

THE RHYTHM OF REFORM

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INTRODUCTION

This year, we celebrate the 250th anniversary of our independence. In January 1776, Thomas Paine published *Common Sense*.¹ Paine was an immigrant who had arrived only two years before.² The pamphlet went viral, a widely bootlegged bestseller with 120,000 copies sold in its first three months in print.³ It galvanized support for independence and argued that the collection of colonies should become a republic. Paine wrote: “[I]n America THE LAW IS KING.”⁴

Is that still true? We are finding out.

Today our Constitution and the institutions of self-government face extraordinary pressure. In the first two months of 2026 alone, we saw an invasion of Venezuela without congressional authorization,⁵ a threat to use military force to seize Greenland from a NATO ally,⁶ and a criminal investigation into Jerome Powell, chair of the Federal Reserve Board, which Powell decried as an attempt to coerce the Federal Reserve into lowering interest rates.⁷ We saw the sickening sight of federal agents killing two civilians in Minnesota in separate incidents, including, Alex Pretti, an ICU nurse at the Veterans Administration who was witnessing and protesting abuse,⁸ followed by a fusillade of lies from top officials who labeled him a “domestic terrorist” and “an assassin.”⁹ These events

¹ See THOMAS PAINE, *COMMON SENSE* v (1776).

² See *Thomas Paine Publishes “Common Sense,”* HIST. (Feb. 18, 2025), <https://www.history.com/this-day-in-history/january-10/thomas-paine-publishes-common-sense> [<https://perma.cc/PH2S-VXZP>].

³ *Thomas Paine: The Original Publishing Viral Superstar*, NAT’L CONST. CTR. (Jan. 10, 2023), <https://constitutioncenter.org/blog/thomas-paine-the-original-publishing-viral-superstar-2> [<https://perma.cc/Z79S-6B28>].

⁴ PAINE, *supra* note 1, at 28.

⁵ Katherine Yon Ebright, *No Legal Basis for Invading Venezuela*, BRENNAN CTR. FOR JUST. (Jan. 6, 2026), <https://www.brennancenter.org/our-work/analysis-opinion/no-legal-basis-invading-venezuela> [<https://perma.cc/93EU-L7LS>].

⁶ Peter Baker, *With Threats to Greenland, Trump Sets America on the Road to Conquest*, N.Y. TIMES (Jan. 20, 2026), <https://www.nytimes.com/2026/01/20/us/politics/trump-greenland-america-conquest.html>.

⁷ See Jerome H. Powell, Statement from Federal Reserve Chair Jerome H. Powell (Jan. 11, 2026), <https://www.federalreserve.gov/newsevents/speech/powell20260111a.htm> [<https://perma.cc/MPX9-9VK7>].

⁸ See Tim Steloh, *Renee Good Was Shot in the Head, Autopsy Commissioned by Her Family Finds*, NBC NEWS (Jan. 21, 2026, at 23:34 ET), <https://www.nbcnews.com/news/us-news/renee-good-was-shot-head-autopsy-commissioned-family-finds-rcna255335> [<https://perma.cc/N5LZ-FDWG>]; Jacob Phillips, *Who Was Alex Pretti, the Intensive Care Nurse Shot Dead in Minneapolis?*, BBC (Jan. 28, 2026), <https://www.bbc.com/news/articles/c62r4g590wqo> [<https://perma.cc/XMH8-M2MN>].

⁹ Brittany Gibson, *Trump Officials Stick “Terrorist” Label on Americans Killed by DHS*, AXIOS (Jan. 25, 2026), <https://www.axios.com/2026/01/25/trump-officials-stick-terrorist-label-on->

unfolded alongside the launch of a full-scale war in the Middle East, undertaken without congressional debate or authorization and with scant public explanation at all.¹⁰

As Canadian prime minister Mark Carney put it in his speech at the World Economic Forum in Davos, “[w]e are in the midst of a rupture, not a transition.”¹¹

At the Brennan Center for Justice, which I lead, we work to counter abuses of power every day. We are deeply engaged in the broad campaign to counter the executive power grab, including filing or coordinating dozens of briefs in the flotilla of cases addressing executive authority. We are preparing to ensure that the 2026 election will be free, fair, and secure. In that effort, we work with election officials and law enforcement officers from both parties. We do so in the face of something unprecedented in our nation’s history: a coordinated campaign by the federal government to undermine elections.¹²

All of this is vital work. But that cannot be all that we do. We must begin, now, to imagine a better future—a future after the wreckage. What will matter most at this moment is not just what we are against, but what we are for.

It is emphatically the time to begin mapping out the next reform agenda.

The 2024 presidential election was the first time since the 1800s that the incumbent party lost the White House three times in a row.¹³ (Democrats in 2016, Republicans in 2020, Democrats in 2024.) The country remains gripped by a deep disquiet. Millions feel left out, left behind, economically dislocated, and culturally ignored. Donald Trump,

americans-killed-by-dhs [<https://web.archive.org/web/20260127011049/https://www.axios.com/2026/01/25/trump-officials-stick-terrorist-label-on-americans-killed-by-dhs>]; Daniel Dale, *What Trump Officials Claimed About Alex Pritti—and What the Evidence Actually Shows*, CNN (Jan. 25, 2026), <https://www.cnn.com/2026/01/25/politics/trump-officials-shifting-rhetoric-alex-pretti> [<https://web.archive.org/web/20260208110839/https://www.cnn.com/2026/01/25/politics/trump-officials-shifting-rhetoric-alex-pretti>].

¹⁰ See Sam Gringlas, *Iran Strikes Were Launched Without Approval from Congress, Deeply Dividing Lawmakers*, NPR (Feb. 28, 2026, at 19:25 ET), <https://www.npr.org/2026/02/28/nx-s1-5730203/iran-israel-trump-congress-strikes-reaction> [<https://perma.cc/44H9-7DR8>].

¹¹ Mark Carney, Prime Minister of Can., *Principled and Pragmatic: Canada’s Path*, Address at the World Economic Forum Annual Meeting (Jan. 20, 2026), <https://www.pm.gc.ca/en/news/speeches/2026/01/20/principled-and-pragmatic-canadas-path-prime-minister-carney-addresses> [<https://perma.cc/WXZ5-ZV7R>].

¹² Jasleen Singh, *The Trump Administration’s Campaign to Undermine the Next Election*, BRENNAN CTR. FOR JUST. (Aug. 3, 2025), <https://www.brennancenter.org/our-work/research-reports/trump-administrations-campaign-undermine-next-election> [<https://perma.cc/UER8-N3XA>].

¹³ In 1884 the Republicans lost the White House; in 1888 the Democrats lost; in 1892 the Republicans lost.

in his way, intuited this. The Democrats, for their part, missed it three—or arguably four—different times. This roiling disaffection, born of a profound misalignment over decades between the lived experience of Americans and the public institutions that are supposed to serve them, is the central, recurring political fact of our era. It is also the backdrop behind all legal and policy change.

Those who want to stand up for the Constitution, the rule of law, and democracy, must offer a better vision of how things can work, and work in a way that will produce a better life for more Americans. Dry calls to defend democracy will not be enough. Norms and institutions cannot simply be safeguarded—they appear outdated at best, and corrupt at worst, to the very citizenry whose energies must be organized to defend the Constitution.

Is now really the time to do this? When the barbarians are at the gate, is it really the time for city planning?

This Article argues so, for several reasons. It is precisely during a time of crisis that new possibilities emerge. Crisis creates opportunities for new thinking, new groups, and new alignments. It is a time when, as Abraham Lincoln put it in the depths of the Civil War, “we must think anew.”¹⁴

American governance does not improve or even change at a stately, steady pace over time. It moves in bursts. Paleontologists Niles Eldredge and Stephen Jay Gould famously posited the theory of “punctuated equilibria”—long periods of stasis, followed by sudden surges of change.¹⁵ I do not pretend to know enough biology to know if that is good science. But I know enough to know that it is good *political* science.¹⁶ If nothing else, American equilibrium surely has been punctuated.

It is noteworthy, too, that courts and litigation played little role in most of these reform moments. The task of reconstruction was undertaken principally in legislatures, in the executive branch, and by journalists and activists—almost never by judges, persuaded by litigators

¹⁴ President Abraham Lincoln, Second Annual Message (Dec. 1, 1862).

¹⁵ Niles Eldredge & Stephen J. Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *MODELS IN PALEOBIOLOGY* 82, 84 (Thomas J. M. Schopf ed., 1972).

¹⁶ In 1993, professors Frank R. Baumgartner and Bryan D. Jones published a foundational book on punctuated equilibria as a theory of understanding changes in politics, crediting Eldredge and Gould with first proposing the term. See FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 18–19 & n.1 (1993). This theory continues to be analyzed and developed in political science scholarship to date. See, e.g., Bryan D. Jones & Frank R. Baumgartner, *From There to Here: Punctual Equilibrium to the General Punctuation Thesis to a Theory of Government Information Processing*, 40 *POL’Y STUD. J.* 1, 3–7 (2012); Clare Brock & Daniel Mallinson, *Measuring the Stasis: Punctuated Equilibrium Theory and Partisan Polarization*, 52 *POL’Y STUD. J.* 31, 32–35 (2023).

to act.¹⁷ Courts played their most useful role, repeatedly, by doing nothing—by getting out of the way and allowing the push and pull of democratic governance to take shape. Indeed, in this century especially, federal courts have been most active at blocking or undermining the very products of previous reform moments.¹⁸ So, preparing for the work of response to today's upheaval will require a rediscovery of an earlier vision of judicial restraint.

So it is time to look at the patterns of change—the rhythms of reform that have shaped American government and law. It is important that we do this with humility—especially in the law school world—recognizing how little of this happened in courtrooms and, instead, how much happened in legislatures, at the ballot box, and in the streets. It is time to put forward bold ideas for the next era of reform.

I. PATTERNS OF CHANGE

American history has been marked by a cycle of decay and renewal. Reform follows scandal and abuse—often, but not always. The challenge for all of us is to ensure that is what happens: to understand the rhythm of reform.

Mark Twain is alleged to have said, “[h]istory does not repeat itself, but it often rhymes.”¹⁹ This Article does not assess the lessons of the past through the prism of an inexorable swing between left and right, liberal and conservative political realignments, as Arthur M. Schlesinger, Jr. and other twentieth century analysts did.²⁰ Nor does it follow the approach of political scientists such as Stephen Skowronek, whose *The Politics Presidents Make* saw a different recurring cycle. In that account, transformative presidents forged a new governing majority, and then

¹⁷ See MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869*, at 77 (1974).

¹⁸ See *infra* notes 344–351 and accompanying text.

¹⁹ See, e.g., Jeff Sommer, *Funny, but I've Heard This Market Song Before*, N.Y. TIMES (June 18, 2011), <https://www.nytimes.com/2011/06/19/your-money/stocks-and-bonds/19stra.html> [<https://web.archive.org/web/20240507203631/https://www.nytimes.com/2011/06/19/your-money/stocks-and-bonds/19stra.html>] (“‘History doesn’t repeat itself but it often rhymes,’ as Mark Twain is often reputed to have said. (I’ve found no compelling evidence that he ever uttered that nifty aphorism. No matter—the line is too good to resist.)”); Garson O’Toole, *History Does Not Repeat Itself, but It Rhymes*, QUOTE INVESTIGATOR (Jan. 12, 2014), <https://quoteinvestigator.com/2014/01/12/history-rhymes> [<https://perma.cc/4DXA-TNPM>] (noting that Twain did use the phrase “[h]istory never repeats itself,” but attributing the famous quote to its likely author, psychoanalyst Theodor Reik, in 1965).

²⁰ See, e.g., ARTHUR MEIER SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* 23–48 (1986) (positing a pendulum that swung between liberal and conservative political eras).

were followed by presidents who sought to conserve the new system, until a president presided over the breakup of that consensus.²¹

Rather, the cycle which seems to repeat is one in which long periods of stasis culminate in scandal, corruption, and disruption—followed by a burst of reform that constructs a new order.

The Constitution itself came in response not just to a Revolution that cost many more lives than we realize—the equivalent of over 3.4 million Americans today²²—but to the chaos that followed under the Articles of Confederation, which verged on a failed state.²³

After the Civil War came Reconstruction. Many nations ended slavery in the nineteenth century, but, as historian Eric Foner points out, the United States was the only one to grant full citizenship and political rights so soon after emancipation.²⁴ The Fourteenth and Fifteenth Amendments, the Freedman's Bureau, and much more achieved striking success—until political cowardice and bargaining led White Americans to withdraw the protection of the federal government after the 1876 election.²⁵

Then came the period with perhaps the most striking resemblance to our own: the Gilded Age and its aftermath. It does not receive as much attention as it should.

The late nineteenth century was a period of rapid, disorienting economic and social change.²⁶ In the wake of the country's roaring rise to global power, industrialization, urban growth, and massive concentration of wealth, Americans felt that their institutions were under siege and

²¹ See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 52–58 (1997).

²² Approximately 25,000 American combatants died during the American Revolution. See HOWARD H. PECKHAM, *THE TOLL OF INDEPENDENCE* 130–33 (1974); Patrick J. Kiger, *How Many Died in the Revolutionary War?*, HIST. (Sep. 12, 2023), <https://www.history.com/articles/revolutionary-war-deaths> [<https://perma.cc/F83L-VRZY>]. Those deaths amounted to about 1% of the population. *Id.*; see also U.S. Census Bureau, *U.S. and World Population Clock*, <https://www.census.gov/popclock> (noting that, as of April 2026, the United States population is approximately 340 million).

²³ MICHAEL J. KLARMAN, *THE FRAMERS COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 11–72 (2016).

²⁴ ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 279 (1988).

²⁵ See, e.g., *The Freedman's Bureau*, NAT'L ARCHIVES (Oct. 28, 2021), <https://www.archives.gov/research/african-americans/freedmens-bureau> [<https://perma.cc/EJ5K-WT99>] (noting that the Bureau was only in existence for seven years, from 1865 to 1872); Sarah Pruitt, *How the 1876 Election Tested the Constitution and Effectively Ended Reconstruction*, HIST. (May 28, 2025), <https://www.history.com/articles/reconstruction-1876-election-rutherford-hayes> [<https://perma.cc/X98B-F67N>].

²⁶ See, e.g., Gideon Rose, *How Today Is Like the 1890s*, COUNCIL ON FOREIGN RELS. (July 16, 2023, at 13:13 ET), <https://www.cfr.org/articles/how-today-1890s> [<https://perma.cc/QZJ8-FHS7>].

increasingly inadequate to the changing economy, and that a corrupt government was falling behind its responsibilities.

There was, as Theodore Roosevelt described it, a “fierce discontent”²⁷ among educated city dwellers as well as beaten-down farmers. Progressive reform bubbled up from communities and movements across the country, engaging millions.²⁸

Much of our understanding of this era focuses on the rise of the administrative state, the timid beginnings of a federal role in the economy.²⁹ It is not entirely accurate, however, to say that the nation’s early years were *laissez faire*.³⁰ There was considerable governmental involvement, from “improvements” such as canals to the regulation of prices and employment.³¹ But these efforts were largely local in nature.³² Then national corporations grew, particularly the trusts, beginning with the railroads.³³ At first, federal policy encouraged the growth of the railroads and other trusts—an “infant industry” subsidy through minimal regulation and taxation.³⁴ Eventually, it became clear that a national economy had emerged, without the counterbalance of an effective national government.

The response to this imbalance came first in the Populist movement of the 1890s.³⁵ Then, after the Populists’ electoral defeat in the 1896 presidential election,³⁶ the Progressive Era took shape. It was a

²⁷ President Theodore Roosevelt, Remarks at the Laying of the Cornerstone of the Office Building of the House of Representatives: “The Man with the Muck-Rake” (Apr. 14, 1906).

²⁸ See generally MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA 1870-1920* (2003) (describing how social movements ultimately fed political and governmental reform).

²⁹ See, e.g., Edward L. Glaeser & Andrei Schleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401, 401–03, 407 (2003); JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 41–50 (2017).

³⁰ See MICHAELS, *supra* note 29, at 43.

³¹ See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 67–75 (1944).

³² See Daniel Walker Howe, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 252–55 (2007) (describing federal internal improvement programs as contested and piecemeal, with Congress resisting a unified national plan).

³³ See JONATHAN LEVY, *AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES* 195–259 (2021).

³⁴ Keith Head, *Infant Industry Protection in the Steel Rail Industry*, 37 J. INT’L ECON. 141, 142 (1994).

³⁵ See generally LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1976) (documenting the Populist movement as a response to railroad monopolies and the concentration of economic power without effective governmental check).

³⁶ David Leblang, Michael Haines, Matthew Jaremski & Barry Eichengreen, *Populists at the Polls: Economic Factors in the 1896 Presidential Election*, CTR. FOR ECON. POL’Y RSCH. (Oct. 25, 2017), <https://cepr.org/voxeu/columns/populists-polls-economic-factors-1896-presidential-election> [https://perma.cc/GMS7-L9W5]; Sarah Pruitt, *The Contentious 1896 Election That Started*

predominantly middle-class movement, drawn from both political parties, and touching government at all levels.³⁷

We are accustomed to understanding the Progressive Era reforms as the first foray into governmental regulation of the economy, with the enactment of statutes such as the Pure Food and Drug Act of 1906, signed into law by President Theodore Roosevelt,³⁸ or the creation of the Federal Reserve under Woodrow Wilson.³⁹

But just as important and central to the Progressives' understanding of their moment was the suite of political reforms that democratized governance and professionalized government.

One big change involved the role that money played in politics. For much of the nineteenth century, campaign finance was not an issue: Campaigns were funded by public employees, who were party loyalists installed under the spoils system.⁴⁰ They were required, in effect, to provide kickbacks on their salaries to the political party who sponsored them.⁴¹ Then came the assassination of James Garfield by a disgruntled and deluded office-seeker.⁴² The television series *Death by Lightning* tells the story.⁴³ Garfield's successor was Chester Alan Arthur.⁴⁴ Known as a corrupt official, he surprised everyone—likely himself included—by championing and instituting civil service for federal employees.⁴⁵ This

the Rural-Urban Voter Divide, HIST. (May 28, 2025), <https://www.history.com/articles/rural-urban-divide-1896-election> [<https://perma.cc/K6ZJ-FUEW>].

³⁷ See, e.g., Kirsten Swinth, *The Square Deal: Theodore Roosevelt and the Themes of Progressive Reform*, GILDER LEHRMAN INST. AM. HIST.: HIST. NOW, Fall 2008, <https://www.gilderlehrman.org/history-resources/essays/square-deal-theodore-roosevelt-and-themes-progressive-reform> [<https://perma.cc/69A6-7MBJ>].

³⁸ See generally Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (regulating the manufacture, sale, or transportation of certain foods, drugs, medicines, and liquors).

³⁹ See generally Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (establishing the Federal Reserve).

⁴⁰ Becky Little, *How a Presidential Assassination Led to the End of the Spoils System*, HIST. (Nov. 4, 2025), <https://www.history.com/articles/garfield-assassination-spoils-system-reforms-federal-employees> [<https://perma.cc/N6YU-798D>].

⁴¹ See *id.*

⁴² *Id.*

⁴³ See *DEATH BY LIGHTNING* (Netflix, aired Nov. 6, 2025). For a written account of the assassination, see generally CANDICE MILLARD, *DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE, AND THE MURDER OF A PRESIDENT* (2011).

⁴⁴ Little, *supra* note 40.

⁴⁵ See ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT 1865-1883*, at 215-17 (1961). The spoils system did not vanish overnight at the federal level: "In 1882, only 11 percent of the civil service was classified [subject to merit, not patronage, selection]; the number grew to 46 percent by 1900. (This figure was to reach 80 percent under Franklin D. Roosevelt and 85 percent in the immediate post-World War II period, declining thereafter.)" FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 153 (2014).

improved how government functioned, but left a hole in the financing of political campaigns.

