millennials attribute their disaffiliation with their childhood religion partly to church teachings regarding homosexuality.

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. The election of 2024 will probably be the first in American history in which white Christians are not a majority of voters.

Obergefell v. Hodges, which held that same-sex marriage was constitutionally protected, was decided in the penultimate year of the presidency of Barack Hussein Obama, who was himself “an exotic figure” to many conservative white evangelicals. 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. 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.

After Obergefell, the Obama Administration opposed efforts by conservative Christians to carve out religious exemptions to antidiscrimination laws for opponents of gay marriage. 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. 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.
1204 Id. at 103.
1205 Id. at 105.
1206 Id.
1208 See id. at 2604–05, 2628.
1209 FEA, supra note 1119, at 18; see also Jones, supra note 1071, at 40–41.
1210 Id. at 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.
based on sexual orientation. 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.

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. Trump did not speak like a religious person and had never been a regular churchgoer. He had been married three times and was widely believed to have cheated on each of his wives. He rarely admitted error or assumed responsibility, and he had stated publicly that he had never asked for God’s forgiveness.

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. Trump then questioned whether Seventh-day Adventists like Carson qualified as Christians. 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. Trump never again lost the lead among white evangelical primary voters, seventy-two percent of whom believe that Islam is incompatible with democracy.

After securing the Republican nomination, Trump cultivated support among many initially skeptical conservative white evangelicals. He selected as his running mate Governor Mike Pence of Indiana, who had a sterling evangelical background. He created an advisory board of

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1215 JONES, supra note 1071, at 86; see also id. at 85–87.

1216 See FEA, supra note 1119, at 13–14, 30.


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.\textsuperscript{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.\textsuperscript{1227}

On October 7, 2016, The Washington Post published the \textit{Access Hollywood} video, in which Trump bragged that he was so famous he could grab women “by the pussy” without repercussion.\textsuperscript{1228} His polling numbers fell, and many Republicans demanded that Governor Pence replace him at the top of the ticket.\textsuperscript{1229} Conservative Christian leaders intervened to help save Trump’s candidacy.\textsuperscript{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.\textsuperscript{1231} Trump won eighty-one percent of white evangelical voters in the general election, the largest such margin in the past two decades.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{1235} and urged the Court to hold that the 1964 Civil Rights Act permits

\textsuperscript{1226} Id.
\textsuperscript{1227} \textsc{Abramowitz, supra note 346, at 170; FEA, supra note 1119, at 66.}
\textsuperscript{1228} FEA, supra note 1119, at 67.
\textsuperscript{1230} \textsc{See FEA, supra note 1119, at 67–68.}
\textsuperscript{1231} \textsc{See id. at 5, 138, 140.}
\textsuperscript{1232} \textsc{Id. at 5–6.}
\textsuperscript{1233} \textsc{See Carl Hulse, With Wilson Confirmation, Trump and Senate Republicans Achieve a Milestone, N.Y. Times (June 24, 2020), https://nyti.ms/3g565Yn [https://perma.cc/L5HC-LAAH]; Ruiz et al., supra note 335.}
\textsuperscript{1235} \textsc{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/2019/9/30/20890043/trump-justice-department-constitution-discrimination-lgbtq-catholic-church [https://perma.cc/89LG-VA3Z]; see also FEA, supra note 1119, at 140–41.}
employment discrimination based on sexual orientation or gender identity. President Trump also moved the U.S. embassy in Israel to Jerusalem.

One Republican Senate candidate in Alabama recently declared: “God sent us Donald Trump because God knew we were in trouble.” Falwell Jr. calls Trump the evangelicals’ “dream president” and affirms that nothing President Trump might do would jeopardize his support among them.

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. Their project in the summer of 1787 was to design a system of government that would retain its representative character while “refining and enlarging” the popular will to ensure the security of property rights.

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. 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. In *Dred Scott v. Sandford*, the Supreme Court sided with Senator Calhoun’s view of the property rights

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1239 FEA, supra note 1116, at 124; see also id. at 120.
1241 THE FEDERALIST NO. 10, supra note 717, at 76 (James Madison); see also KLARMAN, FRAMERS’ COUP, supra note 340, at 171–72, 176.
1243 See RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 83–91 (1948); see also MACLEAN, supra note 65, at 2–5.
of southern slaveholders, barring Congress from denying them equal access to the federal territories with their slave “property.”

During the *Lochner* 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.

The Great Depression and the New Deal ended the *Lochner* era. 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.

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. Big business opposed many of these policies, as did many Republicans, but both groups had been discredited by the Great Depression.

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. 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

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1245 DON E. FEHRENBACKER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 363 (1978); see also id. at 364.


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).


1251 See, e.g., id. at 134–37, 140–43; see also BURGIN, *supra* note 1249, at 4, 13–14, 27–29.

annual income, an expansion of Social Security, and major environmental and consumer protection laws. The Chamber of Commerce, which had bitterly fought the New Deal, adjusted to the new postwar reality and accepted labor unions and Keynesian economics.

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. 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. 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. 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].”

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. 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. 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.

Because many of the leading libertarian thinkers sympathized with southern whites’ massive resistance to Brown, this section’s explanation for the degradation of American democracy cannot be neatly separated from the racial explanation already discussed. Libertarians were
unlikely critics of Brown, which barred coercive government segregation. 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. Brown also facilitated libertarian alliances with racist white southerners, who enthusiastically embraced “freedom of choice” plans to curtail school desegregation.

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. 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. 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.

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. 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. 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.
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.
\(^{1281}\) MACLEAN, supra note 65, at 127–29; M AY E R, supra note 354, at 35–38.
\(^{1282}\) M AY E R, supra note 354, at 47.
\(^{1283}\) MACLEAN, supra note 65, at 129; M AY E R, supra note 354, at 50–52.
\(^{1284}\) HACKER & P IERSON, supra note 352, at 230–31.
libertarians. Their goal was to eliminate government as much as possible, not to make it more efficient.

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. 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. They also invested heavily in universities, creating fellowships and professorships at a time when few academics shared their philosophy.

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. 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.

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. Such policies were not popular with most Americans, whose economic views had not shifted significantly to the right. 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
Second, the libertarians found willing foot soldiers, whose motivations differed from those of their wealthy backers. 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.”

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. Opposition to public education came naturally to southern white evangelicals, who often paid tuition to send their children to segregated private academies. Calls to end government antipoverty programs resonated with those who preferred Christian charity to government “handouts.” 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.

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. 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. Anthony Kennedy, later President Reagan’s third appointment to the Supreme Court, was the Institute’s vice president.

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1294 See infra section III.E, pp. 195–211.
1295 See HACKER & PIERSON, supra note 352, at 249–50.
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 130.
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

1306 HACKER & PIERSON, supra note 352, at 169.
1307 Id. at 170–71.
1308 See id. at 196–97.
1309 Id. at 197.
1311 See HACKER & PIERSON, supra note 352, at 197–98.
1312 MOUNK, supra note 31, at 218.
1313 Id.
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.
free trade agreements that contributed to the loss of hundreds of thousands of American jobs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1334} The Koch political network employs three times as many people as the Republican Party.\textsuperscript{1335}

The political influence of Koch money has been most apparent in Republican environmental policies.\textsuperscript{1336} The number of Americans believing in human-caused climate change dropped dramatically between 2007 and 2011,\textsuperscript{1337} coinciding precisely with the Kochs’ first big political investments.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1340}

\begin{itemize}
\item \textsuperscript{1330} SITARAMAN, \textit{supra} note 1292, at 17; Jeff Faux, \textit{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].
\item \textsuperscript{1331} See ADAM COHEN, \textit{SUPREME INEQUALITY: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA} 244 (2020).
\item \textsuperscript{1332} See HACKER & PIERSON, \textit{supra} note 352, at 228–29, 234; MAYER, \textit{supra} note 354, at 293–96.
\item \textsuperscript{1333} HACKER & PIERSON, \textit{supra} note 352, at 235–56; MAYER, \textit{supra} note 354, at 16–24.
\item \textsuperscript{1334} MAYER, \textit{supra} note 354, at 384–87, 405, 451–55; PAGE & GILENS, \textit{supra} note 533, at 99.
\item \textsuperscript{1335} MACLEAN, \textit{supra} note 65, at xxxiii.
\item \textsuperscript{1336} See HACKER & PIERSON, \textit{supra} note 352, at 291–95; MAYER, \textit{supra} note 354, at 386–87.
\item \textsuperscript{1338} See MAYER, \textit{supra} note 354, at 293–96.
\item \textsuperscript{1339} MACLEAN, \textit{supra} note 65, at 216–17; MAYER, \textit{supra} note 354, at 341–42.
\end{itemize}
The neo–Ayn Randians have also undermined faith in public education and mobilized support for the privatization of other public services, such as prisons. The neo–Ayn Randians have also undermined the power of labor unions. The unionized share of the American labor force declined from thirty-three percent in 1955 to eleven percent in 2015. 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.

Since 2010, the neo–Ayn Randians have also achieved great success at the state level. 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. 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. In Kansas and Louisiana, radical neo–Ayn Randian experiments in tax cutting led to massive budget deficits and emaciated public education systems.

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.” By the end of their careers, the postwar generation of libertarian economists

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1342 See PAGE & GILENS, supra note 533, at 87, 127.
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.
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.\footnote{See \textit{MacLean}, \textit{supra} note 65, at 151.} 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.\footnote{See \textit{Mann} \\& \textit{Ornstein}, \textit{supra} note 996, at 118.} Another solution was to limit voting rights, much as the Framers had envisioned.\footnote{See \textit{Burgin}, \textit{supra} note 1249, at 118–19; \textit{Klarman, Framers’ Coup}, \textit{supra} note 340, at 178.} 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.\footnote{See \textit{MacLean}, \textit{supra} note 65, at 197.}

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.\footnote{See \textit{Hacker} \\& \textit{Pierson}, \textit{supra} note 352, at 252, 257–59.} 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.\footnote{See Ari Berman, \textit{The GOP’s Voter Suppression Strategy}, \textit{The Nation} (Nov. 20, 2012), \url{https://www.thenation.com/article/archive/gops-voter-suppression-strategy}.} 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.”\footnote{\textit{MacLean}, \textit{supra} note 65, at 207.}

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.\footnote{See \textit{Hacker} \\& \textit{Pierson}, \textit{supra} note 352, at 14–15.} 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.\footnote{See id. at 32–33, 35.} Much larger socioeconomic disparities in educational quality, funding, and outcomes exist in the United States than in other wealthy nations.\footnote{See id. at 34–35.} Most Americans would like their government to make higher education more affordable, but Congress has failed to act.\footnote{See \textit{Page} \\& \textit{Gilens}, \textit{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.\footnote{1362 See Hacker & Pierson, supra note 352, at 39, 100–01.} 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.\footnote{1363 Id. at 39.} 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.\footnote{1364 See id. at 318–19; Page & Gilens, supra note 533, at 74–75.} 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.\footnote{1365 See Hacker & Pierson, supra note 352, at 322, 343–44.}

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.\footnote{1366 See Page & Gilens, supra note 533, at 83–84.} 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.\footnote{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/faa-lax-oversight-played-part-in-boeing-737-max-crashes-but-agency-is-pushing-to-become-more-industry-friendly/2019/10/27/bcohf184-fge1-1169-ad8b-85e2aadobc8e_story.html [https://perma.cc/SM7K-V6ZU].}

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.\footnote{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].} The neo–Ayn Randians have long regarded science as an enemy because it demonstrates the need
to regulate industries such as tobacco, food, pharmaceuticals, and oil and
gas.  