That hole was filled by private money, which coincided with the rise of the trusts, whose extraordinary wealth replaced the spoils system as the basis of campaign financing.⁴⁶ Days before the 1904 presidential election, newspapers had charged that Theodore Roosevelt's campaign was being bankrolled by the very business interests he otherwise zestfully denounced.⁴⁷ According to the *New York World*, the firms were seeking to curry favor with the great trustbuster, hoping to avoid antitrust prosecution. As it happens, the charge was true. A jittery Roosevelt had indeed gone to business leaders shortly before the election to beg for campaign funds. He quickly regretted it. The attorney general happened upon the President dictating a letter returning campaign funds from John D. Rockefeller's Standard Oil trust.⁴⁸ "Why, Mr. President," he blurted, "the money has been spent." Roosevelt shrugged: "Well, . . . the letter will look well on the record, anyhow."⁴⁹ The industrialist Henry Clay Frick later complained, "[w]e bought the son of a bitch, and then he didn't stay bought."⁵⁰ Roosevelt was elected to a full term.

Roosevelt was mortified. "Sooner or later, unless there is a readjustment, there will come a riotous, wicked, murderous day of atonement," he had once told a reporter.⁵¹ Stung by scandal, he began to crusade. He signed the Tillman Act of 1907, which banned corporations from spending or contributing money in federal elections⁵²—part of the regulatory framework that the Supreme Court would begin dismantling 93 years later in *Citizens United v. Federal Election Commission*.⁵³ Roosevelt issued the first call for public financing of campaigns.⁵⁴

⁴⁶ ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* 13–26 (2014).

⁴⁷ This passage is drawn from MICHAEL WALDMAN, *THE FIGHT TO VOTE* 100 (2016).

⁴⁸ RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 519 (1998).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ EDMUND MORRIS, *THEODORE REX* 360 (2001).

⁵² Tillman Act, Pub L. No. 59-36, 34 Stat. 864 (1907).

⁵³ 558 U.S. 310, 365–66 (2010).

⁵⁴ In his 1907 State of the Union message, he wrote:

There is a very radical measure which would, I believe, work a substantial improvement in our system of conducting a campaign, although I am well aware that it will take some time for people so to familiarize themselves with such a proposal as to be willing to consider its adoption. The need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties, an appropriation ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money. Then the stipulation should be made that no party receiving campaign funds from the Treasury should accept more than a fixed amount from any individual subscriber or

The broader concern with the influence of concentrated wealth on democratic governance extended to the structure of political institutions themselves. Roosevelt and his supporters backed the Seventeenth Amendment, which gave citizens the power to vote for U.S. senators.⁵⁵ The Constitution had originally provided that state legislatures would choose senators,⁵⁶ but by the turn of the twentieth century, those legislatures were widely seen as corrupt and dominated by powerful industries. As the renowned journalist William Allen White wrote in 1928:

A United States senator in 1889, with few exceptions, represented something more than a state, more even than a region. He represented principalities and powers in business. One senator, for instance, represented the Union Pacific Railway System, another the New York Central, still another the insurance interests of New York and New Jersey.⁵⁷

In 1906, Progressive journalist George Henry Haynes observed, “[i]n one of the North Pacific States, . . . a subsidized continental railway company without any serious shock of surprise presently discovered both members of the firm of its late attorneys in the United States Senate.”⁵⁸

There was also the 19th Amendment, in which women won the right to vote—a transformative measure eventually backed by Progressives from both parties.⁵⁹

States across the country reformed their governmental systems. Referendum and recall were instituted in dozens of state constitutions.⁶⁰ By 1920 in roughly half the states, citizens could vote for legislation or constitutional changes.⁶¹

donor; and the necessary publicity for receipts and expenditures could without difficulty be provided.

President Theodore Roosevelt, Seventh Annual Message (Dec. 3, 1907).

⁵⁵ U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.”).

⁵⁶ U.S. CONST. art. I, § 3, cl. 1.

⁵⁷ WILLIAM ALLEN WHITE, MASKS IN A PAGEANT 79 (1928).

⁵⁸ GEORGE H. HAYNES, THE ELECTION OF SENATORS 177 (1906).

⁵⁹ See ELAINE WEISS, THE WOMAN’S HOUR: THE GREAT FIGHT TO WIN THE VOTE 182–84, 325–26 (2018) (describing the challenges faced leading up to the vote on suffrage and the experience of women voting for the first time following suffrage); WALDMAN, *supra* note 47, at 115–24 (2016). See *generally* TIFFANY K. WAYNE, WOMEN’S SUFFRAGE: THE COMPLETE GUIDE TO THE NINETEENTH AMENDMENT (2020) (discussing the history of women’s suffrage and documenting the suffragists who fought for the right to vote).

⁶⁰ See JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 85 (2006).

⁶¹ *Id.* at 85–86.

Of significant note, none of these responses came in the courts. This was a period when progressives fought hard for judicial restraint.⁶² They rightly saw the federal judiciary as reactionary.⁶³ We all know about *Plessy v. Ferguson*, which blessed “separate but equal.”⁶⁴ It does not excuse the Court’s racism and myopia to note that it was merely ratifying the consensus among White Americans.⁶⁵ Perhaps even more deserving of opprobrium was *Giles v. Harris*, where the Court acknowledged that Southern voting practices violated the Fifteenth Amendment—but shrugged and said there was little it could do about it.⁶⁶

There was one more period in which disruption was followed by a wave of reform—a half century later, a half century ago. On August 9, 1974, Richard Nixon resigned from the presidency, little more than two years after burglars working for his campaign were arrested at the Democratic National Committee headquarters in the Watergate complex.⁶⁷ That scandal mesmerized the public with revelations about dirty tricks, hush money, campaign cash delivered in paper bags to cabinet secretaries, and the astonishing news that the President himself had taped every conspiratorial conversation in the Oval Office.⁶⁸ In the end, the Attorney General, the Commerce Secretary, the White House Chief of Staff, the domestic policy advisor, and Counsel to the President all were convicted, and most served prison time.⁶⁹ Earlier, Nixon’s Vice President had resigned amid a *separate* scandal, also involving manila

⁶² See, e.g., Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 215, 244, 265 (2019).

⁶³ See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1994) (describing widespread public criticism of the courts); Senate Historical Office, *Senate Progressives vs. the Federal Courts*, U.S. SENATE (May 3, 2021), <https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal-courts.htm> [<https://perma.cc/4VJC-ZJFY>] (quoting Senator Robert Owen, who declared “The Federal judiciary has become the bulwark of privilege”).

⁶⁴ 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

⁶⁵ See *id.* at 551–52 (majority opinion).

⁶⁶ See generally 189 U.S. 475 (1903) (ultimately finding that the legislative side of government is more properly equipped to address the “conspiracy” that White people were intending to prevent Black people from voting). For a discussion of the case, see WALDMAN, *supra* note 47, at 86–88, and Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 297 (2000) (noting the significance of *Giles* and labeling it as “one of the most momentous decisions” in Supreme Court history).

⁶⁷ *A President Resigns—50 Years Later*, NAT’L ARCHIVES, <https://visit.archives.gov/whats-on/explore-exhibits/president-resigns-50-years-later> [<https://perma.cc/V8EM-CV52>].

⁶⁸ See generally GARRETT M. GRAFF, *WATERGATE: A NEW HISTORY* (2022) (chronicling the 1972–1974 Watergate scandal).

⁶⁹ Paul L. Montgomery, *Watergate Toll. Case Histories of 17 Men*, N.Y. TIMES (Feb. 22, 1975), <https://www.nytimes.com/1975/02/22/archives/watergate-toll-case-histories-of-17-men.html>.

envelopes containing cash, and pleaded *nolo contendere* in federal court.⁷⁰

At the same time, parallel investigations led by Senator Frank Church revealed systematic abuses of power by the FBI and CIA over decades.⁷¹ All this followed the Vietnam War, which itself had produced a wide credibility gap.⁷²

A far-reaching burst of reform followed these scandals as well. Congress enacted strong campaign finance laws, including a public financing system for presidential campaigns.⁷³ It passed the War Powers Resolution in response to the Vietnam War and the illegal bombing of Cambodia.⁷⁴ It enacted statutes ranging from the Ethics in Government Act (establishing a mechanism to probe executive branch misconduct through special prosecutors),⁷⁵ to the Foreign Intelligence Surveillance Act (requiring a special court to approve surveillance).⁷⁶ Additionally, the Budget Impoundment and Control Act was passed to ensure presidents could not refuse to spend congressionally appropriated money,⁷⁷ while

⁷⁰ See generally RICHARD M. COHEN AND JULES WITCOVER, *A HEARTBEAT AWAY: THE INVESTIGATION & RESIGNATION OF VICE-PRESIDENT SPIRO T. AGNEW* (1974) (detailing the investigation and resignation of Vice President Spiro T. Agnew).

⁷¹ See generally I FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755 (1976) (describing an investigation and study of United States intelligence activities by a Select Committee in the United States Senate established for that purpose).

⁷² See Karl Marlantes, *Vietnam: The War That Killed Trust*, N.Y. TIMES (Jan. 7, 2017), <https://www.nytimes.com/2017/01/07/opinion/sunday/vietnam-the-war-that-killed-trust.html> [<https://web.archive.org/web/20210128173933/https://www.nytimes.com/2017/01/07/opinion/sunday/vietnam-the-war-that-killed-trust.html>].

⁷³ ANTHONY CORRADO, THOMAS E. MANN, DANIEL R. ORTIZ & TREVOR POTTER, *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 20–26 (2005) (describing the 1971 Federal Election Campaign Act and the 1974 Federal Election Campaign Act Amendments, ultimately calling the 1974 Amendments “the most comprehensive campaign finance reform package ever adopted by Congress”).

⁷⁴ See generally War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548) (“It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”).

⁷⁵ Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1867–73 (codified as amended at 5 U.S.C. app. §§ 101–111; 8 U.S.C. §§ 591–599).

⁷⁶ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 1788 (codified as amended at 50 U.S.C. §§ 1801–1885).

⁷⁷ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 298 (codified as amended at 2 U.S.C. §§ 601–881).

Congress also strengthened the Freedom of Information Act, making it easier for citizens and journalists to track spending behavior.⁷⁸

And while it was not embodied in a statute, the norm that the Justice Department should have some considerable degree of independence from the White House took hold under President Gerald Ford and his attorney general, Edward Levi, the former dean of the University of Chicago Law School.⁷⁹

As I noted at the Bauer Lecture Series at the Benjamin N. Cardozo School of Law, courts played little role in this wave of reform—and, in fact, when they did get involved, they often acted to block the changes. The landmark Federal Election Campaign Act, which established spending limits for presidential campaigns, was partially struck down in *Buckley v. Valeo*.⁸⁰ In *Buckley*, Justice Potter Stewart declared at oral argument, “money is speech and speech is money.”⁸¹ The Court applied the First Amendment to campaign finance law for the first time, and ruled that only corruption or the appearance of corruption could be the basis for regulation—not political equality, not democracy.⁸² The Court struck down spending limits and allowed wealthy individuals to spend unlimited amounts on their own campaign (since you cannot corrupt yourself).⁸³ It allowed contribution limits to stand, however.⁸⁴ The Justices tried to grapple with long-standing conflicts between protecting liberty and promoting equality.⁸⁵ Ultimately, they drew a line between contributions (which could be limited) and expenditures (which could not).⁸⁶ Thus, candidates could raise unlimited funds, but only in relatively

⁷⁸ 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552(a)).

⁷⁹ Nancy Virginia Baker, *History, Norms and Conflicting Loyalties in the Office of Attorney General*, 72 MERCER L. REV 833, 834–44 (2021) (noting that independence is “probably [the] oldest[] norm” in the DOJ and describing post-Watergate reforms intended to rehabilitate the perception of DOJ independence); Jack Goldsmith, *Edward Levi’s Department of Justice*, EXEC. FUNCTIONS (Jan. 16, 2026), <https://www.execfunctions.org/p/edward-levis-department-of-justice> [<https://perma.cc/Y6XF-AMWP>].

⁸⁰ *Buckley v. Valeo*, 424 U.S. 1, 23–35, 51–52 (1976) (holding that the First Amendment was violated by a law limiting independent expenditures and personal candidate spending, but was not violated by limitations on individual campaign contributions).

⁸¹ Transcript of Oral Argument at 24, *Buckley v. Valeo*, 424 U.S. 1 (1976) (No. 75-436); see also *Fed. Election Comm’n v. Nat’l Org. for Women*, 713 F. Supp. 428, 430 (1989) (noting that Justice Potter Stewart stated “[m]oney is speech and speech is money” in the oral argument of *Buckley v. Valeo*).

⁸² *Buckley*, 424 U.S. at 27, 48–49.

⁸³ *Id.* at 53.

⁸⁴ *Id.* at 23–35, 143.

⁸⁵ *Id.* at 54.

⁸⁶ *Id.* at 143.

small amounts, all the while worried that an ideological committee or a bored millionaire opponent would suddenly emerge.⁸⁷

Of all the Justices who ruled in *Buckley*, only one had significant electoral experience. Justice Byron “Whizzer” White, a former NFL player, had run John F. Kennedy’s campaign in Colorado.⁸⁸ White’s foreboding dissent warned that the Court was making a mess.⁸⁹ “There are many illegal ways of spending money to influence elections,” he wrote.⁹⁰ “One would be blind to history to deny that unlimited money tempts people to spend it on whatever money can buy to influence an election.”⁹¹ Officeholders would now be forced to spend ever-larger amounts of time fundraising.⁹² White noted his “regret that the Court [] returned them all to the treadmill.”⁹³

II. TODAY’S TERRAIN

Half a century later, there has been no comparable era of political and governmental reform—from left or right—since.⁹⁴ The conditions are ripe for such a reform moment—indeed, overripe.

Once again, technology is shaking and remaking our world. Today five corporations (Alphabet, Amazon, Apple, Meta, and Microsoft) control much of the information we receive, how we shop, and how we communicate, using vast quantities of personal data collected from users.⁹⁵ Those technology firms and two others—Nvidia and Tesla—now account for more than one-third of the value of the Standard and Poors (S&P) 500, a remarkable rush of concentrated capital and power into just

⁸⁷ *Id.* at 288–89 (Marshall, J., concurring in part, dissenting in part).

⁸⁸ Byron R. White, OYEZ, https://www.oyez.org/justices/byron_r_white [https://perma.cc/4CKT-KP9E].

⁸⁹ See *Buckley*, 424 U.S. at 265–66 (White, J., concurring in part, dissenting in part).

⁹⁰ *Id.* at 265.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See generally Robin Stryker & Olivia Neff, *Democracy Under Siege: The Demise of Successful United States Federal Campaign Finance Reform*, 40 *STUD. AM. POL. DEV.* 20 (2026) (tracing the collapse of federal campaign finance reform from its 1970s high-water mark to the present).

⁹⁵ Lionel Sujay Vailshery, *Google, Amazon, Meta, Apple, and Microsoft (GAMAM)—Statistics & Facts*, STATISTA (Dec. 17, 2025), <https://www.statista.com/topics/4213/google-apple-facebook-amazon-and-microsoft-gafam> [https://perma.cc/VA6W-N7EW].

a few hands.⁹⁶ The top 1% control more wealth than the bottom 90% combined.⁹⁷

Once again, population flows across borders are upending settled ways of life. In January 2025, the United States had the highest percentage of foreign-born residents since previous peaks in 1890 and 1910.⁹⁸

And the American government, at every level but especially at the national level, has failed to keep up with the pace of change and the complexity of the challenge. The American system of government has broken down in fundamental ways, increasingly visible long before Donald Trump took that escalator ride in 2015.⁹⁹ Public trust in government has plunged to the lowest level recorded, far below the nadir of Watergate.¹⁰⁰

Many of the problems are embedded deep in our constitutional system. The U.S. Constitution is the world's oldest currently used constitution¹⁰¹—but there is a reason that few other countries have followed its model.¹⁰² Once these flaws were quaint bits of Americana. Now they have hardened into true obstacles to effectiveness.

⁹⁶ Ben Walsh & Noel Randewich, *The Magnificent Seven Monitor*, REUTERS (Oct. 30, 2024), <https://www.reuters.com/data/magnificent-seven-monitor-2024-10-30>.

⁹⁷ *Compare Top 1% Net Personal Wealth Share*, WORLD INEQ. DATABASE https://web.archive.org/web/20260310034712/https://wid.world/world/#shweal_p99p100_z/US;FR;DE;CN;ZA;GB;WO-PPP/last/eu/k/p/yearly/s/false/12.912/100/curve/false/country (demonstrating that as of 2024, the top 1% of the world population possessed 36.4% of the new personal wealth share globally), *with P0p90 Net Personal Wealth Share*, WORLD INEQ. DATABASE, https://web.archive.org/web/20260310034712/https://wid.world/world/#shweal_p0p90_z/US;FR;DE;CN;ZA;GB;WO-PPP/last/eu/k/p/yearly/s/false/0/75/curve/false/country (demonstrating that as of 2024, the bottom 90% of the world population possessed 26.2% of the new personal wealth share globally). For analysis of the growing inequality of wealth distribution since 1975, see Carter C. Price, *Measuring the Income Gap from 1975 to 2023: Extending Previous Work 2* (Rand Corp., Working Paper No. WR-A516-2, 2025), https://www.rand.org/pubs/working_papers/WRA516-2.html [<https://perma.cc/2GDS-7YHT>] (“[I]n 1975[,] the bottom 90 percent of earners received about two thirds of all taxable income based on data from the World Inequality Database (WID). That share fell to less than half by 2015 . . .” (footnote omitted)).

⁹⁸ Stephanie Kramer & Jeffrey S. Passel, *What the Data Says About Immigrants in the U.S.*, PEW RSCH. CTR. (Aug. 21, 2025), <https://www.pewresearch.org/short-reads/2025/08/21/key-findings-about-us-immigrants> [<https://perma.cc/J2H5-UH8F>].

⁹⁹ Russell Berman, *A Decade of Golden-Escalator Politics*, ATLANTIC (June 16, 2025), <https://www.theatlantic.com/politics/archive/2025/06/donald-trump-campaign-escalator/683172> [<https://web.archive.org/web/20250724121901/https://www.theatlantic.com/politics/archive/2025/06/donald-trump-campaign-escalator/683172>].

¹⁰⁰ *Public Trust in Government: 1958–2025*, PEW RSCH. CTR. (Dec. 4, 2025), <https://www.pewresearch.org/politics/2025/12/04/public-trust-in-government-1958-2025> [<https://perma.cc/6E2F-JX6W>].

¹⁰¹ *Constitution Day*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution-day.htm> [<https://perma.cc/M7U2-T73X>].

¹⁰² See, e.g., David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U.L. REV. 762, 765–70, 781–84 (2012).

There is the U.S. Senate, with two senators for each state, big or small.¹⁰³ At the time of the founding, the biggest state, Virginia, was twelve times the size of the smallest, Delaware.¹⁰⁴ Today California, with approximately 39 million people, is 65 times larger than Wyoming, with nearly 600,000 people—yet each is represented by two senators.¹⁰⁵

There is the Electoral College.¹⁰⁶ For over a century, it reflected the popular vote winner.¹⁰⁷ Then in the past quarter century, the popular vote loser became president on two occasions (in 2000 and 2016).¹⁰⁸ It almost happened one more time—if sixty thousand votes had switched in Ohio in 2004, John Kerry would have become President even though George W. Bush would have still handily won the popular vote.¹⁰⁹

There's the House of Representatives, marked by flagrantly gerrymandered maps and dwindling representation. Gerrymandering is not new: In the very first congressional election, Patrick Henry drew a district to try to keep James Madison from being elected to Congress.¹¹⁰ But digital technology now enables political professionals to slice and dice the electorate with precision.¹¹¹ For years the U.S. Supreme Court decried gerrymandering, but despaired of finding a “judicially discernible and manageable standard[]” to police it.¹¹² Finally, in 2019, in *Rucho v.*

¹⁰³ U.S. CONST. art. I, § 3, cl.1.

¹⁰⁴ See DEP'T OF COM. & LABOR, BUREAU OF THE CENSUS, A CENTURY OF POPULATION GROWTH: FROM THE FIRST CENSUS OF THE UNITED STATES TO THE TWELFTH 1790–1900, at 6–7 (1909), <https://www2.census.gov/library/publications/1909/decennial/century-population-growth-part02.pdf> [<https://perma.cc/T9Z4-UBAS>] (noting that in 1790, Delaware had a population of around 60,000, whereas Virginia had almost 750,000).

¹⁰⁵ See *State Population Totals and Components of Change: 2020–2025*, U.S. CENSUS BUREAU (Jan. 13, 2026), <https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html> [<https://perma.cc/UTM7-QGYF>] (download file “Annual Population Estimates, Estimated Components of Resident Population Change, and Rates of the Components of Resident Population Change for the United States, States, District of Columbia, and Puerto Rico: April 1, 2020 to July 1, 2025 (NST-EST2025-ALLDATA)”).

¹⁰⁶ See U.S. CONST. art. II, § 1, cl.2.

¹⁰⁷ See *Splits Between the Electoral College and Popular Vote*, BALLOTPEDIA, https://ballotpedia.org/Splits_between_the_Electoral_College_and_popular_vote [<https://perma.cc/6T6B-K22M>].

¹⁰⁸ *Id.*

¹⁰⁹ See MICHAEL WALDMAN, A RETURN TO COMMON SENSE: SEVEN BOLD WAYS TO REVITALIZE DEMOCRACY 101 (2008).

¹¹⁰ See RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 148 (2006); CHRIS DE ROSE, FOUNDING RIVALRY: MADISON VS. MONROE, THE BILL OF RIGHTS, AND THE ELECTION THAT SAVED A NATION 212–14 (2011).

¹¹¹ Lara Castellino, *Political Gerrymandering in Today's Technological Landscape*, COLUM. SCI & TECH. L. REV. BLOG (Feb. 7, 2023), <https://journals.library.columbia.edu/index.php/stlr/blog/view/482> [<https://perma.cc/6VY6-2B4M>].

¹¹² See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004); *Rucho v. Common Cause*, 588 U.S. 684, 700–09 (2019).

Common Cause, the Court announced it would refuse to police partisan gerrymandering—and even declared that those claims were nonjusticiable.¹¹³ Having been once described as a political evil, gerrymandering is now encouraged as at the heart of the American way. As Justice Alito wrote, blessing a recent gerrymander, it merely reflected “partisan advantage pure and simple.”¹¹⁴ In 2024, under the *Rucho* regime, fewer than 10% of House districts were electorally competitive.¹¹⁵

Then there is the U.S. Supreme Court—with lifetime terms for Justices.¹¹⁶ More on that later.¹¹⁷

In all this, we have a Madisonian system, replete with checks, balances, and multiple veto points.¹¹⁸ And now we have developed a Western European-style party system, with one “left” party and one “right” party.¹¹⁹ For most of the country’s history, parties were patchworks of regional, religious, and ideological factions. No longer. For the first time, the most liberal Republican is to the right of the most conservative Democrat.¹²⁰

How would a polarized party system work in a fragmented Madisonian republic? Not well, it turns out.

Political scientists identify a further source of dysfunction—it’s called presidentialism.¹²¹ Under our system, both the executive (the president) and the legislature are separately elected. Each has its own legitimate sovereignty. That can lead to built-in paralysis. In the few other countries that copied our system, those deadlocks often precipitated a

¹¹³ *Rucho*, 588 U.S. at 720–21.

¹¹⁴ *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418, 420 (2025) (Alito, J., concurring) (per curiam) (granting application for stay).

¹¹⁵ Michael Li & Gina Feliz, *The Competitive Districts That Will Decide Control of the House*, BRENNAN CTR. FOR JUST. (Oct. 24, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/competitive-districts-will-decide-control-house> [<https://perma.cc/E4JE-CFPF>].

¹¹⁶ U.S. CONST. art. III, § 1.

¹¹⁷ See *infra* notes 361–363 and accompanying text.

¹¹⁸ See THE FEDERALIST NO. 51 (James Madison); JAY COST, AM. ENTER. INST, WHAT DOES IT MEAN TO BE MADISONIAN? 1 (2026), <https://www.aei.org/wp-content/uploads/2026/03/What-Does-It-Mean-to-Be-Madisonian.pdf> [<https://perma.cc/QS8U-QBP7>].

¹¹⁹ See THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 3–10 (2012).

¹²⁰ NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 23–29 (2006) (“There is less overlap in the positions of the parties. There are no longer any liberal Republicans or conservative Democrats in Congress.”).

¹²¹ See, e.g., Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51, 52 (1990) (“A careful comparison of parliamentarism as such with presidentialism as such leads to the conclusion that, on balance, the former is more conducive to stable democracy than the latter.”).

military coup.¹²² Political scientist Juan Linz wrote in 1990 that “the only presidential democracy with a long history of constitutional continuity is the United States.”¹²³

All this combined to create the conditions for nationalist populism—for Trumpism, and for Trump.

In his first term in office, Trump decried “American carnage”¹²⁴ and produced chaos, but governed within a normal range. But in 2020, he began a campaign to discredit the electoral system.¹²⁵ After he lost reelection, he did not accept the result, and illegally sought to cling to power and prevent the certification of his opponent as the winner.¹²⁶ All of this culminated in the violent assault on the Capitol on January 6, 2021.¹²⁷ For the first time in American history, the loser of a presidential election tried to stay in power.¹²⁸ This upended the tradition of peaceful transfer of power that had been a hallmark since George Washington retired in 1797, with the exception of the reaction to Abraham Lincoln’s

¹²² *Id.* at 53, 65.

¹²³ Linz, *supra* note 121, at 51–52.

¹²⁴ Donald J. Trump, U.S. President, Inaugural Address (Jan. 20, 2017) (transcript available at <https://www.govinfo.gov/content/pkg/DCPD-201700058/pdf/DCPD-201700058.pdf> [<https://perma.cc/AW8U-9US3>]); see Michael Waldman, *Trump’s Inaugural Address Was Strikingly Radical*, WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/opinions/trumps-inaugural-speech-was-strikingly-radical/2017/01/20/e67bf288-df50-11e6-ad42-f3375f271c9c_story.html [https://web.archive.org/web/20181221045603/https://www.washingtonpost.com/opinions/trumps-inaugural-speech-was-strikingly-radical/2017/01/20/e67bf288-df50-11e6-ad42-f3375f271c9c_story.html?utm_term=.68c0317bc1ab].

¹²⁵ See Anita Kumar & Gabby Orr, *Inside Trump’s Pressure Campaign to Overturn the Election*, POLITICO (Dec. 12, 2020, at 04:30 ET), <https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486> [<https://web.archive.org/web/20210209230628/https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486>].

¹²⁶ See, e.g., Kevin Breuninger, *Trump Refuses to Accept Election Results, Says It’s ‘Far from Over,’* CNBC (Nov. 7, 2020, at 13:05 ET), <https://www.cnn.com/2020/11/07/trump-refuses-to-accept-election-results-says-it-is-far-from-over.html> [<https://perma.cc/2A5S-QTX7>]; Andrew Prokop, *New Shenanigans Are Afoot in Michigan as Trump Tries to Block Certification of Biden’s Win*, VOX (Nov. 19, 2020, at 12:30 ET), <https://www.vox.com/2020/11/19/21575177/trump-wayne-county-michigan-certification> [<https://web.archive.org/web/20201123191553/https://www.vox.com/2020/11/19/21575177/trump-wayne-county-michigan-certification>].

¹²⁷ Nicholas Fandos & Emily Cochrane, *After Pro-Trump Mob Storms Capitol, Congress Confirms Biden’s Win*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/congress-gop-subvert-election.html> [<https://web.archive.org/web/20240412184141/https://www.nytimes.com/2021/01/06/us/politics/congress-gop-subvert-election.html>].

¹²⁸ See *generally* FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, H.R. REP. NO. 117-663 (2022) (outlining how President Trump repeatedly perpetuated the idea that the 2020 election was fraudulent, culminating in the violent attack by right-wing extremists on January 6).

inauguration in 1861.¹²⁹ It was, in short, a major breach in the constitutional order.

Yet the following four years did not produce an institutional reform response. The bipartisan Electoral Count Reform Act clarified and tweaked the system for counting electoral votes¹³⁰—but that was it.

Then Trump ran for office again in 2024 promising to be “a dictator” if just for one day.¹³¹ And the voters elected him, fair and square.¹³²

In his second term, having returned to office, he set in motion dramatic changes in government. His Office of Management and Budget director, Russell Vought, the architect of his domestic policy, claims we are in a “post-constitutional moment.”¹³³ Numerous federal agencies were decimated or effectively eliminated without congressional involvement, including the U.S. Agency for International Development (USAID) and the Department of Education.¹³⁴

The U.S. Supreme Court has significantly abetted this flood of power toward the presidency. *Trump v. United States* granted presidents vast

¹²⁹ Olivia B. Waxman, ‘Alarming Similar.’ *What the Chaos Around Lincoln’s First Inauguration Can Tell Us About Today, According to Historians*, TIME (Jan. 15, 2021, at 08:00 ET), <https://time.com/5929078/lincoln-trump-capitol-history> [<https://perma.cc/52PF-U4F3>].

¹³⁰ Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, 136 Stat. 4459, 5233–41 (codified as amended in scattered sections of 3 U.S.C.).

¹³¹ Jill Colvin & Bill Barrow, *Trump’s Vow to Only Be a Dictator on ‘Day One’ Follows Growing Worry over His Authoritarian Rhetoric*, ASSOCIATED PRESS (Dec. 7, 2023, at 19:58 ET), <https://apnews.com/article/trump-hannity-dictator-authoritarian-presidential-election-f27e7e9d7c13fabbe3ae7dd7f1235c72> [<https://perma.cc/KR55-LBCS>].

¹³² *US Presidential Election Results*, REUTERS (Apr. 12, 2026, at 10:47 ET), <https://www.reuters.com/graphics/USA-ELECTION/RESULTS/zjpnemxwvx> [<https://perma.cc/MMC8-9DN2>].

¹³³ Russell Vought, *Renewing American Purpose: Statesmanship in a Post-Constitutional Moment*, AM. MIND (Sep. 29, 2022), <https://americanmind.org/salvo/renewing-american-purpose> [<https://perma.cc/9NWS-VFMC>].

¹³⁴ Press Release, U.S. Dep’t of State, Secretary Marco Rubio Appointed as Acting Administrator for the United States Agency for International Development (USAID) (Feb. 3, 2025), <https://www.state.gov/secretary-marco-rubio-appointed-as-acting-administrator-for-the-united-states-agency-for-international-development-usaid> [<https://perma.cc/JE86-DAMB>] (claiming the agency “has long strayed from its original mission of responsibly advancing American interests abroad” and its current funding was “not aligned with the core national interests of the United States”); Ari Daniel, *Farewell to USAID: Reflections on the Agency that President Trump Dismantled*, NPR (July 1, 2025, at 11:03 ET), <https://www.npr.org/sections/goats-and-soda/2025/07/01/g-s1-75222/usaid-trump-humanitarian-rubio-musk> [<https://perma.cc/UPA3-4RRS>]; Exec. Order No. 14242, 90 Fed. Reg. 13679, 13679 (Mar. 25, 2025) (“Closing the Department of Education would provide children and their families the opportunity to escape a system that is failing them.”); see also Jody Freeman & Sharon Jacobs, *President Trump’s Campaign of ‘Structural Deregulation,’* Lawfare (Feb. 12, 2025, at 10:40 ET), <https://www.lawfaremedia.org/article/president-trump-s-campaign-of-structural-deregulation> [<https://perma.cc/6GUP-YHB4>] (“[W]hile presidents may enjoy some powers to reorganize government departments, they may not unilaterally abolish agencies that Congress has established without congressional assent.”).

immunity from criminal prosecution.¹³⁵ Indeed, John Roberts wrote that the president is “the only person who alone composes a branch of government.”¹³⁶ That expression is a radical version of the “unitary executive” theory that would effectively remove the executive branch from the rule of law.¹³⁷ The Court made clear through a series of “shadow docket” orders that it would countenance the presidential dismissal of leaders of independent agencies, in direct contravention of a century of statutes passed by Congress and signed into law by presidents.¹³⁸ This, too, upends the structure of the federal government. We await final rulings in these cases, but it appears likely that the Securities and Exchange Commission,¹³⁹ National Labor Relations Board,¹⁴⁰ Consumer Product Safety Commission,¹⁴¹ and many others effectively will lose their independence and shed their nonpartisan nature.

Added to the longstanding problems of the American system of government, in short, we now have a system hurtling toward a vastly expanded presidency.

The need for a reform wave is evident. The political alignment is coming into view as well. What are some elements of that reform moment? What specific changes would make sense? I want to set out a series of possible reforms, all of which are either federal or constitutional in nature.¹⁴²

¹³⁵ 603 U.S. 593, 642 (2024) (holding that presidents are absolutely immune from prosecution for exercises of core constitutional powers and presumptively immune for all other official acts).

¹³⁶ *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020).

¹³⁷ See Saikrishna Bangalore Prakash, Essay, *Too Unitary*, 135 *YALE L.J.F.* 533, 548–49 (2026).

¹³⁸ See, e.g., *Trump v. Slaughter*, 146 S. Ct. 18, 18 (2025) (granting stay of an order preventing removal of members of the Federal Trade Commission and certiorari on the question of whether removal protections for agency officials are a violation of separation of powers).

¹³⁹ See *Lemelson v. Sec. & Exch. Comm'n*, 793 F. Supp. 3d 1, 18–19 & n.1 (2025), *vacated and remanded*, No. 25-5208, 2026 WL 479090 (D.C. Cir. Feb. 17, 2026); Dean M. Conway, *DOJ Withdraws Defense of SEC ALJs' Constitutionality as Trump Issues Executive Order on Agency Accountability*, CARLTON FIELDS (Feb. 21, 2025), <https://www.carltonfields.com/insights/publications/2025/doj-withdraws-defense-of-sec-aljs-constitutionality-as-trump-issues-executive-order-on-agency>.

¹⁴⁰ *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025).

¹⁴¹ *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025).

¹⁴² I expect these ideas, and more, to be included in the series, *Solutions*, published in 2026 by the Brennan Center. *Policy Solutions*, BRENNAN CTR FOR JUST., https://www.brennancenter.org/our-work/policy-solutions/?langcode=en&type=policy_solution [<https://perma.cc/47A2-8HGM>].

III. THE ELEMENTS OF A NEW REFORM AGENDA

A. *Combating Corruption*

Corruption is as old as humanity. The Framers were acutely aware of the risks, and wrote into the Constitution provisions including the Foreign and Domestic Emoluments Clauses, seeking to forestall the rot they saw in the courts of the Old World.¹⁴³ In the nineteenth and early twentieth centuries, corruption was defined by personal graft and self-dealing among officeholders.¹⁴⁴ Urbanization led to the rise of political party machines.¹⁴⁵ As George Washington Plunkitt of New York's Tammany Hall explained it, seated atop the bootblack stand at the New York County Courthouse at the turn of the century, "I seen my opportunities and I took 'em."¹⁴⁶ He and his confederates were engaged in nothing more than "honest graft."¹⁴⁷

Later in the twentieth century, concerns focused on the systemic corruption of the campaign finance system. The breakdown of traditional political party machines, combined with the advent of paid television advertisements as the principal means of campaigning, impelled politicians to aggressively raise funds in large volumes. Fundraising took an ever-greater share of lawmakers' time.¹⁴⁸ Scandals became routine. In 1989, for example, five United States senators faced possible expulsion over their ties to a major donor, Charles Keating, whose Lincoln Savings and Loan received a then-unthinkable bailout worth \$3.4 billion.¹⁴⁹

¹⁴³ See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 26–38 (2014). See generally Zephyr Teachout, *The Anti-Corruption Principle* 94 CORN. L. REV. 341 (2009) (explaining that "the concept of corruption has been unbound from the text and history of the document itself").

¹⁴⁴ See, e.g., Jeff Broxmeyer, *Making Money off of Politics Isn't New—It Was Business as Usual in the Gilded Age*, Conversation (Aug. 12, 2019, at 07:12 ET), <https://theconversation.com/making-money-off-of-politics-isnt-new-it-was-business-as-usual-in-the-gilded-age-120822> [<https://perma.cc/56ZD-RG4R>].

¹⁴⁵ See, e.g., Owen Rust, *US Political Machines at the Turn of the 20th Century*, COLLECTOR (Jan. 5, 2023), <https://www.thecollector.com/american-political-machines-history> [<https://perma.cc/5JWP-8F2Y>].

¹⁴⁶ See WILLIAM L. RIORDON, *PLUNKITT OF TAMMANY HALL: A SERIES OF VERY PLAIN TALKS ON VERY PRACTICAL POLITICS* 49 (1995).

¹⁴⁷ *Id.*

¹⁴⁸ Brandice Canes-Wrone, *Congressional Fundraising Dynamics and Their Implications for Problem-Solving* at 3–4 (Inst. for Soc. & Pol'y Stud., Yale Univ., Working Paper No. 25-15, 2024), https://isps.yale.edu/sites/default/files/publication/2025/02/brandice_canes-wrone_working_paper_12.5.24.web_.pdf [<https://perma.cc/5XJT-ZDB8>].

¹⁴⁹ See MICHAEL WALDMAN, *WHO ROBBED AMERICA? A CITIZENS' GUIDE TO THE S&L SCANDAL* 5 (1990); James S. Granelli, *Forecast Is Now \$3.4 Billion to Liquidate Lincoln Savings: S&L; Failure: As Estimates Climb, Taxpayers Will Pay \$800 Million More to Clean Up the Defunct*

Today, both personal corruption and systemic corruption have roared back and have done so in tandem. We see a fusion of private wealth and public power unrivaled since the Gilded Age, if then.

We lack language to describe what is going on. Elon Musk, then the world's wealthiest man, paid for much of the winning presidential campaign.¹⁵⁰ (That does not include the value of his social media platform, previously Twitter, now X, which was transformed thorough content moderation policies into a propaganda tool.¹⁵¹) Upon victory, Musk moved into the White House.¹⁵² And he was given effective prime ministerial authority, if briefly, to wreck as many agencies as he could, before breaking with his presidential sponsor.¹⁵³ (Lest that seem exaggerated, recall that he brandished a chainsaw at a conservative political conference, and bragged that he had put the Agency for International Development into the “wood chipper.”¹⁵⁴)

We can compare this moment to the Gilded Age, but John D. Rockefeller never moved in with McKinley.

At the same time, personal corruption has returned at the highest levels, emanating from the Oval Office and pervading the upper reaches of the federal government. In his first term, President Trump engaged in

Irvine Thrift, L.A. TIMES (Oct. 31, 1993, at 00:00 PT), <https://www.latimes.com/archives/la-xpm-1993-10-31-fi-51765-story.html> [<https://perma.cc/MYR3-574M>].

¹⁵⁰ Fredreka Schouten, David Wright & Alex Leeds Matthews, *Musk Spent More Than a Quarter-Billion Dollars to Elect Trump, Including Funding a Mysterious Super PAC, New Filings Show*, CNN (Dec. 6, 2024, at 09:33 ET), <https://www.cnn.com/2024/12/05/politics/elon-musk-trump-campaign-finance-filings> [<https://web.archive.org/web/20250329181456/https://www.cnn.com/2024/12/05/politics/elon-musk-trump-campaign-finance-filings>].