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.  

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.  

Republicans labeled Dr. Anthony Fauci, the nation’s top infectious disease expert, an “agent of the ‘deep state’” who deliberately undermined President Trump.  

Conservative religious leaders attributed church shutdowns to a “perverse, even demonic atmosphere” that prevented people from practicing their faith.  

Many of President Trump’s supporters disbelieved the prognoses and prescriptions of scientists, which Democrats tended to trust.  

By early July, daily records of coronavirus cases were being set in the states that had reopened their economies first.

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, and, in turn, to the degradation of American democracy. Scholars have shown that democracy fares best when the working class


1373 Shepherd, supra note 901.


enjoys economic prosperity and that deteriorating economic conditions render such voters vulnerable to the appeal of autocratic demagogues.\textsuperscript{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.\textsuperscript{1378}

The golden age of economic equality in the United States was roughly the half century beginning with the Great Depression.\textsuperscript{1379} From approximately 1935 to 1960, the income of the median American household doubled and then doubled again by 1985.\textsuperscript{1380} Income inequality, as measured by the share of income held by the wealthiest one percent of the country, shrank roughly by half.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1384} In addition, a larger share of gross national product went to managers and stockholders.\textsuperscript{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.\textsuperscript{1386}

As incomes of the working class have stagnated while those of the affluent have skyrocketed, economic inequality in the United States has exploded.\textsuperscript{1387} The share of income accruing to the richest Americans today matches that of the late 1920s.\textsuperscript{1388} In 2007, the top one percent of earners received nearly twenty-five percent of all national income, and

\textsuperscript{1378} See MOUNK, supra note 31, at 232–34.
\textsuperscript{1379} See PAGE & GILENS, supra note 533, at 27, 246–47.
\textsuperscript{1380} MOUNK, supra note 31, at 15, 154; see also PAGE & GILENS, supra note 533, at 41.
\textsuperscript{1381} See MOUNK, supra note 31, at 152–53.
\textsuperscript{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).
\textsuperscript{1383} Id. at 28–29; see HACKER & PIerson, supra note 352, at 35.
\textsuperscript{1384} See PAGE & GILENS, supra note 533, at 43–44.
\textsuperscript{1385} See id. at 29.
\textsuperscript{1386} See id. at 28–30.
\textsuperscript{1387} Id. at 30 (noting economist Thomas Piketty’s characterization of the recent increase in income inequality as an “explosion”).
\textsuperscript{1388} Id.
half of that went to the top 0.1%.\textsuperscript{1389} Top earners today enjoy salaries on average 320 times that of ordinary workers, as compared with a 21-to-1 ratio in 1965.\textsuperscript{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%.\textsuperscript{1391} The United States is by far the most unequal wealthy nation in the world today.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1395} The United States ranked last in a study of life expectancy across seventeen wealthy nations.\textsuperscript{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.\textsuperscript{1397}

Economic dislocation can also mean lives lacking in “structure, status[,] and meaning.”\textsuperscript{1398} Those who remain employed may have jobs in which they are given little advance notice of which days or hours they

\textsuperscript{1389} Hacker & Pierson, supra note 352, at 183.
\textsuperscript{1390} Lawrence Mishel & Jori Kandra, CEO Compensation Surged 14% in 2019 to $21.3 Million, ECON. POL’V INST. (Aug. 18, 2020), https://epi.org/204513 [https://perma.cc/78HQ-GQ0Q] (studing ratios of compensation of chief executive officers to that of average workers); see also Page & Gilens, supra note 533, at 31.
\textsuperscript{1391} Mounk, supra note 31, at 218.
\textsuperscript{1392} See Hacker & Pierson, supra note 352, at 36 (comparing inequality in the United States to that of “other rich countries”).
\textsuperscript{1396} Hacker & Pierson, supra note 352, at 30.
\textsuperscript{1397} See Nicholas Kristof, Opinion, The Hidden Depression Trump Isn’t Helping, N.Y. Times (Feb. 8, 2020), https://nyti.ms/2H5HH08 [https://perma.cc/R0VQ-TLNP].
\textsuperscript{1398} Leonhardt & Thompson, supra note 1395.
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.1399

America is increasingly a country of two different economies, rapidly growing farther apart and correlated strongly with political affiliation.1400 Voters living in Democratic-leaning counties tend to be wealthier, better educated, and more productive.1401 In 1990, people in red and blue states had nearly the same life expectancies.1402 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.1403

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.1404 Government interventions can occur before or after market allocations of income.1405 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.1406 Higher taxes on top incomes, more expansive healthcare coverage, and wage supplements redistribute income after the market has allocated it.1407

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.
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.
1414 See PAGE & GILENS, supra note 533, at 103–04; SIDES ET AL., supra note 585, at 77–79.
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.\textsuperscript{1419} His tax bill was essentially a $1.5 trillion giveaway to corporations, their shareholders, and other wealthy individuals.\textsuperscript{1420} President Trump’s ballyhooed infrastructure bill never got off the ground and became a standing joke in Washington, D.C.\textsuperscript{1421} His trade war with China is not bringing back the manufacturing jobs he promised, and coal has made no comeback under his presidency.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1425}

\textbf{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


\textsuperscript{1420} \textsc{Sitaraman}, supra note 1292, at 78.

\textsuperscript{1421} See, e.g., Krugman, \textit{Tricked Down}, supra note 810.


\textsuperscript{1424} Krugman, \textit{Tricked Down}, supra note 810; see also \textsc{Wolff}, supra note 1229, at 118, 163, 166–67.

\textsuperscript{1425} See, e.g., Applebaum, supra note 810; Hook, supra note 335; Krugman, \textit{Tricked 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.

1. 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. 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. Trump won fifty-seven percent of white voters while Romney had won fifty-nine percent. 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. Trump won eighty-one percent of white evangelical voters, as compared with Romney’s seventy-eight percent. 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.

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. 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.

The parties of this era were also not sorted demographically; they closely resembled one another in terms of race, sex, and marital status. The primary exceptions were that white southerners were strongly Democratic, Protestants leaned Republican, and liberals were slightly more likely to be Democrats. The Republican Party’s nomination of Senator Goldwater for President in 1964 and his commitment to offering the country “a choice”

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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.
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. Yet Senator Goldwater’s massive defeat reinforced, in the short term, the notion that parties had to be ideologically moderate to be electorally competitive.

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. 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.

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. The strategy of Republican Minority Whip Gingrich to “nationalize” congressional elections had worked.

By 2012, the relationship between political ideology and party identification among white Democrats and white Republicans had strengthened considerably since the 1970s. 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. White conservatives had become two-thirds of the party. By contrast, self-identified conservatives were twenty-two percent of white Democratic voters in 1972 but only six percent forty years later.

Today’s congressional parties are almost perfectly sorted ideologically: the most conservative Democrat is more liberal than the most liberal Republican. 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.
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. 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. The partisanship effect now dominates any incumbency advantage. 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. Straight-ticket voting has also become dominant at the state legislative level.

That party identification is at an all-time low does not contradict the conclusion that voter partisanship is at an all-time modern high. In 2012, only sixty-three percent of voters self-identified as Democratic or Republican. Yet, when pushed to identify their party preferences, the vast majority of independents acknowledge that they lean toward one party or the other. As little as five to ten percent of today’s electorate is genuinely open to persuasion.

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.

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. 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

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1448 Abramowitz, supra note 346, at 2–3.
1449 See id. at 62.
1450 See id. at 67.
1451 See id. at 67.
1452 See id. 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 956, 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.\textsuperscript{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.\textsuperscript{1460}

Issue constraint is an illustration of how voters came to have political identities.\textsuperscript{1461} First, parties became ideologically sorted as voters gravitated toward the parties with which they were ideologically aligned.\textsuperscript{1462} Then, parties began to influence their members’ views, especially on issues with little ideological resonance.\textsuperscript{1463} For example, in 2012, most Republicans accepted presidential candidate Romney’s view that Russia was America’s most dangerous international foe.\textsuperscript{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.\textsuperscript{1465} Partisan identity played a critical role in this shift.\textsuperscript{1466}

Party identities become more polarizing as they overlap with characteristics that can be even more divisive than ideology, such as race and religion.\textsuperscript{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.\textsuperscript{1468} With regard to religion, the Republican Party remains overwhelmingly Christian while the religious affiliation with which the most Democrats

\textsuperscript{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).

\textsuperscript{1460} See id. at 117–18.

\textsuperscript{1461} See \textsc{Klein}, supra note 347, at 69–74.

\textsuperscript{1462} See id. at 135–36.


\textsuperscript{1464} Cf \textsc{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).


\textsuperscript{1466} See \textsc{Klein}, supra note 347, at 84.

\textsuperscript{1467} See id. at 68, 73–74, 136; see also \textsc{Levitsky & Ziblatt}, supra note 35, at 220; \textsc{Mason, supra note 1463}, at 14.

\textsuperscript{1468} \textsc{Klein, supra note 347}, at 37; \textsc{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.
1476 See KLEIN, supra note 347, at 85–86; Jonathan Rauch, Rethinking Polarisation, 41 NAT’L AFFS. 86, 91 (2010).
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. 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. 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. 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.

The Democratic Party’s demographic diversity has tempered its shift to the left. 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. 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. The Democratic Party is much more diverse along those dimensions. 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, while Democrats exhibit this psychological sorting only among whites: white Democrats overwhelmingly display a “fluid,” rather than

“fixed,” personality. 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.\textsuperscript{1491}

Uniting this diverse Democratic coalition requires more compromise than fusing the Republican coalition does.\textsuperscript{1492} Thus, unsurprisingly, more Democrats prefer politicians who compromise, while more Republicans prefer politicians who do not.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1495} The Democratic Party is forced to moderate itself ideologically to maximize its chances of political success.\textsuperscript{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.\textsuperscript{1497} Although Democratic big donors are not neo–Ayn Randians, their economic views are more conservative than those of the average Democratic voter.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1500} The Tea Party and

\textsuperscript{1490} See KLEIN, supra note 347, at 47, 230–31.
\textsuperscript{1491} See id. at 231; see also Edsall, supra note 1489.
\textsuperscript{1492} See KLEIN, supra note 347, at 231.
\textsuperscript{1493} See MANN & ORNSTEIN, supra note 996, at 56, 212.
\textsuperscript{1494} See KLEIN, supra note 347, at 247.
\textsuperscript{1495} See id. at 240–41; infra section IV.A, pp. 231–42.
\textsuperscript{1496} See KLEIN, supra note 347, at 241, 247.
\textsuperscript{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.
\textsuperscript{1498} See PAGE & GILENS, supra note 533, at 108, 163.
\textsuperscript{1499} See, e.g., KLEIN, supra note 347, at 228.
\textsuperscript{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/1k1gb9 [https://perma.cc/9359-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

1502 See MANN & ORNSTEIN, supra note 996, at xv–xvi, 216–17.
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 (2010).
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.\textsuperscript{1510} The sort of news that appeals to such partisan consumers — a repetitious message of political Manichaeism — simply hardens political identities and exacerbates polarization.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1513} They estimated that forty-six percent of Democrats are African American, when the real number is about twenty-four percent.\textsuperscript{1514} Democrats estimated that forty-four percent of Republicans earn over $250,000 a year, when the actual number is two percent.\textsuperscript{1515} The more partisan political media a viewer consumed, the more mistaken their views of the other party became.\textsuperscript{1516}

However, Fox News goes beyond politicizing its programming to distorting facts and confirming viewers’ biases regardless of the underlying facts.\textsuperscript{1517} Many of its journalists make no pretense of objectivity or political neutrality.\textsuperscript{1518} The network does not consistently practice fact-checking or source stories as an ordinary news organization would,\textsuperscript{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.\textsuperscript{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.\textsuperscript{1521}

At the invitation of then–Fox News chief executive Roger Ailes, Trump began appearing on the program \textit{Fox \& Friends} on a weekly basis in 2011, soon becoming the leading exponent of the racist “birther”

\begin{enumerate}
\item KLEIN, supra note 347, at 146–47.
\item See ABRAHOWITZ, supra note 346, at 5; KLEIN, supra note 347, at 148–49, 156–60; MANN \& ORNSTEIN, supra note 996, at 60–61.
\item See KLEIN, supra note 347, at 148.
\item See id. at 148–49.
\item See id. at 149.
\item See id. at 149.
\item See id. at 149.
\item See BENKLER ET AL., supra note 1503, at 83–84; Mayer, supra note 281.
\item 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).
\item See Mayer, supra note 281.
\item See Mayer, supra note 281.
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. 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.

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. 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” conspiracy and a “hoax” and diverted attention to the alleged criminality of Hillary Clinton and Joe Biden. Much of Fox’s programming gradually abandoned any pretense of objectivity and became “state TV” for President Trump.

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. 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.

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. Most Republicans’ information ecosystems lack such diversity. Because many Republicans regard traditional media as biased, they have sought alternative sources of information featuring

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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 & PIERNER, 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 55, 60–63, 324; KLEIN, supra note 347, at 234–36.
almost entirely conservative voices, some of which are simply propagandistic. A recent survey found that sixty percent of Republicans got news from Fox over the past week. No media outlet on the political left commands that amount of attention.

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. As late as the 1980s, there was little continuity in how particular states voted in consecutive presidential elections. Today, the states are so thoroughly sorted politically that at most eight to ten of them are seriously contested in any given presidential election.

The geographic sorting of political and ideological identity exists down to the county level. 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. 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. There are no longer any big cities regularly won by Republican candidates, and there are few rural areas carried by Democratic ones. The overlap between partisan and geographic sorting is significant because geography plays a powerful role in constructing identity.

(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.

1534 See KLEIN, supra note 347, at 236–38.
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.
1540 See KLEIN, supra note 347, at 39; PAGE & GILENS, supra note 533, at 161.
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.\textsuperscript{1546} Legislators holding safe seats face little risk of losing general elections and instead worry mainly about primary challenges.\textsuperscript{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.\textsuperscript{1548} In addition, voter turnout is much lower in primaries.\textsuperscript{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.\textsuperscript{1550}

Partly because of gerrymandering but mostly because of geographic sorting, the number of safe congressional seats has dramatically increased in recent decades.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1553}

The risk of being “primaried” now exercises significant disciplining influence over officeholders, especially Republicans.\textsuperscript{1554} Even if serious primary challenges are relatively rare, those that succeed are salient and have significant incentive effects.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{1557} whom they accused of favoring “amnesty” for undocumented immigrants.\textsuperscript{1558} Likewise, in March

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\item \textsuperscript{1546} PAGE & GILENS, supra note 533, at 160; see id. at 160–61, 220; see also DIAMOND, supra note 28, at 266.
\item \textsuperscript{1547} See DIAMOND, supra note 28, at 263, 266; KLEIN, supra note 347, at 180–81; PAGE & GILENS, supra note 533, at 159–60.
\item \textsuperscript{1548} See, e.g., PAGE & GILENS, supra note 533, at 58, 159.
\item \textsuperscript{1549} See KLEIN, supra note 347, at 178; PAGE & GILENS, supra note 533, at 58, 159–60.
\item \textsuperscript{1550} See KLEIN, supra note 347, at 178–79; PAGE & GILENS, supra note 533, at 58.
\item \textsuperscript{1551} See PAGE & GILENS, supra note 533, at 160–61; see also ABRAMOWITZ, supra note 346, at 95–96.
\item \textsuperscript{1552} See ABRAMOWITZ, supra note 346, at 95.
\item \textsuperscript{1553} See id.
\item \textsuperscript{1554} See KLEIN, supra note 347, at 180–81; PAGE & GILENS, supra note 533, at 159–60.
\item \textsuperscript{1555} See KLEIN, supra note 347, at 181; see also HACKER & PIERSON, supra note 352, at 240.
\item \textsuperscript{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/1kk058y [https://perma.cc/KN5J-H9L7/U].
\item \textsuperscript{1557} See PAGE & GILENS, supra note 533, at 160.
\item \textsuperscript{1558} Martin, supra note 1556.
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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1561} Large political donors generally seek to advance a particular policy agenda that may be inconsistent with the policies favored by most Americans.\textsuperscript{1562} Two-thirds of the billionaires who made publicly reported political donations in 2011–2012 contributed primarily or exclusively to Republicans.\textsuperscript{1563} Particularly in low-salience and low-turnout elections like primaries and state legislative contests, such contributions can shift election results to the right.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1566} While forty-five percent of nondonors describe themselves as moderates, only sixteen percent of donors do so.\textsuperscript{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.\textsuperscript{1568}

\textsuperscript{1559} See Emmarie Huetteman, \textit{Backlash as Senator Breaks Ranks on Supreme Court Hearings}, N.Y. TIMES (Mar. 25, 2016), https://nyti.ms/1R4VCq [https://perma.cc/WN2F-SGP3].
\textsuperscript{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/1V7SK4S [https://perma.cc/472Q-HRSE].
\textsuperscript{1561} See PAGE & GILENS, supra note 533, at 165; infra section III.E, pp. 195–211.
\textsuperscript{1563} PAGE & GILENS, supra note 533, at 107.
\textsuperscript{1564} See id.
\textsuperscript{1566} See KLEIN, supra note 347, at 183–85, 189–90; Richard H. Pildes, \textit{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].
\textsuperscript{1567} Pildes, supra note 1566.
\textsuperscript{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-
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

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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. 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.

After Barack Obama was elected President, Republican congressional leaders resurrected Speaker Gingrich’s obstructionist tactics, but on steroids. 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. The favorable votes of three Republican senators were the “high-water mark” of Republican cooperation with President Obama. Republican leaders had decided not to support any legislation that might help President Obama politically. 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.” 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.

Republican hardball proliferated during Obama’s presidency. Democrats controlled the Senate for the first six years of Obama’s presidency, leading to a vast expansion in Republican use of the filibuster. 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. The Senate took only 49 votes to cloture filibusters between

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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 96, at 110.
1599 See Hacker & Pierson, supra note 352, at 157; Mann & Ornstein, supra note 96, 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 96, at 190.
1603 See Krugman, Microbe Meltdown, supra note 858.
1605 See Levitsky & Ziblatt, supra note 35, at 163; Mann & Ornstein, supra note 96, 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 programatically 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.
1614 See MANN & ORNSTEIN, supra note 996, at 94–98, 166.
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/6MD-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.\textsuperscript{1628} Strong partisan identities can influence attitudes and behavior as much as, if not more than, political ideology and pursuit of policy objectives.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1631} In other words, people will often punish out-groups gratuitously,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1636} By 2010, however, forty-nine percent of Republicans and thirty-three percent of Democrats expressed opposition to such an interparty marriage.\textsuperscript{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.\textsuperscript{1638} In
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

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.
1659 See Serwer, supra note 198.
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
likely to disparage the seriousness of the pandemic\(^{1672}\) 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.\(^{1676}\) Large[ly] 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

\(^{1672}\) See id.


\(^{1674}\) 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.


\(^{1678}\) 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/6gA5-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.\textsuperscript{167} Fox News viewers were more likely to approve of the Trump Administration’s response than those who trust other media sources,\textsuperscript{168} even though at a median age above sixty-five, they face a significantly elevated risk of death if they contract the virus.\textsuperscript{169}

\textbf{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.\textsuperscript{168} 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.\textsuperscript{168} 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.\textsuperscript{168} Their commitment to democracy has become provisional: they support it only so long as they win.

\textsuperscript{167} 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].


\textsuperscript{168} See ABRAMOWITZ, supra note 346, at 142.


\textsuperscript{168} 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

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. 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.

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. 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. It also required states or localities with registration or turnout rates below fifty percent that used a “test or device” restricting the opportunity to vote to “preclear” changes to their voting rules with the federal government before implementation to ensure those changes were nondiscriminatory.

Within a few years, voter registration among age-eligible blacks in Mississippi increased from six percent to sixty percent, and registration across the covered southern states rose from twenty-nine percent in 1965 to fifty-two percent in 1967. The number of African American elected officials in the South increased from fewer than 100 in 1965 to 873 in March 1972. Over the forty years following the Act’s passage, the Supreme Court through statutory interpretation and Congress

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1702 See Berman, supra note 7, at 89.
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.  

Many white southerners resented the Act, which applied special rules to the South that were reminiscent to them of federal military occupation during Reconstruction. As the Republican Party became more dependent on the votes of southern whites beginning in the 1960s, Republican administrations sometimes resisted efforts to expand the statute’s reach and to renew it. The Nixon Administration initially opposed interpretations of the law that would cover less direct interferences with the right to vote. 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. 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.