¹⁵¹ See, e.g., Justin Hendrix, *X Is a Preferred Tool for American Propaganda. What Does It Mean?*, TECH POL'Y PRESS (Apr. 5, 2026), <https://www.techpolicy.press/x-is-a-preferred-tool-for-american-propaganda-what-does-it-mean> [<https://perma.cc/WQR2-RSDP>]; Mark Sweney, *Value of Elon Musk's X 'Rebounds to \$44bn Purchase Price'*, GUARDIAN (Mar. 19, 2025, at 07:33 ET), <https://www.theguardian.com/technology/2025/mar/19/value-elon-musk-x-rebounds-purchase-price> [<https://perma.cc/C7CR-V6SM>].

¹⁵² Zoë Schiffer, *Elon Musk Tells Friends He's Sleeping at the DOGE Offices in DC*, WIRED (Jan. 29, 2025, at 14:51 ET), <https://www.wired.com/story/elon-musk-sleeping-doge-office> [<https://web.archive.org/web/20250331235036/https://www.wired.com/story/elon-musk-sleeping-doge-office>].

¹⁵³ Ben Tarnoff & Quinn Slobodian, *What Was Doge? How Elon Musk Tried to Gamify Government*, GUARDIAN (Mar. 17, 2026, at 01:00 ET), <https://www.theguardian.com/news/ng-interactive/2026/mar/17/elon-musk-gamify-government> [<https://perma.cc/JT8Q-CZRV>]

(“Trump’s circle used Musk to wage war on the ‘woke’ domains of higher education, foreign aid and scientific research under the cover of ‘efficiency’ while attacking the administrative state and terrorising the federal workforce.”).

¹⁵⁴ Taylor Giorno, *'We Are Terrified': Musk Puts USAID Through 'Wood Chipper'*, HILL (Feb. 3, 2025, at 12:16 ET), <https://thehill.com/policy/technology/5122676-usaid-shutdown-elon-musk-doge> [<https://web.archive.org/web/20250304112414/https://thehill.com/policy/technology/5122676-usaid-shutdown-elon-musk-doge>].

what one commentator called “petty larceny.”¹⁵⁵ He steered government business to his own hotels, for example, and charged Secret Service agents for staying there to protect him.¹⁵⁶ In his second term, the President has greatly expanded his avaricious ambitions. According to *Forbes*, Trump and his immediate family have increased their net worth by \$3 billion in one year by leveraging public power.¹⁵⁷ Other estimates put the one-year total at a more demure \$1.4 billion.¹⁵⁸

The public now consistently ranks “corruption” as among the top issues, at times the number one concern.¹⁵⁹ They have come to hold this view despite following newspapers or television networks, long accustomed to exposing scandal, less closely than before.¹⁶⁰ Yet despite the weakness of the traditional media, they have figured it out.

In January 2026, the Brennan Center published the first in a series, *Nine Solutions for Political Corruption*.¹⁶¹ It includes proposed reforms for campaign finance as well as the newfangled personal corruption at top.

Campaign finance. The Supreme Court’s misguided doctrine created over the last half a century has prevented the reasonable regulation of money in politics.¹⁶² We now have, in effect, a fully deregulated system, with only occasional remnants of rubble in what was once a meaningful structure. Different membership on the Court could change that, and indeed, had Barack Obama been allowed by the Senate

¹⁵⁵ HOW TO FIX IT WITH JOHN AVLON: *David Frum: The GOP Didn’t Drift Into Trumpism—It Chose It*, at 09:09–09:31 (Apple Podcasts, Feb. 15, 2026).

¹⁵⁶ *Id.*

¹⁵⁷ Dan Alexander, *Presidency Boosts Trump’s Net Worth by \$3 Billion in a Year*, FORBES (Sep. 10, 2025, at 07:59 ET), <https://www.forbes.com/sites/danalexander/2025/09/09/presidency-boosts-trumps-net-worth-by-3-billion-in-a-year> [<https://perma.cc/8AP9-C8TE>].

¹⁵⁸ *E.g.*, The Editorial Board, Opinion, *How Trump Has Pocketed \$1,408,500,000*, N.Y. TIMES (Jan. 20, 2026), <https://www.nytimes.com/interactive/2026/01/20/opinion/editorials/trump-wealth-crypto-graft.html>.

¹⁵⁹ *See, e.g.*, *Top Public Worries in the U.S.*, CTR. FOR CLIMATE CHANGE COMM’N (Sep. 18, 2025), <https://climatecommunication.gmu.edu/all/top-public-worries-in-the-u-s> [<https://perma.cc/W48B-UJBZ>] (finding that government corruption was a top concern for 54% of survey respondents).

¹⁶⁰ *See, e.g.*, Naomi Forman-Katz, *Americans Are Following the News Less Closely Than They Used To*, PEW RSCH. CTR. (Dec. 3, 2025), <https://www.pewresearch.org/short-reads/2025/12/03/americans-are-following-the-news-less-closely-than-they-used-to> [<https://perma.cc/NS6P-9P5D>].

¹⁶¹ Daniel I. Weiner, Joanna Zdanys & Eric Petry, *Nine Solutions for Political Corruption*, BRENNAN CTR. FOR JUST. (Jan. 20, 2026), <https://www.brennancenter.org/our-work/research-reports/nine-solutions-political-corruption> [<https://perma.cc/Z4CW-S8AN>].

¹⁶² *See generally* Richard L. Hasen, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016) (examining how Supreme Court doctrine has enabled plutocratic influence over elections and arguing for a new constitutional framework for campaign finance).

to fill the vacant seat created by the death of Antonin Scalia,¹⁶³ doctrine may well have shifted sharply. But just as in previous eras, damaging and foundational Supreme Court rulings can produce constitutional amendments as a response. The Fourteenth Amendment, for example, overrode *Dred Scott v. Sandford*,¹⁶⁴ while the Sixteenth Amendment undid a ruling that had prohibited income taxes.¹⁶⁵ Other amendments have also repudiated specific Supreme Court rulings.¹⁶⁶

So, a reform agenda should include, at the very least, a constitutional amendment to overturn *Buckley v. Valeo* and *Citizens United* to allow for reasonable regulation of money in politics. This would return the law to where it has been through most of American history.¹⁶⁷ Such an amendment has won a majority support in the Senate, though not by the needed two-thirds margin.¹⁶⁸ Nineteen states have already called for such an amendment, though none since 2017.¹⁶⁹

Public financing of campaigns. This has long been understood to be the most effective voluntary system.¹⁷⁰ The United States had a robust and

¹⁶³ Amy Howe, *Decade in Review: Justice Antonin Scalia's Death and the Republican Delay in Filling the Seat*, SCOTUSBLOG (Dec. 27, 2019, at 00:00 ET), <https://www.scotusblog.com/2019/12/decade-in-review-justice-antonin-scalias-death-and-the-republican-delay-to-fill-the-seat> [<https://perma.cc/6ZVB-6YUV>].

¹⁶⁴ Arguably, the Thirteenth, Fourteenth, and Fifteenth Amendments overturned *Dred Scott v. Sandford*, 60 U.S. 393 (1857). See Cass R. Sunstein, *Constitutional Myth-Making: Lessons from the Dred Scott Case* 24 (U. Chi. L., Occasional Paper No. 37, 1996).

¹⁶⁵ The Sixteenth Amendment authorizing an income tax overturned *Pollock v. Farmers' Loan & Tr. Co.* See 157 U.S. 429, 583 (1895).

¹⁶⁶ The Eleventh Amendment in 1795 overturned *Chisholm v. Georgia*, which had allowed citizens of one state to sue another state in federal court. See 2 U.S. 419, 469 (1793). The Nineteenth Amendment, which guaranteed women the right to vote, effectively overturned *Minor v. Happersett*. See 88 U.S. 162, 177, 178 (1875). The Twenty-fourth Amendment, which ended the poll tax levied on voters, overturned *Breedlove v. Suttles*. See 302 U.S. 277, 283, 284 (1937). The Twenty-sixth Amendment, establishing that eighteen-year-old citizens could vote in state as well as federal elections, responded to *Oregon v. Mitchell*, which had limited that change only to federal elections. See 400 U.S. 112, 117–18 (1970). For a comprehensive account of how amendments have been added to the Constitution, see generally JOHN F. KOWAL & WILFRED U. CODRINGTON III, *THE PEOPLE'S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION* (2021).

¹⁶⁷ See ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* 53–80 (1988); WALDMAN, *supra* note 47, at 215.

¹⁶⁸ 160 Cong. Rec. S5523, S5544 (daily ed. Sep. 11, 2014) (statement of Sen. Tom Udall recording cloture vote on S.J. Res. 19, 113th Cong. (2014) (sponsored by Sens. Udall & Michael Bennet)).

¹⁶⁹ *Nevada Becomes the 19th State to Call for a Constitutional Amendment to Overturn Citizens United*, PUB. CITIZEN (May 25, 2017), <https://www.citizen.org/victories/story/nevada-becomes-the-19th-state-to-call-for-a-constitutional-amendment-to-overturn-citizens-united> [<https://perma.cc/36WK-LVDU>].

¹⁷⁰ See, e.g., Mariana Paez & Ian Vandewalker, *Small Donor Public Financing, Explained*, BRENNAN CTR. FOR JUST. (June 29, 2023), <https://www.brennancenter.org/our-work/research-reports/small-donor-public-financing-explained> [<https://perma.cc/TW9S-JE27>].

effective public financing system for presidential campaigns for three decades after it was enacted in the wake of the Watergate scandal.¹⁷¹ While Watergate is not primarily remembered as a campaign finance controversy, it involved suitcases full of cash from a “fugitive financier,” criminally extorted contributions from future New York Yankees owner George Steinbrenner, and payments to burglars.¹⁷² The checks found on the burglars were traced to Mexico through an elaborate set of campaign accounts.¹⁷³ In the film *All the President’s Men*, the anonymous source “Deep Throat” told journalist Bob Woodward, “Follow the Money.”¹⁷⁴ (That was the scriptwriter’s concoction. The real “Deep Throat” was not an anguished whistleblower but the number two official at the Federal Bureau of Investigation, Mark Felt, who never actually said that.¹⁷⁵)

Under the public financing system enacted after Watergate, candidates running in presidential primaries could receive matching funds (at a 1:1 ratio, up to the first \$250 of each contribution).¹⁷⁶ General election candidates would receive a lump sum grant.¹⁷⁷ In exchange for the grant, they agreed to forgo private funding for their general election campaigns.¹⁷⁸ Rather surprisingly to modern sensibilities, this system worked as intended. Ronald Reagan, for example, held no fundraisers for his campaign committee during the general election in 1984.¹⁷⁹ This

¹⁷¹ See R. SAM GARRETT, CONG. RSCH. SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 3, 8–9 (2025).

¹⁷² See, e.g., Martin Arnold, *Vesco Tells of an Early Plot for Nixon’s Impeachment*, N.Y. TIMES (Jan. 19, 1974), <https://www.nytimes.com/1974/01/19/archives/vesco-tells-of-an-early-plot-for-nixons-impeachment.html> (describing Robert L. Vesco as a “fugitive financier” who was charged with obstruction and conspiracy related to a \$200,000 cash contribution he made to Nixon’s campaign); J. ANTHONY LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 127, 130 (1976) (recounting how George Steinbrenner pleaded guilty to illegal campaign contributions); David Rosenbaum, *An Explanation: How Money That Financed Watergate Was Raised and Distributed*, N.Y. TIMES (May 17, 1974), <https://www.nytimes.com/1974/05/17/archives/an-explanation-how-money-that-financed-watergate-was-raised-and.html>.

¹⁷³ See Rosenbaum, *supra* note 172.

¹⁷⁴ ALL THE PRESIDENT’S MEN, HBO Max, at 0:40:29 (Wildwood Enters. 1976).

¹⁷⁵ See Kee Malesky, *Follow the Money: On the Trail of Watergate Lore*, NPR (June 16, 2012, at 12:15 ET), <https://www.npr.org/2012/06/16/154997482/follow-the-money-on-the-trail-of-watergate-lore> [<https://perma.cc/W876-W34G>].

¹⁷⁶ See Press Release, Off. White House Press Sec’y, Fact Sheet: Federal Election Campaign Act Amendments of 1974 (Oct. 15, 1974) (“A candidate eligible for the matching funds is entitled to receive a subsidy equal to the amount of private contributions he receives, disregarding the amount of any contribution in excess of \$250.”); GARRETT, *supra* note 171, at 3–5.

¹⁷⁷ See Press Release, *supra* note 176.

¹⁷⁸ *Id.*

¹⁷⁹ See *Domestic Trips of President Reagan*, RONALD REAGAN PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.reaganlibrary.gov/reagans/reagan-administration/domestic-trips-president-reagan> [<https://perma.cc/R4SP-5G97>]. The one fundraising event was for a state committee, Victory 84, in Texas. President Ronald Reagan, Remarks at a “Victory ’84” Fundraising Dinner in Houston, Texas (Oct. 2, 1984).

system boosted competition as well: Incumbents lost three times out of the next five general election campaigns.¹⁸⁰ Eventually, the system's effectiveness was eroded. The dollar amounts were too low and had not kept up with rising campaign costs.¹⁸¹ Partly as a result, candidates found a way to raise additional private funds through political parties, known as "soft money," in sums that matched and then exceeded the public funds.¹⁸² Republican Senator John McCain was the last general election candidate to use the public financing system.¹⁸³ Democrat Barack Obama rejected public funds and vowed to press for reform, but never did.¹⁸⁴

A modern version of public financing should reflect the lessons of the previous system. If crafted properly, it would not purport to ban all private funds from campaigns (likely a futile mission). Rather, it should amplify the participation of small donors, recognizing that digital fundraising has empowered millions of citizens to participate politically in this way.¹⁸⁵ The most promising system was pioneered in New York City, whose population of over 8 million makes it larger than many states.¹⁸⁶ There, qualified candidates received a multiple match for small donations; as the system evolved, the match now stands at 8:1.¹⁸⁷

New York State recently enacted a statewide system modeled after the successful law in its biggest city. Under the state system, which went into effect in 2024, qualifying candidates receive a 6:1 match for contributions up to \$250 (or \$1,050 in aggregate contributions).¹⁸⁸ In the 2024 general election, 80% of state senate candidates and 67% of

¹⁸⁰ Gerald Ford lost in 1976; Jimmy Carter lost in 1980; and George H.W. Bush lost in 1992. BRITANNICA, *United States Presidential Election Results*, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> [<https://perma.cc/Y337-CGYB>].

¹⁸¹ See Kathy Kiely, *Public Campaign Financing Is So Broken That Candidates Turned Down \$292 Million in Free Money*, Wash. Post (Feb. 9, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/02/09/public-campaign-funding-is-so-broken-that-candidates-turned-down-292-million-in-free-money>.

¹⁸² See R. SAM GARRETT, CONG. RSCH. SERV., RL34534, PUBLIC FINANCING OF PRESIDENTIAL CAMPAIGNS: OVERVIEW AND ANALYSIS 11, 18, 23 (2014).

¹⁸³ See *id.* at 1–2; GARRETT, *supra* note 171, at 9.

¹⁸⁴ See sources cited *supra* note 183.

¹⁸⁵ See, e.g., Jessica Piper, Paula Friedrich, Anna Wiederkehr & Madison Fernandez, *How Online Donations Are Fueling the Election*, POLITICO (Apr. 30, 2024, at 17:41 ET), <https://www.politico.com/interactives/2024/campaign-finance-april-2024> [<https://perma.cc/8TBS-BPDK>].

¹⁸⁶ See *Population*, NYC DEP'T CITY PLAN., <https://www.nyc.gov/content/planning/pages/planning/population> [<https://perma.cc/PP8F-5QNC>].

¹⁸⁷ N.Y.C. ADMIN. CODE § 3-705(2)(a).

¹⁸⁸ N.Y. STATE PUB. CAMPAIGN FIN. BD., 2024 NEW YORK STATE PUBLIC CAMPAIGN FINANCE HANDBOOK 53–54 (2025), <https://pcfb.ny.gov/system/files/documents/2026/03/pcfb-handbook-version-2-final-draft-accessible-03182026.pdf> [<https://perma.cc/DL7Y-VYKQ>].

Assembly candidates participated.¹⁸⁹ According to Brennan Center research, “[t]hese donations leaped from less than 5 percent of overall funding in recent cycles to 45 percent in the last cycle when factoring in matching funds.”¹⁹⁰ Notably, New York State matches only contributions from within a candidate’s legislative district.¹⁹¹ This diminishes the risk that money would pour into the coffers of incendiary or extreme candidates on the left or right, thus magnifying polarization.

This approach could be the model for a similar reform for congressional elections. A small donor public financing model was included in pilot form in the For the People Act, an early version of the Freedom to Vote Act.¹⁹²

End to Dark Money. The Supreme Court’s current jurisprudence rests on the credulous notion that all campaign money will be disclosed.¹⁹³ It is not. Court rulings and the Federal Election Commission’s inaction have enabled anonymous giving to return to federal elections. In 2024, the Brennan Center estimates, almost \$2 billion was spent by donors who did not disclose their identity.¹⁹⁴ Legislation could require disclosure of the identity of all donors who contribute funds to be spent in federal elections, not just those who give directly to campaign committees or political action committees.

A New Federal Ethics Law. We need measures including a revamped federal ethics law that would apply to presidents, vice presidents, and the Supreme Court. The Brennan Center has also proposed creating a strong new ethics agency.¹⁹⁵ “Today, enforcement of ethics rules is weak and

¹⁸⁹ N.Y. STATE PUB. CAMPAIGN FIN. BD., 2024 NYS PUBLIC CAMPAIGN FINANCE PROGRAM END OF CYCLE REPORT 5 (2025), <https://pcfb.ny.gov/system/files/documents/2025/01/2024-new-york-state-public-campaign-finance-board-election-cycle-report-final.pdf> [<https://perma.cc/8BQ4-BTKM>].

¹⁹⁰ Marina Pino, Grady Yuthok Short, Celina Avalos Jaramillo & Ian Vandewalker, *New York State’s Public Campaign Financing Program Empowers Constituent Small Donors*. BRENNAN CTR. FOR JUST. (Feb. 6, 2025), <https://www.brennancenter.org/our-work/research-reports/new-york-states-public-campaign-financing-program-empowers-constituent> [<https://perma.cc/JA4U-NQ5M>].

¹⁹¹ *Candidate & Committee Services*, N.Y. STATE PUB. CAMPAIGN FIN. BD., <https://pcfb.ny.gov/candidate-committee-services> [<https://perma.cc/R3VG-SHV7>].

¹⁹² See For the People Act of 2021, H.R. 1, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021–2022).

¹⁹³ See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 370 (2010) (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).

¹⁹⁴ Anna Massoglia, *Dark Money Hit a Record High of \$1.9 Billion in 2024 Federal Races*, BRENNAN CTR. FOR JUST. (May 7, 2025), <https://www.brennancenter.org/our-work/research-reports/dark-money-hit-record-high-19-billion-2024-federal-races> [<https://perma.cc/Z5G7-XABR>].

¹⁹⁵ Weiner et al., *supra* note 161.

sporadic. A single agency . . . should be empowered to issue binding rules and to seek civil penalties and other relief against violators. (The Justice Department would retain criminal enforcement power.)”¹⁹⁶ “The agency’s leaders should serve for fixed terms, with any removal by the president prior to the end of an official’s term requiring a detailed, written explanation to Congress in order to be given effect,” and budget requests should go directly to Congress.¹⁹⁷

Removing the Unilateral Pardon Power from the President. Finally, the Brennan Center urged, for the first time, a constitutional amendment to take away the unfettered pardon power from the president.¹⁹⁸ This is a remnant of the prerogative held by King George III, which was conceptually cut-and-pasted and given to the U.S. president.¹⁹⁹ The Framers debated whether this unfettered power was a good idea. For example, a proposal to require the Senate’s assent for pardons was proposed but defeated, with one state supporting and eight opposed.²⁰⁰ During the ratification fights in the states, one antifederalist pamphleteer warned that unlimited pardon power in the hands of one person would “tend either to the establishment of a vile and arbitrary aristocracy [] or monarchy.”²⁰¹ The Supreme Court has held that the pardon power is coextensive with the Royal pardon power as of 1787.²⁰²

Mercy and fairness demand an opportunity for redress to correct errors of an often harsh and racially discriminatory criminal justice system. Now, however, the pardon power has become an overheated

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Currently the Constitution reads:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

U.S. CONST. art. II, § 2, cl. 1.