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? 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. 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. The most recent renewal of the Act passed the

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.
1713 See supra notes 904–1002 and accompanying text.
Senate unanimously and the House with only token opposition.\footnote{1715}{See Berman, supra note 7, at 242–43.} Support for the law, one conservative critic in \textit{National Review} observed, was too good “a way to prove the [GOP’s] race credibility.”\footnote{1716}{John J. Miller, \textit{Every Man’s Burden}, NAT’L REV., Apr. 10, 2006, at 22, 22.}

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.\footnote{1717}{See Berman, supra note 7, at 280.} In his opinion for the Court in \textit{Shelby County v. Holder}, Chief Justice Roberts invalidated the geographic coverage formula, which necessarily terminated the preclearance requirement.\footnote{1718}{See Shelby County v. Holder, 570 U.S. 529, 557 (2013).} Preclearance was “a drastic departure from basic principles of federalism”\footnote{1719}{Shelby County, 570 U.S. at 535.} because it required the states to “beseech the Federal Government for permission” to change voting rules.\footnote{1720}{Id. at 544.} 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.\footnote{1721}{Id. at 547, 557.} 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.\footnote{1722}{See id. at 556–57.} 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.\footnote{1723}{See id. at 535–36, 544–45.}

Doctrinally, Chief Justice Roberts invoked the principle of equal state sovereignty and insisted that departures from it required a demonstration of current need.\footnote{1724}{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)).} 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.\footnote{1725}{See Glover Moore, The Missouri Controversy, 1819–1821, at 118–20 (1966).} 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.\footnote{1726}{See Glover Moore, The Missouri Controversy, 1819–1821, at 118–20 (1966).} However, because the Court in \textit{Shelby County} could easily have reached the same result applying the
“congruence and proportionality” test for evaluating exercises of congressional power under the enforcement provisions of the Fourteenth and Fifteenth Amendments, 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. 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 North). 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. At oral argument, Chief Justice Roberts emphasized that in 2012 Mississippi blacks, who were about thirty-seven percent of the state’s population, turned out to vote at higher rates than whites. 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. 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

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.
1730 See Shelby County, 570 U.S. at 578–79 (Ginsburg, J., dissenting).
1731 See BERMAN, supra note 7, at 275.
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 pre clearance, 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


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).


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)).


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 Board1751 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/2Ijr3jm [https://perma.cc/794-D-XFWU].
1745 See id.
1747 See supra section I.C.2, pp. 48–51.
1748 See ANDERSON, supra note 6, at 56; Resources on Voter Fraud Claims, BRENNA N 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).
1750 See Crawford, 553 U.S. at 203–04 (plurality opinion).
1751 553 U.S. 181.
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. Justice Stevens distinguished *Harper v. Virginia Board of Elections*, where the Court had invalidated a poll tax requirement for voting, 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.

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. In *Crawford*, Indiana presented no evidence of such fraud in the state’s history and only minimal evidence of such fraud in other states. Justice Stevens mostly focused, strangely, on voter impersonation fraud perpetrated by Tammany Hall in New York City in the late nineteenth century. 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. 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. Yet Justice Stevens nonetheless concluded that the risk of voter impersonation fraud was real and “could affect the outcome of a close election.”

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. However, that rationale simply rewarded the Republican Party for a decade’s worth of lies perpetuating the myth of voter impersonation fraud.

Justice Stevens acknowledged that photo identification requirements posed “some burdens” on prospective voters, although he understated

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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 216.
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.
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.\textsuperscript{1768} Studies conducted prior to \textit{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.\textsuperscript{1769} The trial judge in a case that was consolidated with \textit{Crawford} estimated that about 43,000 Indians 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.\textsuperscript{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.\textsuperscript{1771} Because Indiana provided free photo identification to the poor, there was no poll tax problem.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1776} Justice Scalia suggested that focusing on the burdensome impact of a law on particular individuals would be inconsistent with the holding in \textit{Washington v. Davis}\textsuperscript{1777} that proof of discriminatory purpose was required to establish an equal protection violation.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{1768} \textit{Crawford}, 553 U.S. at 197 (plurality opinion); \textit{see id.} at 197–98.
\item \textsuperscript{1769} \textit{See id.} at 219 (Souter, J., dissenting); \textsc{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/id/download_file_39242.pdf [https://perma.cc/9MNZ-4V7P].
\item \textsuperscript{1770} \textit{Crawford}, 553 U.S. at 218 (Souter, J., dissenting); \textit{Brief for Petitioners at} 17–18, \textit{Ind. Democratic Party v. Rokita}, 551 U.S. 1192 (2007) (No. 07-25).
\item \textsuperscript{1771} \textit{Crawford}, 553 U.S. at 198 (plurality opinion).
\item \textsuperscript{1772} \textit{See id.}
\item \textsuperscript{1773} \textit{See id.} at 199.
\item \textsuperscript{1774} \textit{See id.} at 203–04.
\item \textsuperscript{1775} \textit{See id.} at 204 (Scalia, J., concurring in the judgment).
\item \textsuperscript{1776} \textit{Id.} at 205–06.
\item \textsuperscript{1777} 426 U.S. 229 (1976).
\item \textsuperscript{1778} \textit{See Crawford}, 553 U.S. at 207 (Scalia, J., concurring in the judgment) (citing \textit{Davis}, 426 U.S. at 248).
\end{itemize}
impact, not purpose. Justice Scalia did not explain how Reynolds v. Sims 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. 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. 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.” The conservative Justices, however, have given no hint of reconsidering the matter.


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. 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. 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. However, voters may be removed from the rolls for change of residence only if they also fail to respond to a follow-up inquiry. Further, the Act forbids using registrants’ failure to vote in recent elections as a reason for removing them from the rolls. 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.”

Ohio Republicans took advantage of the federal law’s failure to fully clarify the circumstances under which a state was authorized to send

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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.
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).
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

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.
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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{1804} Most of those who fail to vote also fail to respond to a warning notice.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{1808} The purpose of the electoral system, as Justice Breyer noted in dissent, is “to discern the will of the majority,”\textsuperscript{1809} not to “test the fortitude and determination of the voter.”\textsuperscript{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.\textsuperscript{1811} Purges for failure to vote removed ten percent of registrants in predominantly African American neighborhoods in Hamilton County,

\textsuperscript{1802} CHARLES DICKENS, OLIVER TWIST 347 (Fred Kaplan ed., W.W. Norton & Co. 1993) (1838).
\textsuperscript{1803} See \textit{Husted}, 138 S. Ct. at 1859–60 (Breyer, J., dissenting); \textit{id.} at 1863–65 (Sotomayor, J., dissenting).
\textsuperscript{1804} See \textit{id.} at 1856 (Breyer, J., dissenting).
\textsuperscript{1805} \textit{Id.}
\textsuperscript{1806} \textit{Id.}
\textsuperscript{1807} See \textit{id.}
\textsuperscript{1808} See \textit{id.}
\textsuperscript{1809} \textit{Id.} at 1851 (quoting S. REP. NO. 103–6, at 3 (1993)).
\textsuperscript{1810} \textit{Id.} at 1850–51 (quoting S. REP. NO. 103–6, at 3).
\textsuperscript{1811} See \textit{id.} at 1864 (Sotomayor, J., dissenting); Brief of \textit{Amici Curiae} NAACP & the Ohio State Conference of the NAACP in Support of Respondents at 18–19, \textit{Husted}, 138 S. Ct. 1833 (No. 16–980) [hereinafter Brief of \textit{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


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

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1812 Brief of Amici Curiae NAACP, supra note 1811, at 19.
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.
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.\footnote{2020}

However, in 1986 in \textit{Davis v. Bandemer},\footnote{1986} 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.\footnote{19822} 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.\footnote{19823} 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.\footnote{19824}

No lower court applying the standard of the \textit{Davis} plurality vindicated a claim of unconstitutional gerrymandering.\footnote{19825} In 2004, the Court’s conservative majority rejected the \textit{Davis} approach.\footnote{19826} 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 \textit{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.\footnote{19827}

Responding to Justice Kennedy’s invitation, political scientists and law professors sought to develop such a standard.\footnote{19828} By 2019, when the Court took up the question again, it seemed that they had done so.\footnote{19829} Yet Justice Kennedy had retired in 2018, replaced by Justice Kavanaugh, who provided the fifth vote in \textit{Rucho v. Common Cause}\footnote{19830}
to rule definitively that challenges to partisan gerrymandering posed a nonjusticiable political question.\footnote{Robert Barnes, \textit{Supreme Court Says Federal Courts Don’t Have a Role in Deciding Partisan Gerrymandering Claims}, \textsc{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-a6ac1a0e3e_story.html \[https://perma.cc/QD5Q-YK8Y\].} Writing for the majority, Chief Justice Roberts had nothing positive to say about partisan gerrymandering, even acknowledging that it produces unfair political outcomes.\footnote{\textit{See Rucho}, 139 S. Ct. at 2506–07.} Nonetheless, he ruled the challenge nonjusticiable for two reasons. First, there was no “judicially discoverable and manageable” standard\footnote{\textit{Id.} at 2496 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).} short of proportional representation against which to measure gerrymandering.\footnote{\textit{See id.} at 2499.} Second, methods of counteracting gerrymandering other than judicial review were available.\footnote{\textit{See id.} at 2507–08.} 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.\footnote{\textit{See id.} at 2509 (Kagan, J., dissenting).}

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.\footnote{\textit{See Stephanopoulos & McGhee, supra note 1839, at 834; see Whitford v. Gill, 218 F. Supp. 3d 837, 903 (W.D. Wis. 2016), vacated, 138 S. Ct. 1916 (2018).}} 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.\footnote{\textit{See Stephanopoulos & McGhee, supra note 1829, at 850–53.}}

One such method, the “efficiency gap,” measures the number of “wasted” votes that a particular districting scheme entails for both parties.\footnote{\textit{Stephanopoulos & McGhee, supra note 1829, at 834; see Rucho, 139 S. Ct. at 2506–07.}} The larger the gap, the more obvious the partisan purpose and the more probable that the gerrymander will have a durable and substantial effect.\footnote{\textit{See Stephanopoulos & McGhee, supra note 1829, at 850–53.}} Alternatively, one can evaluate gerrymandering by
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 inter-
est.\textsuperscript{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.\textsuperscript{1842} At oral argument in a
gerrymandering case the preceding Term, \textit{Gill v. Whitford},\textsuperscript{1843} Chief
Justice Roberts disparaged this social science as “gobbledygook,”\textsuperscript{1844} but
it is not actually that complicated.

Both measurement methods confirm that the two gerrymanders be-
fore the Court in \textit{Rucho} could have been invalidated without any danger
of establishing a requirement of proportional representation. For ex-
ample, measured against three thousand randomly generated districting
maps, the one actually enacted by North Carolina Republicans pro-
duced \textit{the most extreme} partisan impact.\textsuperscript{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.\textsuperscript{1846} How is a rule barring
punitive damages more than ten times as high as compensatory dam-
ages\textsuperscript{1847} any less arbitrary than a rule stating that efficiency gaps over ten
percent or districting maps producing partisan effects in the outer ten per-
cent 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 cam-
paign finance reform.\textsuperscript{1848} The Chief Justice was not put off by the impos-
sibility of drawing coherent lines in finding the ACA’s Medicaid expansion
provision unconstitutionally coercive of the states.\textsuperscript{1849} If the conservative
Justices were willing to draw arbitrary lines to limit punitive damages but

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\item \textsuperscript{1841} \textit{See Rucho}, 139 S. Ct. at 2517–18 (Kagan, J., dissenting) (citing Brief for \textit{Amicus Curiae} Eric S. Lander in Support of Appellees at 7–22, \textit{Rucho}, 139 S. Ct. 2484 (No. 18-422)).
\item \textsuperscript{1842} \textit{Id.}
\item \textsuperscript{1843} 138 S. Ct. 1916.
\item \textsuperscript{1844} Transcript of Oral Argument at 40, \textit{Gill v. Whitford}, 138 S. Ct. 1916 (No. 16-1161), https://
www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_mjn0.pdf [https://
perma.cc/438W-D4XW].
\item \textsuperscript{1845} \textit{See Rucho}, 139 S. Ct. at 2518 (Kagan, J., dissenting).
\item \textsuperscript{1846} \textit{See}, e.g., Phillip Morris USA v. Williams, 549 U.S. 346, 349 (2007); State Farm Mut. Auto.
\item \textsuperscript{1847} \textit{See Campbell}, 538 U.S. at 425.
\item \textsuperscript{1848} \textit{Cf. Rucho}, 139 S. Ct. at 2522 (Kagan, J., dissenting) (noting that “courts all the time make
judgments about the substantiality of harm”).
\item \textsuperscript{1849} \textit{See Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)}, 567 U.S. 519, 583, 585 (2012) (opinion of
Roberts, C.J.).
\end{itemize}
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. Yet, as Justice Kagan noted in dissent, these alternatives were not clearly workable. While the national government could theoretically bar gerrymandering of congressional districts under the Elections Clause, 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. 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. Moreover, less than half the state constitutions allow for ballot initiatives, 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.

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. In the past, the Court has intervened to remedy democratic dysfunction flowing from legislative malapportionment and black disfranchisement. 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?

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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.
1855 See Rucho, 139 S. Ct. at 2524 (Kagan, J., dissenting).
1858 See id. at 2543; 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

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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.
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*\(^1\) 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.\(^2\)

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.\(^3\) 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.\(^4\) 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.\(^5\)

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?\(^6\) 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.
\(^{1873}\) See *Buckley*, 424 U.S. at 16–21, 40–49.
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?

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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).


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.\textsuperscript{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.\textsuperscript{1885} The Court created a free market democracy.\textsuperscript{1886} The neo-Ayn Randians have won in politics in large part because they won in the Court.\textsuperscript{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 \textit{v.} Bellotti,\textsuperscript{1888} the Court invalidated a Massachusetts law limiting corporate contributions to a ballot initiative campaign,\textsuperscript{1889} starting down a road that culminated in \textit{Citizens United}.\textsuperscript{1890}

\textit{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.\textsuperscript{1891} The Court divided mostly along ideological lines, with the majority opinion written by Justice Powell,\textsuperscript{1892} who seven years earlier had authored the famous memorandum calling for business to undertake a more vigorous defense of the free enterprise system.\textsuperscript{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.\textsuperscript{1894}

Justices favorably disposed toward campaign finance regulation then won two narrowly divided victories. In 1990, \textit{Austin v. Michigan State Chamber of Commerce}\textsuperscript{1895} distinguished \textit{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.\textsuperscript{1896} In 2003,
McConnell v. FEC\textsuperscript{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.\textsuperscript{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.\textsuperscript{1899} In dissent, Justice Kennedy lamented that the ruling made Americans “less free.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{1897} 540 U.S. 93 (2003).
\textsuperscript{1898} COHEN, supra note 1331, at 147; see McConnell, 540 U.S. at 185, 196; COHEN, supra note 1331, at 146–48.
\textsuperscript{1899} McConnell, 540 U.S. at 145; COHEN, supra note 1331, at 146–48.
\textsuperscript{1900} McConnell, 540 U.S. at 341 (Kennedy, J., concurring in the judgment in part and dissenting in part).
\textsuperscript{1901} See MANN & ORNSTEIN, supra note 996, at 73; HASEN, supra note 1562, at 29.
\textsuperscript{1902} See COHEN, supra note 1331, at 151–52.
\textsuperscript{1903} See FEC v. Wis. Right to Life, 551 U.S. 449, 455–57 (2007); COHEN, supra note 1331, at 148.
\textsuperscript{1904} Wis. Right to Life, 551 U.S. at 471 (plurality opinion); see also COHEN, supra note 1331, at 148.
\textsuperscript{1905} Wis. Right to Life, 551 U.S. at 469 (plurality opinion); see also id. at 469–70.
\textsuperscript{1906} See COHEN, supra note 1331, at 148.
of their own money, the limits on individual contributions to the opposing candidate would triple.\textsuperscript{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 \textit{Buckley} had ruled impermissible.\textsuperscript{1908}

Justice Stevens wrote the dissent for the liberal Justices. In addition to criticizing \textit{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.\textsuperscript{1909} Yet even within the \textit{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.\textsuperscript{1910}

The conservatives’ hostility to campaign finance restrictions culminated in 2010 in \textit{Citizens United}, which ruled that corporations enjoy the same right of political speech as individuals do.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1913} \textit{Citizens United}, a 501(c)(4) organization funded mostly by individuals, produced \textit{Hillary: The Movie}, a ninety-minute documentary criticizing Hillary Clinton that was released in theaters and on DVD.\textsuperscript{1914} Because \textit{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.\textsuperscript{1915} The Court has often adopted less plausible narrowing constructions of statutes to avoid resolving contentious constitutional issues.\textsuperscript{1916}

The parties had not asked the Court to reconsider \textit{Austin}, which upheld differential treatment of corporate and individual political speech, or

\begin{footnotes}
\item[1907] Davis v. FEC, 554 U.S. 724, 729 (2008); \textit{see also} id. at 743–44.
\item[1908] \textit{See id.} at 738–41 (citing \textit{Buckley} v. Valeo, 424 U.S. 1, 54 (1976) (per curiam)).
\item[1909] \textit{See id.} at 751 (Stevens, J., concurring in part and dissenting in part).
\item[1910] \textit{See id.} at 752–57.
\item[1911] \textit{Citizens United} v. FEC, 558 U.S. 310, 343 (2010).
\item[1912] \textit{See} MANN & ORNSTEIN, \textit{ supra} note 996, at 72.
\item[1913] \textit{See} \textit{Citizens United}, 558 U.S. at 320.
\item[1914] \textit{See id.} at 339–50, 404.
\item[1915] \textit{See id.} at 405–08 (Stevens, J., concurring in part and dissenting in part).
\end{footnotes}
the portion of *McConnell* that had rejected a facial challenge to the statutory provision at issue. 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. 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.”

*Citizens United* overruled *Austin* and the relevant part of *McConnell*. Justice Kennedy’s majority opinion noted that political speech is indispensable to democratic decisionmaking, regardless of its source, and emphasized the difficulty of drawing lines that would safeguard obviously protected speech from the statute’s coverage. 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. 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. 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.

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. In 1947, Congress had extended that prohibition to cover both political expenditures and contributions made by corporations and labor unions. 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

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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).
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.
1931 Citizens United, 558 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).
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, such as Koch Industries, which spends hundreds of millions of dollars to help elect Republican climate change deniers. 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, obscene and nonobscene speech, content and viewpoint restrictions, and reckless and negligent defamation. 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. 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. At the time the Bipartisan Campaign Reform Act was passed, eighty percent of Americans believed that corporations engaging in electioneering communications received special consideration from elected officials. 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 a opposing litigant. 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.” 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.
1947 COHEN, supra note 1331, at 164–65.
1949 Citizens United, 558 U.S. at 449 (Stevens, J., concurring in part and dissenting in part).
1951 See COHEN, supra note 1331, at 153–54.
statutory contribution limits. 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.

Contributions to purely political entities such as PACs and super PACs are at least subject to federal disclosure requirements. 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. Such entities can spend vast sums on politics without disclosing their donors — a type of political spending known as “dark money.” Since 2010, dark money has played an increasing role in election spending. In 2015, President Obama warned that the nation was “drowning in dark money.”

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. Even though the state maintained that the law had been enacted in response to concerns about actual corruption, the Court concluded that its purpose was to equalize political influence, which was impermissible under *Buckley*.

In 2014, the Republican Justices invalidated aggregate contribution limits for federal candidates. 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. *Buckley* had upheld both individual and aggregate contribution limits as potentially preventing corruption or its appearance, calling the aggregate limit a “quite modest restraint” on

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1952 See id. at 154.
1953 See id.; SpeechNow.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010).
1957 See id.; see also MAYER, supra note 354, at 281, 305.
1958 COHEN, supra note 1331, at 155.
1961 See id. at 748–50 (majority opinion).
1963 See id. at 193–94.
However, the 2014 decision *McCutcheon v. FEC* invalidated the statutory limits at issue as bearing too attenuated a connection to anticorruption objectives. 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. 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.

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. 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. *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. Moreover, the public’s belief that political contributions influence officeholders’ decisionmaking, even if inaccurate, could feed cynicism and diminish political participation. Indeed, if unfounded public concerns about voter fraud justify restrictive voter identification laws, 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” — and pretty clearly for the worse, except from a neo–Ayn Randian perspective. The American political system is awash in money, and the wealthiest Americans dominate the political spending. The percentage of all federal campaign

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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.
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.\textsuperscript{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.\textsuperscript{1979}

Of course, corporations have far more money at their disposal than even the wealthiest individuals have.\textsuperscript{1980} In the first five years after \textit{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.\textsuperscript{1981} Spending by outside groups nearly tripled between the 2008 and 2012 presidential elections.\textsuperscript{1982} Moreover, almost one-third of that $2 billion in spending since \textit{Citizens United} was in the form of dark money.\textsuperscript{1983}

The Kochs substantially increased their spending on politics the year of \textit{Citizens United}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1987} When Senate Democrats sought to create a robust disclosure regime to restrict dark money after \textit{Citizens United}, not a single Republican supported the measure.\textsuperscript{1988} No other country in the world comes close to allowing as much money to be spent on elections as does the United States.\textsuperscript{1989}
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.\textsuperscript{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.\textsuperscript{1991} Even among the wealthiest twenty percent of Americans, most of the influence is likely exerted by multimillionaires and billionaires.\textsuperscript{1992}

Money influences which candidates get on the ballot\textsuperscript{1993} and which policy proposals gain salience and support.\textsuperscript{1994} Early money is crucial to political success.\textsuperscript{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.\textsuperscript{1996} Most of the contributions went to Republican super PACs and came from people who were whiter, wealthier, and older — that is, more conservative\textsuperscript{1997} — than is the general population, and many of these donors had made their fortunes in energy and finance.\textsuperscript{1998} Money plays an even larger role in “low-salience, low-turnout” elections, such as primaries and state legislative contests.\textsuperscript{1999} Large donors are also less likely to support blue-collar candidates who do not usually resemble them.\textsuperscript{2000} Wealthy candidates, like wealthy donors, push economic policy to the right.\textsuperscript{2001}

Big donors influence policymaking in both parties.\textsuperscript{2002} In 2011–2012, about two-thirds of the reported political contributions of the wealthiest Americans went to Republicans,\textsuperscript{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,
Tom Steyer, and George Soros. 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.

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. 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. 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. Further, fifty-five percent of Americans favor expanding Social Security while only three percent of multimillionaires do.

In a political system containing multiple veto points, blocking change in government policy is easier than achieving it. Maintaining control of one branch of Congress, the presidency, or the Court is sufficient to stymie most policy initiatives. 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.

In 2015, about two-thirds of Americans agreed that wealth should be more evenly distributed. Large majorities of Americans favor paid sick leave and parental leave for workers, a higher minimum wage, and higher taxes on millionaires. But such policies do not get enacted.