¹⁹⁹ SAIKRISHNA BANGALORE PRAKASH, *THE PRESIDENTIAL PARDON: THE SHORT CLAUSE WITH A LONG, TROUBLED HISTORY* 6–7 (2026); see Colleen Shogan, *The History of the Pardon Power*, WHITE HOUSE HIST. ASS’N (Dec. 2, 2020), <https://www.whitehousehistory.org/the-history-of-the-pardon-power> [<https://perma.cc/D9FT-ELK3>] (linking the presidential pardon power to the “prerogative of mercy” in English history, which is first attributed to King Ine of Wessex); *Ex parte Wells*, 59 U.S. 307, 308 (1855) (“The language used in the Constitution as to the power of pardoning, must be construed by the exercise of that power in England prior to the Revolution, and in the States prior to the adoption of the Constitution.”). See generally *Ex parte Garland*, 71 U.S. 333 (1866) (holding that legislation could not be imposed to limit or regulate the pardon power).

²⁰⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 412–20 (Max Farrand ed., 1911).

²⁰¹ *Cato No. 4*, in 2 THE COMPLETE ANTI-FEDERALIST 116 (Herbert J. Storing ed., 1981).

²⁰² See sources cited *supra* note 199.

engine of corruption.²⁰³ There had been previous examples, such as Bill Clinton's pardon of fugitive financier Marc Rich or the pardon of Joe Biden's son Hunter Biden.²⁰⁴ But Trump has so overtly wielded clemency as a tool of corruption that it has changed the nature of the pardon power. Trump issued pardons in his first year at eight times the rate of Biden's entire presidency, even excluding the more than 1,500 insurrectionists whom he pardoned on his first day in office after they sought to illegally keep him in power in 2021.²⁰⁵ The former Pardon Attorney, Liz Oyer, calculates that Trump's pardons erased over \$1.5 billion in restitution, fines, and forfeitures.²⁰⁶ These pardons include the former president of Honduras—who had been sentenced to 45 years in prison and who had once vowed to “shove the drugs right up the noses of the gringos”²⁰⁷—corrupt politicians, and many donors to Trump's campaign and other committees.²⁰⁸ The influence market for pardons is so open that *The Wall Street Journal* reports that the going rate charged by lobbyists to seek a presidential pardon is \$1 million.²⁰⁹

²⁰³ See Jeremy Kohler, *How Trump Has Exploited Pardons and Clemency to Reward Allies and Supporters*, PROPUBLICA (Nov. 12, 2025, at 05:30 ET), <https://www.propublica.org/article/trump-pardons-clemency-george-santos-ed-martin> [<https://perma.cc/DDR9-58BC>].

²⁰⁴ Dafna Linzer, *The Shadow of Marc Rich*, PROPUBLICA (Dec. 3, 2011, at 23:00 ET), <https://www.propublica.org/article/the-shadow-of-marc-rich> [<https://perma.cc/BXX2-8ZXQ>]; Sofia Ferreira Santos, *Biden Gives Son Hunter 'Unconditional' Pardon*, BBC (Dec. 2, 2024), <https://www.bbc.com/news/articles/cjwl3venz39o> [<https://perma.cc/2PXB-G7UY>].

²⁰⁵ Dan Greenberg, *President Trump's Pardons: An Embarrassment of Riches*, CATO INST. BLOG (Feb. 11, 2026, at 16:25 ET), <https://www.cato.org/blog/embarrassment-riches> [<https://perma.cc/DE37-XMZ3>].

²⁰⁶ Liz Oyer, *Trump's Year-One Pardons Have Erased over \$1.5 Billion in Penalties for Fraud and Other Crimes*, LAW. OYER (Jan. 20, 2026), <https://open.substack.com/pub/lizoyer/p/trumps-year-one-pardons-have-erased> [<https://perma.cc/R85F-6P2R>].

²⁰⁷ Tobi Raji, Shayna Jacobs, Samantha Schmidt & Derek Hawkins, *Ex-Honduras President, Convicted of Drug Trafficking, Freed on Trump Pardon*, WASH. POST (Dec. 2, 2025), <https://www.washingtonpost.com/world/2025/12/02/hernandez-trump-pardon-prison-honduras>; Nathaniel Janowitz, *Honduras President Wanted to 'Shove Drugs Up the Noses of Gringos,' US Prosecutors Say*, VICE (Jan. 11, 2021, 16:08 ET), <https://www.vice.com/en/article/honduras-president-wanted-to-shove-drugs-up-the-noses-of-gringos-us-prosecutors-say> [<https://perma.cc/M8RG-NRND>]. The pardon came thanks to the efforts of a longtime political fixer, Roger Stone. Michael Rios & Lex Harvey, *Ex-Honduran Leader Thanks Trump for Pardon on US Drug Trafficking Charges*, CNN (Dec. 3, 2025), <https://www.cnn.com/2025/12/03/americas/donald-trump-pardon-honduras-president-intl-hnk/index.html>.

²⁰⁸ See, e.g., Karen Yourish, Kenneth P. Vogel & Charlie Smart, *Hundreds of Big Post-Election Donors Have Benefited From Trump's Return to Office*, N.Y. TIMES (Dec. 22, 2025), <https://www.nytimes.com/interactive/2025/12/22/us/politics/trump-donors-fundraising-benefits.html> [<https://web.archive.org/web/20260206104337/https://www.nytimes.com/interactive/2025/12/22/us/politics/trump-donors-fundraising-benefits.html>].

²⁰⁹ Rebecca Ballhaus, Josh Dawsey & C. Ryan Barber, *Inside the New Fast Track to a Presidential Pardon*, WALL ST. J. (Dec. 23, 2025, 21:00 ET), <https://www.wsj.com/politics/policy/trump-presidential-pardon-process-dda97c15>.

What can be done? Daniel Weiner and other authors at the Brennan Center have written:

Because the president's clemency power is broad, any solution is likely to require a constitutional amendment proposed by Congress. An amendment could, for example, take the clemency power from the president and vest it in an independent clemency board, akin to systems in many states and staffed by senior judges and other experts. The board could be designed to make clemency more accessible in most cases while preventing political favoritism. In addition, an amendment should bar all preemptive pardons as well as clemency for well-connected individuals, such as a president's family members, business associates, political appointees, and major donors.²¹⁰

B. *Elections and Representation*

The electoral system, too, cries out for reform. The system is rickety and easily manipulated, and increasingly, voters have little recourse when their rights are stymied.

Over the past quarter century, rules and laws governing elections became an intense partisan battleground.²¹¹ Before the 2000 presidential election and the protracted Florida recount, modern campaigns paid relatively little attention to turnout and mobilization. The Florida debacle revealed how rickety the existing election infrastructure was. The breathtakingly narrow margin also showed partisans that election administration mattered greatly.

Republicans have pressed states to enact laws restricting voting, such as identification requirements that disenfranchise many voters.²¹² Democrats, in turn, came to realize that mobilization could mean the difference between winning and losing in an unusually divided country.²¹³

²¹⁰ Weiner et al., *supra* note 13.

²¹¹ WALDMAN, *supra* note 47, at 173–98. See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012) (arguing that since *Bush v. Gore*, partisan warfare over election rules has eroded public confidence in American democracy and made future election disputes increasingly dangerous).

²¹² See *Research on Voter ID*, BRENNAN CTR. FOR JUST. (Apr. 11, 2017), <https://www.brennancenter.org/our-work/research-reports/research-voter-id> [<https://perma.cc/A2TB-R9DJ>] (cataloguing research on the impact of voter identification laws in certain states).

²¹³ See, e.g., Matt Brown, *Democrats Will Spend Millions to Shift Voter Registration Strategy Ahead of the Midterm Elections*, AP NEWS (Jan. 13, 2026, at 17:44 ET), <https://apnews.com/article/democrats-dnc-voter-registration-midterms-6f15083ad2b6f428348c5e70ef85d34d> [<https://perma.cc/V6E9-WXHP>] (“[F]or our party to actually win elections, we have to actually create more Democrats” (quoting DNC Chair Ken Martin)).

Much of this has unfolded in state capitols. Under the Constitution’s Elections Clause, states run elections, as the Supreme Court reaffirmed in 2023.²¹⁴ The Clause charges state legislatures with setting the “Times, Places, and Manner” of voting.²¹⁵ The Constitution gives Congress the power to override states and enact national standards.²¹⁶ In so doing, Madison aimed to block what today we would call gerrymandering and vote suppression. “It was impossible to foresee all the abuses that might be made [by legislators] of the discretionary power,” Madison explained at the Constitutional Convention.²¹⁷

Congress has exercised that power to override states in recent decades. In 1993, responding to falling voter registration rates,²¹⁸ Congress enacted the National Voter Registration Act.²¹⁹ This “Motor Voter” law required states to register voters at Departments of Motor Vehicles and other government agencies.²²⁰ In 2002, the Help America Vote Act became law after the Florida recount.²²¹ It required states to adopt computerized statewide voter registration lists, update election administration and voting systems, authorized funds to assist that shift, and established the U.S. Election Assistance Commission (EAC), a bipartisan agency to help states implement the law.²²² A pro-voter legislative package came close to enactment in 2022. The Freedom to Vote Act, combined with the John R. Lewis Voting Rights Advancement Act, passed the House but failed to achieve cloture in the Senate.²²³

²¹⁴ U.S. CONST. art. I, § 4, cl. 1; see *Moore v. Harper*, 600 U.S. 1, 34 (2023) (“[T]he Elections Clause expressly vests power to carry out its provisions in ‘the Legislature’ of each State, a deliberate choice that this Court must respect.”).

²¹⁵ U.S. CONST. art. I, § 4, cl. 1.

²¹⁶ *Id.*; U.S. CONST. art. VI, cl. 2.

²¹⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 200, at 240.

²¹⁸ Registration rates fell from 1972 to 1992, with registration among the poorest one-fifth of voters falling by nearly a third during that time. J. MIJIN CHA, DÉMOS, REGISTERING MILLIONS: THE SUCCESS AND POTENTIAL OF THE NATIONAL VOTER REGISTRATION ACT AT 20, at 3–4 (2013), <https://www.demos.org/research/registering-millions-success-and-potential-national-voter-registration-act-20> [<https://perma.cc/454H-A82Y>].

²¹⁹ National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501-20511).

²²⁰ See *id.*; *National Voter Registration Act (NVRA)*, N.Y. STATE BD. ELECTIONS, <https://elections.ny.gov/national-voter-registration-act-nvra> [<https://perma.cc/L8QP-M3FM>] (noting that the NVRA is commonly called the “Motor Voter” law).

²²¹ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901-21145); KAREN L. SHANTON, CONG. RSCH. SERV., R46949, THE HELP AMERICA VOTE ACT OF 2002 (HAVA): OVERVIEW AND ONGOING ROLE IN ELECTION ADMINISTRATION POLICY 1–2 (2026).

²²² SHANTON, *supra* note 221, at 1–17.

²²³ Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2021–2022). The bill passed 220–203 in the House, but could not reach 60 votes to avoid the filibuster. *The Freedom to Vote*

Recently, Congress has considered more restrictive legislation. The Safeguard American Voter Eligibility Act (SAVE Act) would require citizens to produce a passport, birth certificate, or naturalization papers each time they register to vote.²²⁴ The Brennan Center's research shows that 21.3 million citizens of voting age lack ready access to those documents.²²⁵ The SAVE Act passed the House of Representatives in 2025,²²⁶ but lacked the votes required to defeat a Senate filibuster.²²⁷ It was introduced in a revised form in 2026,²²⁸ again passed the House,²²⁹ and as of this writing remains stalled in the upper chamber.²³⁰

National standards. In recent years, states have enacted a wave of restrictive voting statutes. A study released in January 2026 by the Brennan Center and the Berkeley Goldman School of Public Policy reported that at least 17 states passed 32 total restrictive voting laws in 2025.²³¹ False claims of fraud became an electoral staple, long before

Act: An Explainer, ROCKTHEVOTE (Apr. 4, 2024), <https://www.rockthevote.org/explainers/the-freedom-to-vote-act> [https://perma.cc/T5UK-XMHL].

²²⁴ Safeguard American Voter Eligibility Act, H.R. 22, 119th Cong. (2025–2026) (as passed by House, Apr. 10, 2025).

²²⁵ Kevin Morris & Cora Henry, *Millions of Americans Don't Have Documents Proving Their Citizenship Readily Available*, BRENNAN CTR. FOR JUST. (June 11, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/millions-americans-dont-have-documents-proving-their-citizenship-readily> [https://perma.cc/FF6M-5GLD].

²²⁶ H.R. 22, 119th Cong. (2025); 171 CONG. REC. H1569, H1680–81 (daily ed. Apr. 10, 2025); *House Roll Call Vote 102*, CONGRESS.GOV (Apr. 10, 2025), <https://www.congress.gov/votes/house/119-1/102> [https://perma.cc/G9GH-HUGR]; Michael Gold, *House Votes to Require Proof of Citizenship in Federal Elections*, N.Y. TIMES (Apr. 10, 2025), <https://www.nytimes.com/2025/04/10/us/politics/house-citizenship-elections-save-act.html> [https://web.archive.org/web/20250416051944/https://www.nytimes.com/2025/04/10/us/politics/house-citizenship-elections-save-act.html].

²²⁷ Michael Waldman & Emily Whitehead, *The Anti-Voter SAVE Act Must Be Stopped*, BRENNAN CTR. FOR JUST. (Mar. 17, 2026), <https://www.brennancenter.org/our-work/analysis-opinion/anti-voter-save-act-must-be-stopped> [https://perma.cc/7X8Y-JSFC].

²²⁸ SAVE America Act, S. 1383, 119th Cong. (2026) (as passed by House, Feb. 11, 2026).

²²⁹ *Id.*; Press Release, Brennan Ctr. for Just., House Passes New Version of the SAVE Act; Brennan Center Responds (Feb. 11, 2026), <https://www.brennancenter.org/our-work/analysis-opinion/house-passes-new-version-save-act-brennan-center-responds> [https://perma.cc/V5E5-H2J2]; Annie Karni, *House Passes Strict Voter ID Bill, Amplifying Trump's Claims of Fraud*, N.Y. TIMES (Feb. 11, 2026), <https://www.nytimes.com/2026/02/11/us/politics/house-passes-voter-id-bill.html>.

²³⁰ See, e.g., Savannah Behrmann, *Future for voter ID bill unclear in Senate*, ROLL CALL (Apr. 22, 2026, at 14:54 ET), <https://rollcall.com/2026/04/22/future-for-voter-id-bill-unclear-in-senate> [https://perma.cc/U2RA-HN5Z] (SAVE Act “hits a wall”); Press Release, Legal Def. Fund, LDF Commends U.S. Senate for Stalling Passage of the SAVE Act (Mar. 27, 2026), <https://www.naacpldf.org/press-release/ldf-commends-u-s-senate-for-stalling-passage-of-the-save-act> [https://perma.cc/AUN3-V74D].

²³¹ *State Voting Laws Roundup: 2025 in Review*, BRENNAN CTR. FOR JUST. (Jan. 21, 2026), <https://www.brennancenter.org/our-work/research-reports/state-voting-laws-roundup-2025-review> [https://perma.cc/4F3F-8CVY].

Donald Trump entered office.²³² Conspiracy theories and the “Big Lie” of a stolen election, of course, grew even more central after Trump tried to cling to power after losing the 2020 election.²³³ It is appropriate, once again, for Congress to exercise its authority under the Elections Clause to build a floor so voters in every state are protected.²³⁴

The Freedom to Vote: John R. Lewis Act would have set national standards for matters including the availability of early voting, vote-by-mail procedures (including when ballots must be received), national voter ID requirements, and more.²³⁵ It passed the House in 2021 and had the support of a majority of the U.S. Senate, but fell two votes short of having enough Senate support to change the filibuster rule so it could pass by majority vote.²³⁶

Automatic voter registration. Voter participation rates in the United States lag behind other democracies.²³⁷ Even high-turnout years would be seen as scandalously low in many peer nations. One long-understood reason for low participation rates is the voter registration system itself, which relies on citizens to get themselves onto the rolls, navigate changing laws, and stay registered even when they move.²³⁸ A task force

²³² Peter Overby, *ACORN Has Long Been in Republicans’ Cross Hairs*, NAT’L PUB. RADIO (Oct. 15, 2008, at 13:51 ET), <https://www.npr.org/2008/10/15/95696267/acorn-has-long-been-in-republicans-cross-hairs> [<https://perma.cc/W2WA-SBHU>] (“[R]ight now, voter fraud is the GOP’s top campaign message.”).

²³³ See, e.g., Aaron Blake, *Trump’s ‘Big Lie’ Was Bigger Than Just a Stolen Election*, WASH. POST (Feb. 12, 2021), <https://www.washingtonpost.com/politics/2021/02/12/trumps-big-lie-was-bigger-than-just-stolen-election> [<https://web.archive.org/web/20211215223335/https://www.washingtonpost.com/politics/2021/02/12/trumps-big-lie-was-bigger-than-just-stolen-election>].

²³⁴ See U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. VI, cl. 2.

²³⁵ Freedom to Vote Act, S. 2747, 117th Cong. §§ 1001–07, 1301–05, 1801 (2021).

²³⁶ See *Roll Call Vote 117th Congress—1st Session*, U.S. SENATE (Oct. 21, 2021, at 14:45 ET), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00420.htm [<https://perma.cc/2HU5-TEGM>].

²³⁷ See Drew Desilver, *Turnout in U.S. Has Soared in Recent Elections but by Some Measures Still Trails That of Many Other Countries*, PEW RSCH. CTR. (Nov. 1, 2022), <https://www.pewresearch.org/short-reads/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries> [<https://perma.cc/HSE3-2SQP>] (“[W]hen comparing turnout among the voting-age population in the 2020 presidential election against recent national elections in 49 other countries, the U.S. ranks 31st—between Colombia (62.5%) and Greece (63.5%).”); Lyon Nishizawa, *How Does U.S. Voter Turnout Compare to the Rest of the World’s?*, COUNCIL ON FOREIGN RELS. (Aug. 24, 2020, at 14:20 ET), <https://www.cfr.org/articles/how-does-us-voter-turnout-compare-rest-worlds> [<https://perma.cc/M8NR-K9PF>] (“Voter turnout in the United States has long been low compared to other developed countries, raising worries over the health of the country’s democracy.”).

²³⁸ See Nishizawa, *supra* note 237 (“Unlike in most other countries, registration in the United States is left up to individual voters.”); Desilver, *supra* note 237 (“In many countries, the national government takes the lead in getting people’s names on the voter rolls In other countries—notably the United States—it’s largely up to individual voters to register themselves. And the U.S.

for a commission chaired by former presidents Jimmy Carter and Gerald Ford noted in 2001, “[The] registration laws in force throughout the United States are among the world’s most demanding. In the United States, the burdens of voter registration fall primarily on the voters themselves. In most of the rest of the democratic world, the government takes responsibility for the creation of voter rolls.”²³⁹

To ensure that eligible voters are on the rolls, states have enacted Automatic Voter Registration (“AVR”).²⁴⁰ As the Brennan Center has explained, AVR

makes registering ‘opt-out’ instead of ‘opt-in.’ Eligible citizens who interact with government agencies, such as the Department of Motor Vehicles, are registered to vote or have their existing registration information updated automatically, unless they actively decline. The voter’s information is transmitted to election officials electronically rather than via paper registration forms. These cost-effective reforms increase registration rates and clean up the voter rolls.²⁴¹

As of 2025, according to the National Conference of State Legislatures, about half of all states have enacted or implemented AVR.²⁴²

The Freedom to Vote Act included a nationwide standard so that all states would have a system of automatic voter registration.²⁴³

Redistricting. Federal law can curb gerrymandering, as well. Congress can set national rules for redistricting and electoral representation. It has done so before. The current system of single-member districts, for example, was implemented pursuant to a federal Apportionment Act passed in 1842.²⁴⁴ When the law was passed, “ten

is unusual in that voter registration is not the job of a single national agency, but of individual states, counties and cities.”).