Until the recent pandemic, the federal government’s deficit problem was largely attributable to healthcare expenditures. 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.
of the healthcare industry.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2025} Reducing the influence of money in politics would produce both a fairer political system and one that is less ideologically polarized and dysfunctional.\textsuperscript{2026} It would also liberate officeholders from having to spend half of their time raising money, which

\textsuperscript{2017} See Hacker & Pierson, supra note 352, at 273, 275, 278–79.
\textsuperscript{2018} See id. at 278–79; see also Cohen, supra note 1331, at 160–61.
\textsuperscript{2019} See Page & Gilens, supra note 533, at 73–74.
\textsuperscript{2020} See Hacker & Pierson, supra note 352, at 94, 290–96; Page & Gilens, supra note 533, at 74.
\textsuperscript{2022} See Page & Gilens, supra note 533, at 49, 53–54, 81, 88.
\textsuperscript{2023} See id. at 166.
\textsuperscript{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/2019/08/06/1c1d7613e-b7ba-11e9-b3b4-2b60e84e39_story.html [https://perma.cc/3RXX-FMMN].
\textsuperscript{2025} See Page & Gilens, supra note 533, at 3–4, 6–8.
\textsuperscript{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. At the end of his majority opinion in *Rucho v. Common Cause*, 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. Where has that judicial modesty been as the conservative Justices have decimated campaign finance restrictions enacted by democratically elected legislatures? These rulings have done incalculable damage to the American political system on the basis of contrived rationales largely divorced from political reality. They have also advantaged the Republican Party that put these conservative Justices on the Court. One recent study shows that Republicans increased their share of state legislative seats by about five percentage points after *Citizens United*. 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. 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.”

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. In 1960, even the libertarian Senator Barry Goldwater thought that neither corporations nor labor unions should participate directly in politics. *Citizens United* reveals the extent to which the neo–Ayn Randians have realized their vision. Not only the Republican Party but

2028 139 S. Ct. 2484 (2019).
2029 See id. at 2507.
also Republican Justices appear to have no qualms about economic inequalities translating into inequalities in political influence. 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.


In December 2000, the Supreme Court helped pick a President. 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. The election in Florida had been beset by many problems — voters wrongly purged from the rolls, 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, and thousands of African American voters’ spoiling their ballots by both checking the box for Vice President Gore and writing in his name (“overvotes”). 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.

Florida Secretary of State Katherine Harris — who also served as one of Governor Bush’s campaign co-chairs in the state — 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.
2045 See POSNER, supra note 2041, at 7–8.
qualify as uncounted "legal votes." 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. The Florida Supreme Court sided with Vice President Gore and ordered a statewide manual recount of the undervotes. Probably because the U.S. Supreme Court had previously warned the Florida justices against changing state law retrospectively, the state jurists declined to impose a unitary statewide standard for determining voters' intent from indented and hanging chads. Thus, county canvassing boards were left to devise their own varying standards.

On December 12, 2000, the Supreme Court shut down the recount, handing the presidency to Governor Bush. To be sure, Vice President Gore probably would not have become President even had the Court abstained. 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. More importantly, Republicans, who strenuously opposed the recount, controlled the state legislature, the governorship (held by Governor Bush's younger brother, Jeb Bush), and the U.S. House. 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. Yet the Justices did not know what a recount might have shown when they shut it down.


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).


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 191–94; POSNER, supra note 2041, at 155, 158.

2059 See Margolick et al., supra note 2046, at 323.
lines, though an aborted compromise effort complicated the vote breakdown. 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. 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. 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. 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.

*Bush v. Gore* is probably the Court’s most absurd opinion in a highly consequential case. 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. Moreover, Justice Scalia, who famously loved a good argument, often responded “get over it” when asked about the ruling, rather than defending it on the merits.

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. Moreover, courts have

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2060 See id. at 356–58.
2062 See id. at 110–11 (majority opinion).
2063 See Margolick et al., supra note 2046, at 356.
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.
generally not interpreted the Equal Protection Clause as requiring geographic uniformity within a state, 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. 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. 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.

The Article II rationale — that state legislatures must specify the method by which presidential electors are selected — was no more convincing. 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. Florida judicial precedent plainly supported ascertaining voters’ intentions when possible rather than discarding ballots. The Florida court’s interpretation of state law in *Bush v. Gore* was plausible, if not compelling. 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.

*Bush v. Gore* stands for the proposition that if Justices care enough about a case’s outcome, the law goes out the window. The conservative Justices wanted Governor Bush to become President. 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

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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.


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.


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

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.
the population advantage shifted to the South, which virtually everybody in 1787 (wrongly) assumed would happen quickly.

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. Previous censuses included questions about military service, radio ownership, and native language. Before 1950, most censuses asked the citizenship question. 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. Beginning in 2010, the Bureau abandoned the long-form questionnaire, and the citizenship question was not asked at all. Instead, the Bureau calculated the number of noncitizens from the American Community Survey, distributed annually to only two or three percent of households.

However, the Trump Administration’s motives for adding the citizenship question were dubious. First, asking the question would almost certainly depress the response rate. 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. 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.

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2089 Klarmann, Framers’ Coup, supra note 340, at 272.
2090 Id. at 192.
2092 See id.
2093 See id.
2094 See id.
2095 See id. at 2562.
2096 See id.
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/2Y8F-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.” 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. Both Justices Alito and Thomas have already suggested such a shift in the basis of representation may be constitutionally permissible, though a demonstrated purpose to reduce Latino political power would be constitutionally problematic.

The principal legal challenge raised in Department of Commerce v. New York was that the Administration had violated the Administrative Procedure Act (APA) by insufficiently justifying its decision to add the citizenship question to the census. 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. 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. But this rationale turned out to be a pretext. In fact, Secretary Ross himself had pressed the Department to request the question after conversations with White House political officials.


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).

139 S. Ct. 2551.

See id. at 2569.

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

2111 See Dept 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).
2118 See supra notes 96–107 and accompanying text.
television that “Islam hates us,” and he suggested placing American mosques under surveillance.\textsuperscript{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.\textsuperscript{2122} Right-wing autocrats elsewhere also portray Muslims as dangerous terrorists.\textsuperscript{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.\textsuperscript{2124} The executive order suspended for 90 days entry into the United States of all nationals of seven predominantly Muslim nations,\textsuperscript{2125} and it also suspended admission of all refugees for 120 days,\textsuperscript{2126} except those from Syria — whom President Trump had linked to terrorists\textsuperscript{2127} — who were banned indefinitely.\textsuperscript{2128} Once refugee admissions resumed, priority would be extended to those belonging to minority religions in the covered countries,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2132} Moreover, the Court has long recognized that excluding foreign nationals is a fundamental attribute of sovereignty, which courts should not stringently review.\textsuperscript{2133}
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.\textsuperscript{2134} Those doctrines apply to executive actors as much as to legislatures.\textsuperscript{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.\textsuperscript{2136} Members of the Commission, according to the Court, had revealed \textquotedblleft a clear and impermissible hostility toward . . . sincere religious beliefs\textquotedblright{} by stating that many awful things have been done in the past in the name of religion.\textsuperscript{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.\textsuperscript{2138} When he publicly read the title of his executive order, President Trump said: \textquoteleft{}We all know what that means.\textquoteright{}\textsuperscript{2139} Later, he told supporters that the second iteration of the ban was just a \textquoteleft{}watered down version of the first one\textquoteright{} and had been \textquoteleft{}tailored\textquoteright{} per the request of \textquoteleft{}the lawyers,\textquoteright{} and that he preferred the original.\textsuperscript{2140} Prominent former national security officials charged that the order did nothing to advance national security and possibly undermined it.\textsuperscript{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.\textsuperscript{2142}

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\begin{enumerate}
\item\textsuperscript{2135} See Yick Wo v. Hopkins, 118 U.S. 356, 371, 373–74 (1886).
\item\textsuperscript{2137} Masterpiece Cakeshop, 138 S. Ct. at 1720.
\item\textsuperscript{2138} See Trump, 138 S. Ct. at 2437 (Sotomayor, J., dissenting).
\item\textsuperscript{2139} Id. at 2436.
\item\textsuperscript{2140} Id. at 2437 (alteration in original).
\end{enumerate}
\end{footnotesize}
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,
President Trump’s order was facially neutral, 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). However, the commonalities between the two cases were substantial. 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. Government lawyers had deliberately misled the Supreme Court, concealing evidence that would have revealed the alleged national security threat was exaggerated.

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, which is how many Americans saw people of Japanese descent in 1942. Many experts ridiculed the Muslim travel ban as irrelevant to national security. 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.

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. Many Americans feared a Japanese invasion of the West Coast, and even the ACLU was divided over whether to challenge the

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2156 *See Trump*, 138 S. Ct. at 2418.
2158 *See Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).
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 614–25.
2168 See Trump, 138 S. Ct. at 2431–33 (Breyer, J., dissenting); id. at 2438–40 (Sotomayor, J., dissenting).
2170 United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977).
2173 See Korematsu v. United States, 390 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

2176 17 U.S. (4 Wheat.) 316 (1819).
2178 See FEHRENBACKER, 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.
2185 See, e.g., id. at 872–77 (Stevens, J., dissenting).
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.”).
when originalist evidence supports their conclusions.\textsuperscript{2193} Justices sometimes invoke political process theory to support their reasoning,\textsuperscript{2194} but other times ignore it when it seems equally pertinent.\textsuperscript{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,\textsuperscript{2196} but do not hesitate themselves to invalidate a local school board’s efforts to integrate its schools\textsuperscript{2197} or gun control measures enacted by city councils.\textsuperscript{2198} Government paternalism deeply offends the conservative Justices,\textsuperscript{2199} except when they embrace it.\textsuperscript{2200} Justices love referenda,\textsuperscript{2201} except when they distrust them.\textsuperscript{2202} Justices celebrate the Court’s role in defending the rights of unpopular minorities,\textsuperscript{2203} except when they celebrate the virtues of democratic decisionmaking, in which case the opposing Justices suddenly become “black-robed rulers overriding citizens’ choices.”\textsuperscript{2204}

Precedents are not to be lightly overruled,\textsuperscript{2205} except when “there are strong grounds for doing so,” which is not the most determinate of legal standards.\textsuperscript{2206} Legislative departures from tradition are frowned upon in constitutional law,\textsuperscript{2207} except when they are not.\textsuperscript{2208} Justices instruct us to interpret the past at a low level of generality when defining constitutional rights,\textsuperscript{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.\textsuperscript{2210} Justices insist they should not second guess the cost-


\textsuperscript{2198} See Heller, 554 U.S. at 636.


\textsuperscript{2206} Janus, 138 S. Ct. at 2478.


benefit calculus of legislatures, except when they know better. The primary responsibility of the Court is to declare what the law is, except when Justices determine that the judiciary has no business involving itself in a certain sphere.