²³⁹ NAT’L COMM’N ON FED. ELECTION REFORM, TASK FORCE ON THE FED. ELECTION SYS., TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 3 (2001), http://web1.millercenter.org/commissions/comm_2001_taskforce.pdf [<https://perma.cc/RVF2-CGMC>].

²⁴⁰ SARAH J. ECKMAN, CONG. RSCH. SERV., R46406, VOTER REGISTRATION: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 11 (2025). States which have enacted or implemented the policy include California, New York, Georgia, and Illinois. *Id.* at 11 fig. 3.

²⁴¹ Kevin Morris & Peter Dunphy, *Automatic Voter Registration*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/topics/voting-elections/voting-reform/automatic-voter-registration> [<https://perma.cc/C9S9-BN4U>].

²⁴² See *Automatic Voter Registration*, NAT’L CONF. STATE LEGISLATURES (July 21, 2025), <https://www.ncsl.org/elections-and-campaigns/automatic-voter-registration> [<https://perma.cc/92MQ-Q5M4>].

²⁴³ See Freedom to Vote Act, S. 2747, 117th Cong. §§ 1000–07 (2021).

²⁴⁴ See *generally* Apportionment Act of 1842, ch. 47, 5 Stat. 491 (requiring U.S. House representatives to be elected from single-member districts rather than at large from a general ticket).

states used [at-large] voting for House elections.”²⁴⁵ A uniform national election day was enacted by Congress in 1845.²⁴⁶

Today’s highly gerrymandered congressional map promotes polarization and magnifies the voices of extremes in each party. In 2024, “[o]nly 37 districts—22 won by a Democrat and 15 won by a Republican—were decided by five or fewer percentage points, and, of those, just 11 districts flipped between parties.”²⁴⁷ Congress has the power to end this arms race. It can prohibit partisan gerrymandering and prohibit mid-decade redistricting as well. Both were elements of the Freedom to Vote Act.²⁴⁸ Indeed, in his majority opinion in *Rucho*, John Roberts effectively “pre-approved” the constitutionality of these provisions, noting that they were in a precursor bill and that was a constitutionally appropriate avenue rather than judicial fiat.²⁴⁹

National redistricting standards have a distinct current political advantage. In 2025, states competed to complete mid-decade redistricting in a partisan arms-race. The scramble began when Texas redrew its maps in an effort to create five more Republican House seats, after a demand for action by President Trump.²⁵⁰ Other Republican states followed suit.²⁵¹ Outraged Democrats were hamstrung by state-focused redistricting reform systems that had been enacted, often by voters

²⁴⁵ Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1023–35 (2021).

²⁴⁶ See generally An Act to Establish a Uniform Time for Holding Elections for Electors of President and Vice President in All the States of the Union.(a), ch. 1, 5 Stat. 721 (1845) (establishing a uniform presidential election day).

²⁴⁷ Michael Li, *How Gerrymandering and Fair Maps Affected the Battle for the House*, BRENNAN CTR. FOR JUST. (Dec. 16, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/how-gerrymandering-and-fair-maps-affected-battle-house> [<https://perma.cc/35N2-XWWL>].

²⁴⁸ Freedom to Vote Act, S. 2747, 117th Cong. §§ 5001–07 (2021).

²⁴⁹ *Rucho v. Common Cause*, 588 U.S. 684, 720 (2019) (“As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§ 2401, 2411 (2019).”).

²⁵⁰ See, e.g., J. David Goodman, *Texas Legislature Gives Final Approval to Redistricting Map*, N.Y. TIMES (Aug. 23, 2025), <https://www.nytimes.com/2025/08/23/us/texas-redistricting.html> [<https://web.archive.org/web/20250823124459/https://www.nytimes.com/2025/08/23/us/texas-redistricting.html>].

²⁵¹ Missouri, North Carolina, and Ohio similarly redrew their maps, while states like Indiana and Utah tried, but failed, to secure new maps that created a Republican advantage. David W. Chen & Nick Corasaniti, *A State-by-State Guide to the Gerrymandering Fight for Congress*, N.Y. TIMES (Feb. 26, 2026), <https://www.nytimes.com/2025/11/05/us/politics/congress-gerrymander-redistricting-elections.html> [<https://web.archive.org/web/20251109223006/https://www.nytimes.com/2025/11/05/us/politics/congress-gerrymander-redistricting-elections.html>].

through direct democracy, but which made it harder for them to match Republican gerrymanders.²⁵² Notably, California Democratic officials found it necessary to go to voters with a ballot initiative, Proposition 50, to redraw the state's maps and circumvent the work of the state's widely respected redistricting commission.²⁵³ The measure passed with 64% of the vote on November 4, 2025.²⁵⁴ With effective judicial remedies largely unavailable after *Rucho*, unless Congress acts, states are likely to continue with a nonstop pattern of redistricting.²⁵⁵ A national ban on mid-decade redistricting and partisan gerrymandering would apply across the country, to states dominated by Democrats and to those dominated by Republicans. It offers the only chance to fairly end the retribution cycle, which risks making elections even less competitive.

Protecting Voters from Discrimination. The Voting Rights Act had been perhaps the nation's most effective civil rights law. It was enacted in 1965 after public outcry following the televised beatings of civil rights marchers on Edmund Pettus Bridge in Selma, Alabama.²⁵⁶ The law transformed the South. In Mississippi, African American registration leaped from 6.7% in 1964 to 59.4% four years later and 71.3% by 1998.²⁵⁷

In 2013, the Supreme Court effectively gutted the law's most important provision.²⁵⁸ Section 5 of the Voting Rights Act had required states with a history of discrimination in voting to receive approval in advance ("preclearance") from the Justice Department or a federal court before changing voting practices.²⁵⁹ In *Shelby County v. Holder*, John Roberts wrote, in effect, that that was then, and this is now: "African-

²⁵² See, e.g., Jonathan Blitzer, *Can Democrats Fight Back Against Trump's Redistricting Scheme?*, NEW YORKER (Aug. 10, 2025), <https://www.newyorker.com/magazine/2025/08/18/can-democrats-fight-back-against-trumps-redistricting-scheme> [https://web.archive.org/web/20250810112415/https://www.newyorker.com/magazine/2025/08/18/can-democrats-fight-back-against-trumps-redistricting-scheme] ("In a battle like this, it's far from clear what kind of firepower the Democratic Party has. In California, voters would have to support a ballot measure to change state redistricting rules. In New York and New Jersey, the state constitution would need to be changed.").

²⁵³ See Laurel Rosenhall, *California Lawmakers Release a Proposed House Map Favoring Democrats*, N.Y. TIMES (Aug. 15, 2025), <https://www.nytimes.com/2025/08/15/us/california-redistricting-maps-released.html> [https://web.archive.org/web/20250817011525/https://www.nytimes.com/2025/08/15/us/california-redistricting-maps-released.html].

²⁵⁴ SHIRLEY N. WEBER, CAL. SEC'Y OF STATE, STATEMENT OF VOTE, NOVEMBER 4, 2025, STATEWIDE SPECIAL ELECTION 13 (2025), <https://elections.cdn.sos.ca.gov/sov/2025-special/sov/complete-sov.pdf> [https://perma.cc/Z3WU-C5JT].

²⁵⁵ *Rucho v. Common Cause*, 588 U.S. 684, 720–21 (2019).

²⁵⁶ See GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 85–93 (2013).

²⁵⁷ RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 207 (2004).

²⁵⁸ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 553–57 (2013).

²⁵⁹ *Id.* at 536–37.

American voter turnout has come to exceed [W]hite voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.”²⁶⁰ Ruth Bader Ginsburg wrote a memorable dissent: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”²⁶¹ The Court said that the Voting Rights Act no longer matched “current conditions,” but those conditions included the act itself.²⁶²

In ruling on Section 5, the Court reassured that the law’s Section 2 was still intact.²⁶³ Section 2 allows lawsuits against discrimination in voting and voting practices.²⁶⁴ From 2013 to 2021, it was used successfully to challenge restrictive and discriminatory voting laws that previously would have been blocked by the preclearance process. Key victories were won by voting rights litigators in states including Texas, where a federal court blocked and then softened a harsh voter identification law,²⁶⁵ and North Carolina, where a federal appeals court ruled that the state’s omnibus voting law’s provisions “target[ed] African Americans with almost surgical precision.”²⁶⁶ But in 2021, in *Brnovich v. Democratic National Committee*, the Court rendered Section 2 nearly unusable to address voting restrictions unless legislators were uncouth enough to explicitly declare their racist intention.²⁶⁷ But Section 2 was still in use to protect against “dilution” of voting power for voters of color, especially through the drawing of district lines.²⁶⁸

All this appears to have had a measurable impact on the ability of voters of color to participate. Political scientists at the Brennan Center conducted a study using a billion voter records.²⁶⁹ For years, the gap in the participation rate between Black voters and White voters shrank all

²⁶⁰ *Id.* at 535.

²⁶¹ *Id.* at 590 (Ginsburg, J., dissenting).

²⁶² *Id.* at 553–57 (majority opinion).

²⁶³ *Id.* at 557 (“Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.”).

²⁶⁴ Michael Li, *Section 2 of the Voting Rights Act at the Supreme Court*, BRENNAN CTR. FOR JUST. (Oct. 15, 2025), <https://www.brennancenter.org/our-work/research-reports/section-2-voting-rights-act-supreme-court> [<https://perma.cc/V3M2-UEHM>].

²⁶⁵ *Veasey v. Abbott*, 830 F.3d 216, 272 (2016).

²⁶⁶ *N.C. State Conf. of NAACP v. McRory*, 831 F.3d 204, 226 (2016).

²⁶⁷ *See* 594 U.S. 647, 684–85, 689–90 (2021).

²⁶⁸ *See id.* at 660.

²⁶⁹ *See* KEVIN MORRIS & CORYN GRANGE, BRENNAN CTR. FOR JUST., *GROWING RACIAL DISPARITIES IN VOTER TURNOUT, 2008–2022*, at 3 (2024), https://www.brennancenter.org/media/12347/download/2024_02_Growing%20Racial_Disparities_in_Voter%20Turnout_Report.pdf [<https://perma.cc/GR3G-S52Q>].

over the country.²⁷⁰ But starting in 2012, that gap began to grow—and in jurisdictions once covered by Section 5 of the Voting Rights Act, it grew at twice the rate in the rest of the country.²⁷¹

Then, in May 2026, the Court issued *Louisiana v. Callais*, which leaves the law, as Justice Elena Kagan put it, “all but a dead letter.”²⁷² The case addressed the use of the Voting Rights Act to prevent racially discriminatory electoral district maps. The ruling held that intentional discrimination must be proved, and explained that permissible rationales that would defeat such a claim include drawing maps for partisan advantage.²⁷³ In practice, states that draw maps to prevent Black voters from achieving representation need only argue that it was actually Democrats who were being disadvantaged. In its first weeks, this ruling has already launched another frenzy of redistricting. Some analyses predict that more than a dozen seats in Congress now represented by Black and Latino lawmakers could be redrawn to make it unlikely those communities would have full and fair representation.²⁷⁴

What reforms would respond to *Callais*? One answer would undoubtedly be to redouble efforts to ban partisan gerrymandering, which is so tightly bound up with racial polarization in many parts of the country. Voters must also have the chance to go to court to effectively challenge the dilution, denial, or abridgement of their right to vote—a race-neutral enforcement mechanism that would enable voters of color to vindicate their rights.²⁷⁵ Federal law must also be strengthened to make it easier to prove discrimination and to require judges to apply strict scrutiny to state laws that burden the right to vote. It should also be made easier to prove discriminatory intent. The nationwide standards for voting described above would make it harder to manipulate voting processes in a discriminatory manner.²⁷⁶

And as we assess possible constitutional changes, an amendment explicitly guaranteeing citizens the right to vote, and ensuring Congress has the power to enforce it, now may be necessary. For years, I did not

²⁷⁰ *Id.* at 7–8.

²⁷¹ *Id.*

²⁷² No. 24-109, 2026 WL 1153054, at *38 (U.S. May 4, 2026) (Kagan, J., dissenting).

²⁷³ *Id.* at *12–14.

²⁷⁴ See, e.g., Abby Ward, *Callais Decision Threatens to Stall Diversity Gains in House*, BROOKINGS (May 6, 2026), <https://www.brookings.edu/articles/callais-decision-threatens-to-stall-diversity-gains-in-house> [<https://perma.cc/H3RY-6KBE>].

²⁷⁵ This would effectively undo the Supreme Court’s holdings in *Burdick v. Takushi* and *Crawford v. Marion County Election Board*. See generally *Burdick v. Takushi*, 504 U.S. 428 (1992) (holding that courts should not apply “strict scrutiny” to burdens on voting); *Crawford v. Marion Cnty Election Bd.*, 553 U.S. 181 (2008) (holding that burdens on voters were offset by the state’s interest in preventing risk of fraud).

²⁷⁶ Freedom to Vote Act, S. 2747, 117th Cong. §§ 1001–07, 1301–05, 1801 (2021).

support such an amendment. It seemed redundant: The original Constitution implied a right to vote, at least for the House of Representatives, even if it never declared it. And four separate amendments in the next two centuries addressed that right directly: for African American men (the Fifteenth Amendment),²⁷⁷ for women (Nineteenth),²⁷⁸ for the poor without a poll tax (Twenty-fourth),²⁷⁹ for the young (Twenty-sixth).²⁸⁰ The Fourteenth Amendment at least temporarily reduced congressional representation for states that blocked “the right to vote.”²⁸¹ And the Seventeenth Amendment established the right to vote for U.S. senators.²⁸² These provisions assumed a right to vote, but did not guarantee it, focusing as they did on eliminating exceptions to the franchise. And now courts will not enforce such a right as a general constitutional practice.²⁸³ To avoid decisions such as *Shelby County, Brnovich*, and many others, a core constitutional guarantee may need to be enshrined.

²⁷⁷ U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude[.] . . . The Congress shall have power to enforce this article by appropriate legislation.”).

²⁷⁸ U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex. Congress shall have power to enforce this article by appropriate legislation.”).

²⁷⁹ U.S. CONST. amend. XXIV (“The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax. . . . The Congress shall have power to enforce this article by appropriate legislation.”).

²⁸⁰ U.S. CONST. amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age. . . . The Congress shall have power to enforce this article by appropriate legislation.”).

²⁸¹ U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *id.* § 2 (“But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”).

²⁸² The amendment does not use the phrase “right to vote,” unlike the others, but gives voters the power to elect senators. Compare U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof. . . . The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”), with U.S. CONST. amend. XIV, § 2 (explicitly conditioning apportionment of representatives among the several states on the states protecting the “right to vote at any election” to “citizens of the United States”).

²⁸³ A point made by Jamin Raskin—then a law professor, now a member of Congress and the ranking Democrat on the U.S. House Judiciary Committee. See Jamin B. Raskin, *What’s Wrong with Bush v. Gore and Why We Need to Amend the Constitution to Ensure It Never Happens Again*, 61 MD. L. REV. 652, 695–96 (2002).

Here, as elsewhere, there are strong reasons to forgo a strategy of pursuing an amendment. Language would inevitably be broad and vague, and would still require courts to enforce constitutional provisions through litigation. The enormous political energy required to enact such a guarantee could be better exerted toward passing precise and strong legislation, including the establishment of government bodies to enforce the freedom to vote. As Heather Gerken points out: “The moment one thinks about how much organizing and politicking will be necessary to pass the right to vote is the moment one wonders what role political elites will play in the process”—the very elites whose politicization of voting has rendered a constitutional avenue appealing.²⁸⁴

C. *Curbing Abuses of Executive Power*

The executive power grab is the great constitutional issue of this moment. (In some eras, it was individual rights, federalism, or the elusive quest for racial equality. Now it is executive power.) All presidents want power. After Watergate, the nation erected an apparatus of safeguards to ensure that quest for power does not become abusive, but it slowly eroded—and now much of it has been knocked down altogether. So, the reform agenda will necessarily require concrete steps to rein in the imperial presidency and bring the office into balance with a democratic and republican Constitution.

The Presidency is given few specific responsibilities, yet few constraints are imposed.²⁸⁵ Consequently, over time, and especially during wartime, the office has grown to become the prime mover of American government.²⁸⁶

The Constitution itself is maddeningly vague on this topic. The Framers were dumbstruck, at least in part, because all knew that the first president would be George Washington—and he was *sitting right there*. On June 1, 1787, just one week into the Constitutional Convention, Washington left his spot chairing the gathering and huddled with the Virginia delegates as they debated what kind of executive the new government would have.²⁸⁷ Madison described the scene. James Wilson

²⁸⁴ See Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL RTS. J. 11, 14 (2014).

²⁸⁵ See U.S. CONST. art. II, § 3.

²⁸⁶ See generally ARTHUR M. SCHLESINGER, JR. THE IMPERIAL PRESIDENCY (1973) (tracing the growth of presidential power throughout history).

²⁸⁷ James Madison, *Madison Debates—In Convention, June 1, 1787*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR.: THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/debates_601.asp [<https://perma.cc/8N68-7UMH>].

of Pennsylvania proposed that the executive consist of “a single person.”²⁸⁸ That was a huge change from the status quo, for a country that just had fought a war to end a monarchy. It also was different from the approach taken by the Articles of Confederation. The delegates appear to have been flummoxed by this. Madison drolly reports: “A considerable pause ensuing and the Chairman asking if he should put the question . . .”²⁸⁹ Finally, the one delegate whose stature neared that of Washington spoke up. Benjamin Franklin “observed that it was a point of great importance and wished that the gentlemen would deliver their sentiments on it before the question was put.”²⁹⁰ After a rather desultory debate, the delegates voted for Wilson’s proposal.²⁹¹

Justice Robert Jackson, in his canonical concurrence in *Youngstown Sheet and Tube*, wrote:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.²⁹²

Throughout the 19th century, except for Andrew Jackson’s two terms and during the Civil War, the presidency largely receded in importance. Major policies were crafted in Congress, where debates were held and compromises forged. The political scientist Woodrow Wilson complained endlessly about this fact. In *Congressional Government*, he decried the dominance of Congress, especially committees, which prevented action.²⁹³ In 1908, in *Constitutional Government in the United States*, he identified a strong presidency as the response: “The President is at liberty, both in law and conscience, to be as big a man as he can.”²⁹⁴ Just four years later, Wilson himself was President of the United States.²⁹⁵ He expanded on the mold-breaking presidency of Theodore Roosevelt. But even Roosevelt felt constrained by norms that restricted the office. For example, he deemed it inappropriate to speak publicly on a “swing

²⁸⁸ *Id.* at 65.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 67.

²⁹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

²⁹³ WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 44, 297 (1885).

²⁹⁴ WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 70 (1908).