In some doctrinal areas, government motive is everything, but in others it is irrelevant, and no attempt to reconcile the inconsistencies is offered. Judicial intervention in a particular sphere requires administrable standards, except when it does not. The Court will not decide more than is necessary to resolve the matter before it, except when it does; and the Court will not decide issues unless properly presented, unless it feels like doing so. The Court has no expertise on certain issues, but lots on others. 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 narrowly and sometimes broadly, without explaining the divergent choices. 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. 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. The judicial brain, though trained to

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2217 See supra section III.D, pp. 190–94.
2221 See, e.g., Citizens United v. FEC, 558 U.S. 310, 396 (2010) (Stevens, J., concurring in part and dissenting in part) (“The 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.”).
2225 See, e.g., Gonzalez v. Raich, 545 U.S. 1, 34–35 (2005) (Scalia, J., concurring in the judgment).
2227 See Kahan, supra note 1477, at 7–8.
2228 See HAIDT, supra note 1477, at 91–95.
resist that tendency, cannot transcend nature. In addition, smarter and better educated people are simply more adept at formulating justificatory arguments.

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. 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. 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. “Really?” Justice Breyer asked quizzically in dissent. This is how reasoned elaboration is supposed to work?

The Court’s near-invalidation 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, the five conservative Justices ruled that the individual mandate could not be justified under

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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.
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.
Congress’s commerce power, even though healthcare spending constitutes roughly one-sixth of the nation’s economy.\textsuperscript{2237} Chief Justice Roberts provided two rationales for this conclusion. First, the Commerce Clause empowers Congress to regulate action, not inaction.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{2244} Yet, over the last half century, the parties have sorted ideologically and have

\textsuperscript{2237} Id. at 561 (opinion of Roberts, C.J.).
\textsuperscript{2238} Id. at 552.
\textsuperscript{2239} Id. at 557–58.
\textsuperscript{2240} See Ezra Klein, Unpopular Mandate, NEW YORKER (June 18, 2012), https://www.newyorker.com/magazine/2012/06/25/unpopular-mandate [https://perma.cc/L6XR-L2US].
\textsuperscript{2241} See NFIB, 567 U.S. at 549, 558 (opinion of Roberts, C.J.).
\textsuperscript{2242} See NFIB, 567 U.S. at 549, 558 (opinion of Roberts, C.J.).
polarized, albeit asymmetrically. 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.

Why would Justices appointed by Republican Presidents and vetted over decades of party service and membership in the Federalist Society, an organization funded from its inception by neo–Ayn Randians like the Koch brothers, not think about the world in the same way as conservative Republicans? 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.

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.” 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.


2250 See, e.g., KLEIN, supra note 347, at 198.

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

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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.\textsuperscript{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.\textsuperscript{2257} The affluent, the elderly, and whites are the most likely to vote.\textsuperscript{2258} On class-inflected issues, such as universal healthcare, those most likely to vote are more conservative than nonvoters.\textsuperscript{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.\textsuperscript{2260} If the pool of actual voters looked like America, Republicans would have to change their policies or else never win another national election.\textsuperscript{2261}

Democratic legislatures should make voter registration and voting easier.\textsuperscript{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.\textsuperscript{2263} Felon disfranchisement, which has enormous racially disparate effects, should be ended.\textsuperscript{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


\textsuperscript{2258} \textit{Id. at 55; see also Historical Reported Voting Rates, supra note 2256, at tbl. A-1.}

\textsuperscript{2259} \textit{See PAGE & GILENS, supra note 533, at 60.}

\textsuperscript{2260} \textit{See id.; see also BERMAN, supra note 7, at 311; HACKER & PIERSON, supra note 352, at 256 & n.52.}

\textsuperscript{2261} \textit{See PAGE & GILENS, supra note 533, at 69.}

\textsuperscript{2262} \textit{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).}


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.
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.
2272 See ABRAMOWITZ, supra note 346, at xviii; DIAMOND, supra note 28, at 96–98.
occurred.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2278} This flaw can be fixed without a constitutional amendment — most easily, through a system of multimember districts with ranked-choice voting.\textsuperscript{2279} Such a reform would also waste fewer votes, make elections more competitive, and incentivize politicians to appeal to the ideological middle.\textsuperscript{2280}

The U.S. Senate is one of the most malapportioned legislative bodies in the world.\textsuperscript{2281} California has sixty-six times the population of Wyoming, yet both states have two senators.\textsuperscript{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.\textsuperscript{2283} Indeed, this Senate malapportionment is constitutionally entrenched; it may not

\begin{thebibliography}{9}
\bibitem{2274} See KLEIN, supra note 347, at 240–41.
\bibitem{2275} See id. at 40.
\bibitem{2276} See id. at 40–41; Cohn, supra note 266.
\bibitem{2278} Cf. FARIS, supra note 1598, at 120 (explaining how a fairer system would benefit Democrats).
\bibitem{2279} See DIAMOND, supra note 28, at 260–61; FARIS, supra note 1598, at 117–18; KLEIN, supra note 347, at 253–54.
\bibitem{2280} See DIAMOND, supra note 28, at 261–62; FARIS, supra note 1598, at 118–21; KLEIN, supra note 347, at 254.
\bibitem{2281} See PAGE & GILENS, supra note 533, at 170–71; Richards, supra note 2273.
\bibitem{2282} PAGE & GILENS, supra note 533, at 171.
\bibitem{2283} See Reynolds v. Sims, 377 U.S. 533, 568, 574 (1964).
\end{thebibliography}
be altered without the consent of every state, which the smaller states will never give.\textsuperscript{2284}

Because of the Senate’s malapportionment, sparsely populated states receive more federal government money than their populations warrant,\textsuperscript{2285} and they tend to secure more favorable outcomes on issues that divide the nation along rural/urban lines, such as gun control.\textsuperscript{2286} In addition, three Republican Justices — Thomas, Gorsuch, and Kavanaugh — would not have been confirmed by a Senate apportioned according to population.\textsuperscript{2287} Senate malapportionment also has a significant disparate racial impact given that people of color tend to live in more populous, urbanized states.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2290} In 2016, Trump lost the national popular vote by more than two percentage points but won the popular vote in thirty states.\textsuperscript{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.\textsuperscript{2292} That was the first time this has occurred since senators

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\item U.S. Const. art. V; see also Richards, supra note 2273.
\item See Page & Gilens, supra note 533, at 228–29.
\item See Baker & Dinkin, supra note 2285, at 43–46.
\item See Abramowitz, supra note 346, at 128; Hacker & Pierson, supra note 352, at 257.
\item See Hacker & Pierson, supra note 352, at 257.
\item See Drew DeSilver, Most Senate Elections Reflect States’ Presidential Votes, PEW RSCH. CTR. (Sept. 1, 2020), https://pewrsr.ch/2tGqoVW [https://perma.cc/C55U-W4CF].
\end{enumerate}
\end{footnotesize}
began to be directly elected in 1914 and reflects extreme political polarization and the nationalization of elections. 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. 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.

If Democrats regain control of the Senate, they will obviously need to abolish the filibuster with regard to legislation. 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 2017 (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. 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. 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.

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. 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.
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.
one state with less than ten percent of the population of another deserved equal voting power in the Senate.\textsuperscript{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.\textsuperscript{2303}

Whether that argument carried any weight was debatable in 1787,\textsuperscript{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,\textsuperscript{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,\textsuperscript{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,\textsuperscript{2307} then Democrats ought to control the Senate.\textsuperscript{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).\textsuperscript{2309} Two of the reasons these jurisdictions are not already states are

\textsuperscript{2302} See id. at 188–91.
\textsuperscript{2303} See id. at 188–89.
\textsuperscript{2304} Id. at 184–88.
\textsuperscript{2306} See supra note 2117 and accompanying text.
\textsuperscript{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-8GJV] (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).
\textsuperscript{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”).
\textsuperscript{2309} See FARIS, supra note 1598, at 49–50, 52–53, 64–68; Belkin, supra note 2249, at 42, 49.
partisanship and racism. In the second half of the nineteenth century, Republicans regularly created new states to expand their advantage in the Senate and the Electoral College. 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. 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. While adding senators from new states does not directly redress the Senate’s malapportionment, it would counter the current partisan effects of that malapportionment. 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. 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]” and applying the First Amendment to the Executive and the judiciary even though its reach is plainly limited to “Congress.”

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
national government from interfering with slavery in existing states.\textsuperscript{2318} By its terms, this amendment would have been unamendable.\textsuperscript{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.\textsuperscript{2320} Because Republicans benefited both times from this constitutional quirk,\textsuperscript{2321} and indeed are systematically more likely to benefit from it under current political conditions,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2327} As George Mason explained, allowing the people to choose the President would be like referring “a trial of colors to a blind man.”\textsuperscript{2328} Second, southern delegates would never have agreed to that alternative, as their slaves would have counted

\textsuperscript{2318} KLARMAN, FRAMERS’ COUP, supra note 340, at 625.
\textsuperscript{2319} See id.
\textsuperscript{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/5570161/presidents-elected-electoral-college [https://perma.cc/N3WE-6YV8].
\textsuperscript{2323} Id.
\textsuperscript{2324} Id.
\textsuperscript{2325} See KLARMAN, FRAMERS’ COUP, supra note 340, at 226.
\textsuperscript{2326} See id. at 226–27, 230.
\textsuperscript{2327} See id. at 227.
\textsuperscript{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. Third, small states objected because they would count for little in a system of direct popular election. 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. 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, 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. 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.

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. 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. 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% 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 votes.

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2329 See id. at 228, 270–77.
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.
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/2zY7dX9 [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

2339 See Wegman, supra note 2335.
2341 Wegman, supra note 2335.
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/2GIZeCo [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

2345 See MANN & ORNSTEIN, supra note 996, at 152; PAGE & GILENS, supra note 533, at 187–89.
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.
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 support-
ers. 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.

In New Jersey and Virginia, Democrats who recently took control of the state government have declined to engage in reciprocal gerrymander-
ing, partly because of resistance from factions within the party that prioritize “good government” ideals over partisanship. 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. 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. As already noted, the Republican Court came within a whisker of invalidating healthcare reform that Democrats had been trying to enact since the 1940s. 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. 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

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2352 See supra notes 1489–1491 and accompanying text.
2353 See MANN & ORNSTEIN, supra note 996, at 192.
2355 HACKER & PIERSON, supra note 352, at 344; MANN & ORNSTEIN, supra note 996, at 102; PAGE & GILENS, supra note 533, at 150–51, 154.
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.\textsuperscript{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.\textsuperscript{2360} Republican Supreme Court Justices then concluded that partisan gerrymandering is a nonjusticiable political question.\textsuperscript{2361}

Wisconsin Republicans also enacted a right-to-work law that undermined the political clout of labor unions and Democrats.\textsuperscript{2362} Democratic legislatures do not enact such laws,\textsuperscript{2363} but the Republican Justices have essentially made such measures constitutionally mandatory with regard to public sector labor unions.\textsuperscript{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.\textsuperscript{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

\textsuperscript{2359} See supra section III.B, pp. 184–87.
\textsuperscript{2361} See supra section III.D, pp. 190–94.
\textsuperscript{2363} See, e.g., \textit{COHEN}, supra note 1331, at 220; McElwee, supra note 2362.
\textsuperscript{2365} See supra sections I.C.7(d), pp. 65–66; III.C, pp. 187–90.
voter identification law. Wisconsin is one of the states most likely to determine the outcome of the 2020 presidential election. 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 postmarking and receipt of absentee ballots, many of which the state had only recently mailed to voters. 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. Republican legislators are probably counting on the conservative state supreme court justices to overturn an old precedent requiring gubernatorial involvement in redistricting.

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. Stricter gun control legislation could be ruled invalid under the conservative Justices’ recently renovated understanding of the Second Amendment. Aggressive federal action on climate change, healthcare, or economic inequality would be vulnerable to attack by neo–Ayn Randian...

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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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2377} Since then, an informal norm has developed against changing the Court’s size.\textsuperscript{2378} President Franklin D. Roosevelt challenged that norm, unsuccessfully, in 1937, after the Court had invalidated a dozen New Deal measures in eighteen months.\textsuperscript{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

\textsuperscript{2373} See \textit{supra} note 1856 and accompanying text.

\textsuperscript{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).


\textsuperscript{2376} See generally Braver, \textit{supra} note 2347 (manuscript at 12–39) (providing a comprehensive account of changes in the Court’s size during the nineteenth century).

\textsuperscript{2377} See infra notes 2408–2411 and accompanying text.

\textsuperscript{2378} \textit{Levitsky \& Ziblatt, supra} note 35, at 131–32; Braver, \textit{supra} note 2347 (manuscript at 37).

\textsuperscript{2379} See generally \textit{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. 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. 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. However, threats of being primaried and targeted with millions of dollars in dark money advertising quickly rallied all Republican senators behind the Majority Leader. 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.

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

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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

2387 See FARIS, supra note 1598, at 85; KLEIN, supra note 347, at 199; Kar & Mazzone, supra note 2386, at 58.
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, FIVETHIRTEYIGHT (Mar. 29, 2012, 8:26 PM), https://fivethirtyeight.com/features/supreme-court-may-be-most-conservative-in-modern-history [https://perma.cc/RJ2G-3QJ3].
2391 Kar & Mazzone, supra note 2386, at 72.
2392 Id. at 68.
2393 See id. at 71.
2394 Id. at 83–86.
upon the President’s death in office.\footnote{2395} Two of the three involved Presidents who had been largely repudiated by the political party that had nominated them to be Vice President.\footnote{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.\footnote{2397} Senate refusals to confirm their nominees reflected internal party disputes and thus entailed minimal risk of retaliatory escalation by the opposition party.\footnote{2398} These episodes are therefore weak precedents for Senator McConnell’s ploy.\footnote{2399}

Moreover, several Presidents have made Court nominations and had them confirmed by the Senate in the last year of their terms.\footnote{2400} As recently as 1988, a Democratic Senate confirmed President Reagan’s nomination of then-Judge Anthony Kennedy in an election year.\footnote{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.\footnote{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 2020\footnote{2403} — 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.\footnote{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.\footnote{2405}

Naturally, the Jeffersonians restored the Court’s size to six as soon as they assumed power.\footnote{2406} This response was entirely justified, and

\footnote{2395}{Id. at 64–66.}
\footnote{2396}{See id. at 65–66; Braver, supra note 2347 (manuscript at 33, 38–39).}
\footnote{2397}{See Braver, supra note 2347 (manuscript at 38–39).}
\footnote{2398}{See id. (manuscript at 37–39).}
\footnote{2399}{See Kar & Mazzone, supra note 2386, at 66.}
\footnote{2400}{See, e.g., Cohen, supra note 1331, at 217; Kar & Mazzone, supra note 2386, at 74.}
\footnote{2401}{Kar & Mazzone, supra note 2386, at 75.}
\footnote{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.}
\footnote{2403}{See Klein, supra note 347, at 200.}
\footnote{2404}{See Braver, supra note 2347 (manuscript at 25).}
\footnote{2405}{Id.}
\footnote{2406}{See id. (manuscript at 28).}
even Federalists did not protest very much.\footnote{See id. (manuscript at 29).} 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.\footnote{See id. (manuscript at 32, 38).} After President Lincoln’s assassination, President Johnson repudiated congressional Reconstruction and advocated the preservation of white supremacy.\footnote{See, e.g., ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 183–84 (1960).} 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.\footnote{See Braver, supra note 2347 (manuscript at 33–34).} Once Republican Ulysses S. Grant became President in 1869, they restored the Court to nine Justices.\footnote{Id. (manuscript at 34).} 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
2020 | THE SUPREME COURT — FOREWORD

federal appellate courts since the 1980s, yet Majority Leader McConnell’s decision to block every such nomination but two during the last two years of Obama’s presidency was unprecedented. 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.

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; 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, 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.

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.
2417 See FARIS, supra note 1598, at 36, 46.
court judges, and Republicans at the state level have already embarked upon court-packing schemes.

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. 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.

To be sure, there is no denying that autocrats use court packing to undermine judicial independence. 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. 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, 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. In the spring of 1937, the Court in rapid succession upheld a state minimum wage

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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).


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

\[\text{2426 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).} \]
\[\text{2427 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).} \]
\[\text{2428 Helvering v. Davis, 301 U.S. 619, 640 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548, 583, 585, 598 (1937).} \]
\[\text{2431 See supra pp. 217–18, 228–29.} \]
\[\text{2432 Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901, 1915 (2020) (plurality opinion) (holding that the Trump Administration’s rescission of the Deferred Action for Childhood Arrivals program was arbitrary and capricious).} \]
\[\text{2433 June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2131, 2133 (2020) (plurality opinion) (invalidating a Louisiana law requiring doctors performing abortions to have admitting privileges at a local hospital).} \]
\[\text{2434 Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020) (holding that an employer violates Title VII of the Civil Rights Act of 1964 by discriminating against employees for being homosexual or transgender persons).} \]
\[\text{2435 See Liptak, supra note 2430.} \]
economic inequality. 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. 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. A more responsive democracy would have more gun control, lower healthcare costs, increased educational spending, and sensible immigration reform. 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.

Without such economic reforms, democracy may not survive much longer in any event. As the Founders understood, extreme economic inequality is probably inconsistent with the conditions required for democracy to survive. 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. 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. To break the spiral, democratic reform logically must come first.

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” 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. 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. Of course the North would win the Civil War. 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. 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. 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

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2446 See Friedersdorf, supra note 333.
2448 See KLARMAN, FRAMERS’ COUP, supra note 340, at 596–600.
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.
is no singular moment at which the nation ceases to be a democracy.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{2464}

\textit{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

\textsuperscript{2458} Huq & Ginsburg, supra note 36, at 166.
\textsuperscript{2462} See SITARAMAN, supra note 1292, at 205–07, 210–12.
\textsuperscript{2463} See KABASERVICE, supra note 939, at 388, 401–02; PAGE & GILENS, supra note 533, at 261.
\textsuperscript{2464} See KLEIN, supra note 347, at 250.
to authoritarian reversion.\footnote{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).} Even after nearly four years of Trump’s presidency, he probably still cannot get away with imprisoning \textit{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,\footnote{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-d35bda07d66a_story.html [https://perma.cc/WP2S-W5W8].} 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.\footnote{PAGE & GILENS, supra note 533, at 264.} 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.\footnote{See id. at 264–66.} While many of their diagnoses and reform proposals fundamentally differ, eighty percent of Americans, across party lines, agree that \textit{Citizens United} should be overturned and the influence of money on politics reduced.\footnote{Id. at 266.} Yet change is difficult in a system stacked against it.

Another reason for optimism is that Americans have been here before — and survived.\footnote{See, e.g., KLEIN, supra note 347, at 267–68; Huq & Ginsburg, supra note 36, at 168.} In the 1790s, Federalists and Jeffersonians feared and hated one another.\footnote{See ELKINS & MCKITRICK, supra note 1030, at 4; LEVITSKY & ZIBLATT, supra note 35, at 102.} The period from the 1870s to the 1910s was one of deeply partisan politics and mass disfranchisement.\footnote{PAGE & GILENS, supra note 533, at 4, 25–26.} 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.\footnote{DIAMOND, supra note 28, at 255.} Progressive Era reformers secured women’s suffrage, direct election of senators, the initiative and referendum, and antitrust laws.\footnote{PAGE & GILENS, supra note 533, at 4, 25–26.} Later, New Dealers secured Social Security, the empowerment of organized labor, fair labor standards, and banking and securities law reforms.\footnote{PAGE & GILENS, supra note 533, at 4, 25–26.}
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. 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. 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. 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, which produced a huge Democratic victory in the 2018 midterm elections. 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.

Another reason for optimism is that President Trump’s approval rating has never topped fifty percent — unprecedented among modern American Presidents — and has hovered between forty and forty-


2477 See supra pp. 119–20, 121–23.


2479 See MOUNK, supra note 31, at 259–60; SITARAMAN, supra note 1292, at 210.


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).

five percent for most of his term. 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. 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. 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.

California’s experience confirms the plausibility of this optimistic scenario. In the early 1990s, California Republicans invested in an anti-immigrant strategy to ward off what many of them identified as unfavorable demographic trends. Proposition 187, promoted by Republican Governor Pete Wilson as he sought reelection in 1994, barred undocumented immigrants from many public services. Although the proposition was obviously unconstitutional under a recent Court decision, Governor Wilson and California Republicans nonetheless put it on the ballot to bolster turnout from anti-immigrant voters. The strategy worked in the short term but has virtually destroyed the California Republican Party in the longer term.

The strategy worked in the short term but has virtually destroyed the California Republican Party in the longer term. Voters enacted

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2486 Cf. KLEIN, supra note 247, 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.
Proposition 187, and courts quickly enjoined it. 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. Latinos make up thirty-eight percent of California’s population and nineteen percent of its state legislators. The legislature regularly supports immigrant-friendly policies, such as providing undocumented immigrants with in-state college tuition and access to driver’s licenses. 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. Europeans do not tend to regard themselves as children of immigrants or value racial and ethnic diversity in the way that most Americans do. Despite the best efforts to the contrary of President Trump and his white nationalist immigration advisor Stephen Miller, the majority of Americans continue to hold favorable views of immigration.


2495 A BRAJANO & HAJNAL, supra note 1015, at 194.

2496 See id.

2497 See JARDINA, supra note 787, at 265.

2498 See id.


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. 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. 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. As George Orwell once explained: “Whoever is winning at the moment will always seem to be invincible” — until they cease to be. 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). 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.

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.
Then the coronavirus hit, roughly 200,000 Americans died (as of the end of September), 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.

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. Less well-educated white men tend overwhelmingly to favor President Trump, while urban dwellers, well-educated women, and secular Americans thoroughly repudiate him.2510

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. However, if America were instead like Massachusetts, which Trump lost by twenty-seven points, he never would have gotten near the presidency. 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.

Finally, if American democracy survives the Trump presidency intact, it will be mostly because President Trump has been such an ineffective,

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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. Arajano & Hajnal, supra note 1015, at 211–16 (discussing how increasing diversity may shape the American political system).
self-defeating autocrat. 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. 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.

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].


2517 Cf. LEVITSKY & ZIBLATT, supra note 35, at 207 (arguing that the threat to democracy will outlast the Trump presidency).