²⁹⁵ 1912, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/1912> [<https://perma.cc/S88F-FBBA>].

around the country” on his support for the Hepburn Act to regulate railroads while Congress was considering it.²⁹⁶

But in the 125 years since the first Roosevelt took office, the presidency grew in power. Beginning during the New Deal in the 1930s, as the role of the federal government expanded, presidents vied to control the expanding bureaucracy. Franklin Roosevelt persuaded Congress to create dozens of new agencies.²⁹⁷ A response came, pressed by large corporations and the organized bar which represented them, resulting in the Administrative Procedure Act in 1946, which created a set of procedural rules that have become so embedded in law as to achieve quasi-constitutional status.²⁹⁸

A strong presidency proved essential for the creation of a modern government and, indeed, a modern nation. At times, the office prompted change through unilateral domestic action, such as Franklin Roosevelt’s decision to take the United States off the gold standard in 1933.²⁹⁹ But the most significant place where the presidency claimed ever greater power came in foreign affairs and as a result of the growth of the national security state during the Cold War. At the start of World War II, the entire national security leadership of the country could fit in one office building (the building now known as the Eisenhower Executive Office Building, across West Executive Drive from the West Wing of the White House). By the end of the Cold War, the federal government employed over 2.2 million civilians.³⁰⁰ The four decades since have seen a continued push-and-pull between the executive and other branches.

Donald Trump, however, aims to expand the power of the presidency well beyond what other presidents have sought. His aggrandizement is far more than an ascending trendline. He articulated his understanding of constitutional constraints to Charlie Kirk’s Turning Points USA in 2019: “I have an Article 2, where I have the right to do whatever I want as President.”³⁰¹ As for foreign and military affairs,

²⁹⁶ JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 104 (1987).

²⁹⁷ President Franklin D. Roosevelt, Message to Congress Recommending Reorganization of the Executive Branch (Jan. 12, 1937).

²⁹⁸ Walter Gelhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219, 230–33 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558–65 (1996).

²⁹⁹ *Roosevelt’s Gold Program*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/roosevelts-gold-program> [<https://perma.cc/L875-EXM9>].

³⁰⁰ *The Evolution of Government Employment*, FRED BLOG (Dec. 30, 2024), <https://fredblog.stlouisfed.org/2024/12/the-evolution-of-government-employment> [<https://perma.cc/B2F4-EY6W>].

³⁰¹ President Donald Trump, Remarks at Turning Point USA’s Teen Student Action Summit 2019 (July 23, 2019). This statement reflected his elation at the conclusion of the investigation by Robert Mueller, which led to no charges against him relating to Russia’s interference in the 2016

Trump was asked by *New York Times* reporters if there were any limits on his global power. “Yeah, there is one thing,” he replied, “My own morality. My own mind. It’s the only thing that can stop me.”³⁰²

This mindset manifests itself across the executive branch and risks creating a new accepted reality for future presidents. On the day of his second inauguration, Trump signed twenty-six executive orders in an arena setting before a cheering crowd.³⁰³ Often, such executive orders have little legal force.³⁰⁴ Repeatedly, Trump’s choice to try to govern by executive order seems designed, above all, to show that he can—even when a legal means is available—flamboyantly flaunt executive authority. Courts have repeatedly declared Trump’s executive orders to be illegal, an extraordinary rebuke from the judicial branch.³⁰⁵

election. See ROBERT S. MUELLER III, U.S. DEP’T OF JUST., 1 REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 2, 181 (2019), <https://www.justice.gov/archives/sco/file/1373816/dl> [<https://perma.cc/27LJ-6BNP>]. Mueller’s report was publicly released on April 18, 2019. The day after Trump’s claim at the Turning Point conference, Mueller gave disastrous testimony before Congress. The day after that, an emboldened president had what he called a “perfect” phone call with Ukrainian president Volodymyr Zelensky in which he asked, “I would like you to do us a favor, though,” and dig up dirt on a political opponent in exchange for the release of long-promised American military assistance. See Associated Press, *I Would Like You to Do Us a Favor: The 30 Minute Phone Call That Changed Trump’s Presidency*, CNBC (Oct. 12, 2019, at 17:18 ET), <https://www.cnn.com/2019/10/12/i-would-like-you-to-do-us-a-favor-the-30-minute-phone-call-that-changed-trumps-presidency.html> [<https://perma.cc/B2B6-B237>]. A whistleblower report on the call eventually led to Trump’s impeachment by the House of Representatives. 165 CONG. REC. H12130, H12132–33 (daily ed. Dec. 18, 2019). He was acquitted by the Senate. 166 CONG. REC. S936, S939 (daily ed. Feb. 5, 2020).

³⁰² David E. Sanger, Tyler Pager, Katie Rogers & Zolan Kanno-Youngs, *Trump Lays Out a Vision of Power Restrained Only by ‘My Own Morality’*, N.Y. TIMES (Jan. 10, 2026), <https://www.nytimes.com/2026/01/08/us/politics/trump-interview-power-morality.html> [<https://web.archive.org/web/20260204195416/https://www.nytimes.com/2026/01/08/us/politics/trump-interview-power-morality.html>].

³⁰³ See *2025 Donald J. Trump Executive Orders*, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025> [<https://perma.cc/G73J-K5XX>]; Maddie Gannon, *Trump Signs Executive Orders, Targets Biden Policies on Inauguration Day*, SPECTRUM NEWS (Jan. 20, 2025, at 19:44 ET), <https://spectrumlocalnews.com/us/snplus/news/2025/01/21/president-trump-former-president-biden-executive-orders-inauguration> [<https://perma.cc/5WF8-6LU5>].

³⁰⁴ Cf. Susan A. Hughes, *Explainer: Executive Orders as a Governing Tool*, HARV. KENNEDY SCH. (June 4, 2025), <https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/explainer-executive-orders-governing-tool> [<https://perma.cc/FQJ9-B8LX>] (discussing how executive orders are weak and transient, such that they are “easy to overturn by a successor or by the courts”).

³⁰⁵ See, e.g., *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Mullin*, No. 25-5243, 2026 WL 1110616, at *2, *8 (D.C. Cir. Apr. 24, 2026).

Emergency Powers. Presidents, at times, must declare emergencies.³⁰⁶ They should, however, be for actual emergencies. And they must be invoked pursuant to laws enacted by Congress. Donald Trump declared nine emergencies in his first one hundred days back in office.³⁰⁷ Barack Obama, by contrast, declared thirteen emergencies in eight years, according to a running tally kept by the Brennan Center.³⁰⁸ A declaration of emergencies can unlock significant powers for the executive. In April 2020, at the onset of the COVID pandemic, Trump declared, “I have the right to do a lot of things that people don’t even know about.”³⁰⁹ Unsettlingly, Trump was right: some powers are secret, set forth in classified “presidential emergency action documents.”³¹⁰

In 1976, Congress passed the National Emergencies Act (NEA) in an attempt to curb the untrammelled declaration of emergencies by presidents.³¹¹ This attempt was ultimately unsuccessful. As Elizabeth Goitein, a leading expert who is a Director of the Brennan Center’s Liberty and National Security Program, has testified,

In its current form, the NEA makes it far too easy for presidents to declare national emergencies and keep them in place indefinitely—and far too difficult for Congress to terminate them. Congress should amend the NEA to provide that presidential emergency declarations will terminate after 30 days (or a similarly short period) unless approved by Congress, and to require congressional approval for any subsequent renewals of the declaration.³¹²

³⁰⁶ See ELIZABETH M. WEBSTER, CONG. RSCH. SERV., RL98-505, NATIONAL EMERGENCY POWERS I (2021).

³⁰⁷ See Karen Yourish & Charlie Smart, *How Trump Used 10 Emergency Declarations to Justify Hundreds of Actions*, N.Y. TIMES (Aug. 22, 2025), <https://www.nytimes.com/interactive/2025/08/22/us/politics/trump-emergency-immigration-tariffs-crime.html> [<https://web.archive.org/web/20250824114402/https://www.nytimes.com/interactive/2025/08/22/us/politics/trump-emergency-immigration-tariffs-crime.html>].

³⁰⁸ *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST. (Mar. 5, 2026), <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> [<https://perma.cc/XX8N-8YFJ>].

³⁰⁹ Elizabeth Goitein & Andrew Boyle, *Trump Has Emergency Powers We Aren’t Allowed to Know About*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/opinion/trump-coronavirus-emergency-powers.html> [<https://web.archive.org/web/20250212221339/https://www.nytimes.com/2020/04/10/opinion/trump-coronavirus-emergency-powers.html>].

³¹⁰ *Id.*

³¹¹ National Emergencies Act of 1976, 50 U.S.C. §§ 1601–1651; MICHAEL GREENE, CONG. RSCH. SERV., R46567, NATIONAL EMERGENCIES ACT: EXPEDITED PROCEDURES IN THE HOUSE AND SENATE 4–6 (2025).

³¹² *Examining Potential Reforms of Emergency Powers: Hearing Before the H. Comm. on the Judiciary & Subcomm. on the Const., C.R., & C.L.*, 117th Cong. 15 (2022) (statement of Elizabeth Goitein, Sr. Dir., Brennan Ctr. For Just.).

Among other things, the law does not define “emergency.”³¹³ As a result, recent presidents have declared emergencies when stymied by Congress on matters ranging from funding for a border wall (Trump)³¹⁴ to student loan debt relief (Biden).³¹⁵ Bipartisan legislation to clarify the use of emergency declarations reflecting the proposed time limit has been introduced in several Congresses. Sen. Mike Lee (R-UT) proposed the ARTICLE ONE Act in 2019, and it was reported out of committee with strong bipartisan support.³¹⁶ Its provisions were echoed in Democrat-sponsored bills in subsequent years, including the Protecting Our Democracy Act, which passed the House in 2021.³¹⁷ Yet neither Republican nor Democratic White House administrations were enthusiastic about such limits, and they did not pass.³¹⁸

Alien Enemies Act. The Alien and Sedition Acts of 1798 were three notorious laws signed by President John Adams.³¹⁹ They criminalized dissent and made it easier to jail critics of the government.³²⁰ Thomas Jefferson said they came from a “reign of witches.”³²¹ The only one of those laws still on the books is the Alien Enemies Act (AEA).³²² This

³¹³ See National Emergencies Act of 1976, 50 U.S.C. §§ 1601–1651.

³¹⁴ See, e.g., Jessica Taylor & Brian Naylor, *As Trump Declares National Emergency to Fund Border Wall, Democrats Promise a Fight*, NPR (Feb. 15, 2019, at 05:00 ET), <https://www.npr.org/2019/02/15/695012728/trump-expected-to-declare-national-emergency-to-help-fund-southern-border-wall> [https://perma.cc/76CC-JE84].

³¹⁵ See, e.g., Elizabeth Goitein, *Biden Used ‘Emergency Powers’ to Forgive Student Debt? That’s a Slippery Slope*, BRENNAN CTR. FOR JUST. (Sep. 8, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/biden-used-emergency-powers-forgive-student-debt-thats-slippery-slope> [https://perma.cc/ZDF2-NA69].

³¹⁶ Press Release, Off. of Sen. Mike Lee, U.S. Sen. for Utah, Bipartisan Letter Urges Leadership to Have Full Senate Consider ARTICLE ONE Act (Oct. 18, 2019), <https://www.lee.senate.gov/2019/10/bipartisan-letter-urges-leadership-to-have-full-senate-consider-article-one-act> [https://perma.cc/HFE4-9QLU].

³¹⁷ See H.R. 5314, 117th Cong. (2021); S. 2921, 117th Cong. (2021).

³¹⁸ See sources cited *supra* note 317.

³¹⁹ *Alien and Sedition Acts (1798)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/alien-and-sedition-acts> [https://perma.cc/F3NS-DP4E]; see also JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB11269, *THE ALIEN ENEMY ACT: HISTORY AND POTENTIAL USE TO REMOVE MEMBERS OF INTERNATIONAL CRIMINAL CARTELS 2–3* (2025) (providing an overview of the Acts).

³²⁰ Michael Waldman, *The Alien Enemies Act Rears Its Head*, BRENNAN CTR. FOR JUST. (Oct. 15, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/alien-enemies-act-rears-its-head> [https://perma.cc/A72U-7FNU].

³²¹ *Id.*; Letter from Thomas Jefferson to John Taylor (June 4, 1798), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-30-02-0280> [https://perma.cc/9Z7K-G5WG].

³²² Alien Enemies Act, 50 U.S.C. §§ 21–24 (repealed in part 2006).

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives,

wartime law applies only when war has been declared or there is an “invasion or predatory incursion . . . by any foreign nation or government”³²³ and has been used only three times previously: during the War of 1812, World War I, and most notoriously, during World War II when it was used to detain Japanese, German, and Italian nationals.³²⁴ The current administration invoked it to detain and deport Venezuelans without due process.³²⁵ Federal courts issued multiple rulings to constrain the administration, most visibly in the case of Kilmar Abrego Garcia, who was deported to a prison camp in El Salvador despite a court ordering that he remain in the United States.³²⁶ Eventually the Fifth Circuit Court of Appeals ruled that the use of the AEA under President Trump’s Proclamation was likely unlawful,³²⁷ a ruling that went before the U.S. Supreme Court and is now pending rehearing en banc in the Fifth Circuit.³²⁸ The shocking abuse of the statute demonstrates that more must be done: The AEA—legacy of the “reign of witches”—should be repealed outright.³²⁹

Fix the Insurrection Act. This 1807 law has been used 30 times over the years, principally to help state and local governments quell civil unrest—and in recent decades, always at their behest.³³⁰ It authorizes deployment of troops only to suppress an insurrection, rebellion,

citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

Id. § 21.

³²³ *Id.*

³²⁴ Katherine Yon Ebright, *The Alien Enemies Act, Explained*, BRENNAN CTR. FOR JUST. (May 1, 2025), <https://www.brennancenter.org/our-work/research-reports/alien-enemies-act-explained> [<https://perma.cc/627H-HEBH>].

³²⁵ See, e.g., Sofia Ferreira Santos, *What Is the 1798 Law That Trump Used to Deport Migrants?*, BBC (Sep. 3, 2025), <https://www.bbc.com/news/articles/cy871w21d3vo> [<https://perma.cc/3VWP-WDVM>].

³²⁶ See, e.g., Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025).

³²⁷ W.M.M. v. Trump, 154 F.4th 207, 212–13 (5th Cir. 2025).

³²⁸ W.M.M. v. Trump, 154 F.4th 319, 321 (5th Cir. 2025) (mem.) (granting petition for rehearing en banc).

³²⁹ See sources cited *supra* note 321.

³³⁰ Joseph Nunn & Elizabeth Goitein, *Guide to Invocations of the Insurrection Act*, BRENNAN CTR. FOR JUST. (Apr. 25, 2022), <https://www.brennancenter.org/our-work/research-reports/guide-to-invocations-insurrection-act> [<https://perma.cc/E7ME-W2MK>].

domestic violence, or similar events that obstruct federal law or state civil rights law.³³¹ It creates a significant exception to the Posse Comitatus Act, which prohibits the use of troops domestically.³³² The Act was last used in 1992 to help address riots in Los Angeles, which cost 63 lives and \$1 billion in property damage.³³³ There are reasons to retain the Act. But it needs reform, too, to avoid its use as a tool for authoritarian overreach. The Brennan Center has proposed a series of reforms, which would clarify what constitutes an “insurrection” and when the law can be used, require congressional authorization, and limit how troops can be used (for example, they cannot suspend habeas corpus).³³⁴

Immunity decision. The Supreme Court’s ruling in *Trump v. United States* will go down as one of the worst in American history.³³⁵ It will be hard to test its boundaries, unfortunately, since it will depend upon the possible federal prosecution of a former president—an act that has only happened twice in history (both involving Trump himself).³³⁶ Courts may find a way to narrow the illogic of the doctrine, perhaps by ruling that if something is a violation of criminal law, it therefore cannot be an official act—a useful tautology. But one possible response may be simpler: a constitutional amendment to make clear that the law applies to the president and the executive branch. Such amendments have been proposed, although have not received a vote.³³⁷

³³¹ Insurrection Act of 1807, ch. 39, 2 Stat. 443 (codified as amended in 10 U.S.C. § 253); Joseph Nunn & Elizabeth Goitein, *The Insurrection Act, Explained*, BRENNAN CTR. FOR JUST. (Nov. 12, 2025), <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained> [<https://perma.cc/6QTQ-27HW>].

³³² Nunn & Goitein, *supra* note 331; Posse Comitatus Act of 1878, ch. 263, 20 Stat. 152 (codified as amended at 18 U.S.C. § 1385).

³³³ Nunn & Goitein, *supra* note 331.

³³⁴ *The Insurrection Act: Its History, Its Flaws, and a Proposal for Reform: Hearing Before the H. Select Comm. on the Jan. 6th Attack on the U.S. Capitol*, 117th Cong. 21–41 (2022) (statement of Elizabeth Goitein, Sr. Dir., Brennan Ctr. For Just., & Joseph Nunn, Counsel, Brennan Ctr. for Just.); Elizabeth Goitein, *The Antiquated Law Endangering Democracy*, BRENNAN CTR. FOR JUST. (July 15, 2024), <https://www.brennancenter.org/our-work/research-reports/antiquated-law-endangering-democracy> [<https://perma.cc/ARG5-937Z>].

³³⁵ See generally *Trump v. United States*, 603 U.S. 593 (2024) (holding that presidents are absolutely immune from criminal prosecution for conduct within the realm of official responsibility and presumptively immune for acts in the “outer perimeter” of that official responsibility); Michael Waldman, *The Supreme Court Gives the President the Power of a King*, BRENNAN CTR. FOR JUST. (July 1, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-gives-president-power-king> [<https://perma.cc/G3GC-PSWX>] (criticizing the decision as an “instruction manual for future lawbreaking presidents”).

³³⁶ See Amy O’Kruk & Curt Merrill, *Donald Trump’s Criminal Cases, in One Place*, CNN (Jan. 10, 2025), <https://www.cnn.com/interactive/2023/07/politics/trump-indictments-criminal-cases> [<https://perma.cc/9TTM-DD4W>].

³³⁷ See, e.g., H.J. Res. 13, 119th Cong. (2025).

D. *Reforming the Supreme Court*

The Supreme Court wields vast power with minimal accountability. Appointed by the president with advice and consent of the Senate, its members serve for life.³³⁸ The portion of the Constitution that addressed the federal courts took up only one-tenth of the words discussing the democratically accountable branches.³³⁹ It has accumulated power over the centuries because it husbanded credibility.³⁴⁰ Now, that credibility is ebbing. Public trust in the Court hovers near its lowest level ever recorded.³⁴¹ Those low ratings predated the news stories that one billionaire, conservative activist Harlan Crow, had subsidized the lifestyle of Justice Clarence Thomas, going so far as to buy and renovate the house in which his mother lived.³⁴²

At the same time, the Court has exerted ever greater authority over American law and political life. Since the conservative supermajority of six justices was consolidated in 2020,³⁴³ it promulgated a generation's worth of decisions in a breathtakingly short period of time. The Court overturned *Roe v. Wade* and ended the federal constitutional guarantee of reproductive rights,³⁴⁴ effectively ruled that gun regulation only could withstand constitutional scrutiny if it aligned with colonial-era laws,³⁴⁵ and began a series of rulings to strip regulatory agencies of their power³⁴⁶—all within a few days. It ended affirmative action in higher

³³⁸ U.S. CONST. art. II, § 2, cl. 3; U.S. CONST. art. III, § 1.

³³⁹ U.S. CONST. art. III; MICHAEL WALDMAN, *THE SUPERMAJORITY: HOW THE SUPREME COURT DIVIDED AMERICA* 10 (2023).

³⁴⁰ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement: Marbury v. Madison and the Case for Judicial Supremacy*, 20 CONST. COMMENTARY 369, 370–71 (2003).

³⁴¹ Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), <https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low> [<https://perma.cc/ZW43-T6LY>].

³⁴² See Justin Elliot, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crowe Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023, at 14:20 ET), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus> [<https://web.archive.org/web/20260201062805/https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus>].

³⁴³ See WALDMAN, *supra* note 339, at 2–3, 41, 118.

³⁴⁴ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022).

³⁴⁵ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 20–29 (2022).

³⁴⁶ *West Virginia v. EPA*, 597 U.S. 697, 732 (2022) (holding that agencies must point to “clear congressional authorization” when asserting authority over issues of vast economic and political significance); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024) (ending the *Chevron* doctrine, where courts would give deference to agency interpretations of ambiguous statutory language).

education.³⁴⁷ It handed unprecedented power to the presidency, shielding chief executives from legal accountability for crimes committed in office³⁴⁸ and allowing the effective takeover of independent agencies (except in all likelihood the Federal Reserve).³⁴⁹ And the system in which our politics now operates—swimming in money, polarization worsened by rampant gerrymandering, with states increasingly unrestrained in restricting voting rights³⁵⁰—is the product of the Roberts Court’s decisions on democracy.³⁵¹

There is an unavoidable political dimension to this: The two political parties roughly split control of the White House for the past half century, with party control shifting 8 times.³⁵² “But Republican appointees have controlled the U.S. Supreme Court since 1970. In fact, the last Democrat to be appointed chief justice took office in 1946.”³⁵³ The conservative justices all rose through the ranks of the Federalist Society, which began as a student club and evolved to become the most effective political machine in the history of the American judiciary.³⁵⁴ The Federalist

³⁴⁷ See *generally* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (holding affirmative action policies at Harvard and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964).

³⁴⁸ See, e.g., *Trump v. United States*, 603 U.S. 593, 609–10, 615–16 (2024).

³⁴⁹ See *Trump v. Wilcox*, No. 24A966, slip op. at 2 (U.S. May 22, 2025) (“[The parties] contend that arguments in this case necessarily implicate the constitutionality of for-cause removal protections for members of the Federal Reserve’s Board of Governors or other members of the Federal Open Market Committee. . . . We disagree. The Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States.”); BENJAMIN M. BARCZEWSKI & TODD GARVEY, CONG. RSCH. SERV., LSB11292 SUPREME COURT GRANTS EMERGENCY MOTION ON PRESIDENT’S REMOVAL POWER 2, 5–6 (2025) (discussing the Supreme Court’s order allowing removal of independent agency officials and suggesting for-cause removal protections are likely unconstitutional, with a likely exception for the Federal Reserve); *Trump v. Slaughter*, No. 25A264 (25-332), slip op. at 1 (U.S. Sep. 22, 2025) (granting stay pending appeal and permitting the President to remove FTC Commissioner Rebecca Slaughter without cause).

³⁵⁰ See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 355–56 (2010); *Shelby Cnty. v. Holder*, 570 U.S. 529, 556–57 (2013); *Rucho v. Common Cause*, 588 U.S. 684, 721 (2019).

³⁵¹ See, e.g., Lynn Adelman, *The Roberts Court’s Assault on Democracy*, 14 HARV. L. & POL’Y REV. 131, 131 (2020) (“[T]he Roberts Court has been anything but passive. Rather, the Court’s hard right majority is actively participating in undermining American democracy.”).

³⁵² Since 1976, Democrats controlled the presidency for six full terms (Carter, two Clinton, and two Obama), and Republicans six (two Reagan, George H.W. Bush, two George W. Bush, and Trump’s first term).

³⁵³ WALDMAN, *supra* note 339, at 2–3.

³⁵⁴ AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 3 (2015). See *generally* MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013) (tracing how the Federalist Society grew from a small group of disaffected conservative law students into an organization with extraordinary influence over American law and

Society is part of a remarkably well-funded political operation: One donor gave Leonard Leo, the Society's leader, \$1.6 billion to spend to reshape the law.³⁵⁵ It is hard to escape the conclusion that the Supreme Court has been captured by a faction of a faction.

As at other times, the topic of the Supreme Court and its possible reform should be squarely at the center of public debate. That has been a key feature of other political eras. Abraham Lincoln rose to the presidency in part through his relentless attacks on the Taney Court and its decision in *Dred Scott*.³⁵⁶ Theodore Roosevelt's 1912 Progressive Party campaign focused heavily on criticism of the Court.³⁵⁷ Attacks on *Lochner v. New York*³⁵⁸ were not confined to later law school casebooks—they were applause lines on the campaign trail.³⁵⁹ Modern conservatives, from Richard Nixon to Ronald Reagan, attacked “permissive” judges and the doctrines of the Warren Court, and demanded a “strict constitutionalist” approach.³⁶⁰ The Court and its acolytes may want to shroud its workings in mystery, and imply that criticism is inappropriate, but it is very much the American way.

What are some elements of a reform agenda for the Court?

Term limits. The United States is the only major constitutional democracy that does not limit terms or impose a retirement age for its

politics); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2010) (describing the development of a cadre of conservative lawyers to advance policy goals).

³⁵⁵ Andrew Perez, The Lever, Andy Kroll, & Justin Elliott, *How a Secretive Billionaire Handed His Fortune to the Architect of the Right-Wing Takeover of the Courts*, PROPUBLICA (Aug. 22, 2022, 14:45 ET), <https://www.propublica.org/article/dark-money-leonard-leo-barre-seid> [<https://perma.cc/JVX8-XY39>]; Kenneth Vogel & Shane Goldmacher, *An Unusual \$1.6 Billion Donation Bolsters Conservatives*, N.Y. TIMES (Aug. 22, 2022), <https://www.nytimes.com/2022/08/22/us/politics/republican-dark-money.html> [<https://web.archive.org/web/20230228055946/https://www.nytimes.com/2022/08/22/us/politics/republican-dark-money.html>].

³⁵⁶ President Abraham Lincoln, Cooper Union Address (Feb. 27, 1860). See generally HAROLD HOLZER, *LINCOLN AT COOPER UNION: THE SPEECH THAT MADE ABRAHAM LINCOLN PRESIDENT* (2004) (documenting Lincoln's use of the Cooper Union address to build national prominence by attacking the Court's pro-slavery reading of the Constitution).

³⁵⁷ See, e.g., Theodore Roosevelt, *Judges and Progress*, OUTLOOK, Jan. 1912, at 40 [hereinafter Roosevelt, *Judges and Progress*]; Theodore Roosevelt, *A Charter of Democracy: Address Before the Ohio Constitutional Convention* (Feb. 21, 1912), reprinted in S. DOC. NO. 348 (1919).

³⁵⁸ See generally *Lochner v. New York*, 198 U.S. 45 (1905) (striking down government regulations as impermissibly impeding on economic freedom).

³⁵⁹ David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1503 n.223 (“Theodore Roosevelt was among those upset by *Lochner*, and he raised the case as a campaign issue in 1912.”); Roosevelt, *Judges and Progress*, supra note 357, at 40.

³⁶⁰ See RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* 425 (2001) (noting how during his presidential campaign, Senator Barry Goldwater accused the Supreme Court of exercising “raw and naked power”); RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 30–31 (2008).

high court judges.³⁶¹ The same is true in states: Only in Rhode Island do justices serve for life with no mandatory retirement age.³⁶² Such limits rely on the same insight drawn from George Washington’s decision to retire from the presidency after two terms: No person, no matter how valuable, should hold that much power for too long.³⁶³

An eighteen-year term for Justices would maintain the independence of the Court while improving the chance that the Justices do not grow increasingly out of touch with the country they help govern. Intriguingly, the reform is broadly popular across partisan divides. A recent Fox News poll found 78% support for term limits, with strong support from Republicans and Independents as well as Democrats.³⁶⁴ The National Constitution Center asked groups of liberal, and conservative scholars to propose constitutional changes; both independently arrived at Supreme Court term limits.³⁶⁵

Such limits can be imposed by a constitutional amendment. Senators Peter Welch and Joe Manchin introduced such a measure, for example, though it did not receive a vote in either chamber.³⁶⁶

More promisingly, there is growing support for a statutory approach to Supreme Court term limits. Legislation would shift justices to “senior” status after 18 years. They would retain their seat and perform some duties. That is the approach taken by the Supreme Court Tenure Establishment and Retirement Modernization (TERM) Act, legislation

³⁶¹ See Lisa Hilbink, *Life Tenure for U.S. Supreme Court Justices Is a Global Oddity with Clear Costs*, BRENNAN CTR. FOR JUST. (Nov. 20, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/life-tenure-us-supreme-court-justices-global-oddity-clear-costs> [https://perma.cc/G9E3-A6RX].

³⁶² Michael Milov-Cordoba, *Life Tenure Is a Rarity on State Supreme Courts*, BRENNAN CTR. FOR JUST. (Oct. 2, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/life-tenure-rarity-state-supreme-courts> [https://perma.cc/Z42C-UQH5].

³⁶³ Ali Watkins & Matthew Mpoke Bigg, *Why Does America Have Presidential Term Limits?*, N.Y. TIMES (Apr. 2, 2025), <https://www.nytimes.com/2025/03/31/us/politics/trump-presidential-term-limits.html> [https://web.archive.org/web/20250331151512/https://www.nytimes.com/2025/03/31/us/politics/trump-presidential-term-limits.html].

³⁶⁴ Victoria Balara, *Fox News Poll: Supreme Court Approval Rating Drops to Record Low*, FOX NEWS (July 16, 2024, at 18:00 ET), <https://www.foxnews.com/official-polls/fox-news-poll-supreme-court-approval-rating-drops-record-low> [https://perma.cc/5TAC-LVBQ].

³⁶⁵ NAT’L CONST. CTR., CONSTITUTION DRAFTING PROJECT: THE PROPOSED AMENDMENTS 3–4, 7–8 (2022), https://constitutioncenter.org/media/files/The_Proposed_Amendments_v1.pdf [https://perma.cc/S9PB-RVHX]; Amanda Dworkin, *An ‘Ideal Constitution’ Includes SCOTUS Term Limits, Say Progressive and Conservative Scholars*, FIX COURT (Nov. 23, 2020), <https://fixthecourt.com/2020/11/ideal-constitution-includes-judicial-term-limits-say-progressive-conservative-scholars> [https://perma.cc/F9AM-72E2].

³⁶⁶ A Joint Resolution Proposing an Amendment to the Constitution of the United States to Normalize Vacancies and Appointments for Justices of the Supreme Court of the United States and for Other Purposes, S.J. Res. 120, 118th Cong. (2024).

which was cosponsored by 57 House members in the 119th Congress.³⁶⁷ Is this constitutional? Retired Judge Nancy Gertner has argued:

The proposal is structured to avoid a constitutional issue. Article III of the Constitution provides for judicial tenure during “good behavior,” which has been understood to mean life tenure. Term limit proposals avoid the constitutional problem by requiring that a justice not leave judicial service entirely, but rather take on new duties. Ninety years ago, the Supreme Court deemed the senior judge model constitutional, declaring that Congress can lighten judicial duties so long as it neither abolishes a judge’s office nor reduces his or her salary. Just as senior judges remain Article III judges, so too would senior justices.³⁶⁸

Such a term limit should be accompanied by a system of regular appointments of Justices—say, each president gets to nominate a Justice every two years.³⁶⁹ This would remove some of the partisan toxicity from the confirmation process, give predictability, and serve as a transition to a court with its members all serving limited terms.

A *binding ethics code*. Federal judges must comply with a binding ethics code.³⁷⁰ Until 2023, the Supreme Court was governed by no ethics code at all. After public pressure due to revelations of allegedly corrupt support for justices from wealthy donors, the Court announced a Code of Conduct.³⁷¹ The announcement came with a whiff of condescension. The Justices only took this step, they explained, because of some

³⁶⁷ Supreme Court Tenure Establishment and Retirement Modernization Act of 2025, H.R. 3544, 119th Cong. (2025).

³⁶⁸ Nancy Gertner, *The Constitution Allows for Term-Limited Supreme Court Justices*, BRENNAN CTR. FOR JUST. (Dec. 19, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/constitution-allows-term-limited-supreme-court-justices> [<https://perma.cc/2EME-EJSA>].

³⁶⁹ See PRESIDENTIAL COMM’N ON SUPREME CT. UNITED STATES, FINAL REPORT 122 (2021), https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf [<https://perma.cc/52N7-76K9>].

³⁷⁰ JUD. CONF. OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES 2 (2019), <https://www.uscourts.gov/file/25752/download> [<https://perma.cc/DAB8-EU2D>].

³⁷¹ Statement of the Court Regarding the Code of Conduct, *foreword* to CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [<https://perma.cc/D88C-7GSP>]; Debra Cassens Weiss, *Supreme Court Adopts Ethics Code, Addresses ‘Misunderstanding’ That Justices Feel Unrestrained by Rules*, ABA J. (Nov. 13, 2023, at 15:00 ET), <https://www.abajournal.com/news/article/supreme-court-adopts-ethics-code-addresses-misunderstanding-that-justices-feel-unrestrained-by-rules> [<https://perma.cc/8FA5-DZY7>]; Rakim Brooks, *The Supreme Court Just Admitted That Public Pressure Is Working*, DEMOCRACY DOCKET (Nov. 2023), <https://www.democracymocket.com/opinion/the-supreme-court-just-admitted-that-public-pressure-is-working> [<https://web.archive.org/web/20240221094928/https://www.democracymocket.com/opinion/the-supreme-court-just-admitted-that-public-pressure-is-working>].

“misunderstanding” by the public about their probity.³⁷² The Supreme Court had been the only court in the country without a binding ethics code. Now it has one of the country’s weakest, with its new rules more loophole than law.

The rules themselves are weak. Consider recusal, when justices step aside from considering a case. The Justices used the rule that applies to lower court judges, but then inserted a handful of exceptions, such as one effectively allowing a Justice to disregard a required recusal if they think their vote is needed in the case.³⁷³ The financial disclosure rules were not tightened at all.³⁷⁴ And above all, the Code lacks some mechanism to enforce beyond the Justices themselves.³⁷⁵

The Court could go further and establish accountability on its own. But Congress ought not wait, and it emphatically has the power to act. It has enacted ethics rules and other binding requirements on federal judges as well as executive branch officials.³⁷⁶ Justice Samuel Alito insisted (inappropriately, since he may have to rule on such a matter), “I know this is a controversial view, but I’m willing to say it. . . . No provision in the Constitution gives them the authority to regulate the Supreme Court—period.”³⁷⁷ Elena Kagan felt it necessary to publicly respond. “Of course Congress can regulate various aspects of what the Supreme Court does,” she said, noting that Congress can change the Court’s jurisdiction, set its budget, or change its size.³⁷⁸ “It just can’t be that the [C]ourt is the only institution that somehow is not subject to any checks and balances

³⁷² See Statement of the Court Regarding the Code of Conduct, *supra* note 371.

³⁷³ See CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 371, at 10–11.

³⁷⁴ See *id.* at 12–14.

³⁷⁵ See *id.* at 1–8.

³⁷⁶ See Jennifer Ahearn & Michael Milov-Cordova, *The Role of Congress in Enforcing Supreme Court Ethics*, 52 HOEFSTRAL. REV. 557, 561–62 (2024).

³⁷⁷ David B. Rivkin, Jr. & James Taranto, *Samuel Alito, the Supreme Court’s Plain-Spoken Defender*, WALLST. J. (July 28, 2023, at 13:57 ET), <https://www.wsj.com/opinion/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7>.

³⁷⁸ Adam Liptak, *Two Justices Clash on Congress’s Power Over Supreme Court Ethics*, N.Y. TIMES (Aug. 26, 2023), <https://www.nytimes.com/2023/08/26/us/supreme-court-ethics-alito-kagan.html> [<https://web.archive.org/web/20230829042320/https://www.nytimes.com/2023/08/26/us/supreme-court-ethics-alito-kagan.html>]; see also Jesse Wegman, *The Long History of Supreme Court Reform*, BRENNAN CENTER FOR JUSTICE (Feb. 19, 2026), <https://www.brennancenter.org/our-work/analysis-opinion/long-history-supreme-court-reform> [<https://perma.cc/Q473-WD79>] (documenting Congress’s historical exercise of its authority to alter the Court’s size, jurisdiction, and structure); ALICIA BANNON & MICHAEL MILOV-CORDOVA, BRENNAN CTR. FOR JUST. SUPREME COURT TERM LIMITS 2 (2023), https://www.brennancenter.org/media/11236/download/BCJ-146%20SCOTUS_TermLimits.pdf (“The Constitution gives Congress wide latitude to determine the Supreme Court’s structure and responsibilities.”).

from anybody else,” she declared, adding, “I mean, we are not imperial.”³⁷⁹

Legislation to establish a Supreme Court ethics code has included provisions such as allowing private citizens to file complaints against Justices and tightening recusal rules.³⁸⁰ It charges a Counselor to the Chief Justice with making rules for matters such as the acceptance of gifts and requires a panel of circuit judges to assess recusal decisions.³⁸¹ (Of note, such a system would mesh well with a law moving Justices to senior status after eighteen years.)

Address the shadow docket. In recent years, the Court has taken to making significant rulings without full briefing, without stating its reasons, and often without the Justices signing their names to their actions. They do this using the emergency docket, now ominously dubbed the “shadow docket.” The emergency docket has existed in some form for much of the country’s history.³⁸² But during the second Trump term, as lower courts ruled against illegal executive actions, the government made an unheard-of 30 emergency applications to the Supreme Court.³⁸³ The Court sided with the Trump White House 80% of the time in those applications.³⁸⁴

Congress determines the jurisdiction of the Court and has ample power to regulate aspects of its operations.³⁸⁵ Senator Richard Blumenthal

³⁷⁹ Liptak, *supra* note 378.

³⁸⁰ See Supreme Court Ethics, Recusal, and Transparency Act of 2025, S. 1814, 119th Cong. §§ 2, 4 (2025).

³⁸¹ *Id.* §§ 3–5.

³⁸² For example, an emergency order temporarily halted the execution of convicted spies Julius and Ethel Rosenberg in 1953. *Rosenberg v. United States*, 346 U.S. 273, 283 (1953); see Brad Snyder, *Taking Great Cases: Lessons from the “Rosenberg” Case*, 63 VAND. L. REV. 885, 888 (2010). An emergency ruling temporarily halted the bombing of Cambodia. *Holtzman v. Schlesinger*, 414 U.S. 1316, 1316, 1320 (1973). And the order where the Supreme Court halted the 2000 presidential recount in Florida, days before its final ruling, was *Bush v. Gore*. 531 U.S. 1046 (2000); see WALDMAN, *supra* note 343, at 115, 309; see also Taraleigh Davis, *What the New York Times Got Wrong—and Right—About the Emergency Docket*, SCOTUSBLOG (Apr. 21, 2026), <https://www.scotusblog.com/2026/04/what-the-new-york-times-got-wrong-and-right-about-the-emergency-docket> [<https://perma.cc/XYL8-JV7L>] (discussing the Court’s 2016 emergency order halting the Clean Power Plan).

³⁸³ Ashleigh Maciolek & Alicia Bannon, *Supreme Court Abuse of the Shadow Docket Under Trump*, BRENNAN CTR. FOR JUST. (Mar. 3, 2026), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-abuse-shadow-docket-under-trump> [<https://perma.cc/3U25-6Q4A>].

³⁸⁴ *Id.*

³⁸⁵ See U.S. CONST. art. III, § 2, cl. 2; Stephen Wermiel, *Where Congress Controls the Court*, SCOTUSBLOG (Sep. 17, 2025), <https://www.scotusblog.com/2025/09/where-congress-controls-the-court> [<https://perma.cc/X6GT-3RSF>]; Akhil Reed Amar, *Term Limits/Time Rules for Future Justices: Eighteen Arguments for Eighteen Years*, 2022-2023 CATO SUP. CT. REV. 9, 18 (2022) (discussing the Judiciary Act of 1789, 1 Stat. 73, § 1); see *supra* note 378 and accompanying text.

and Representative Deborah Ross have proposed legislation to bring some regularity to the abuse of the emergency docket.³⁸⁶ Justices should have to state whether a ruling is intended to have precedential effect; they should be required to articulate reasons for intervention, and, arguably, they could be required to identify who voted for or against a motion. Jurisdictional reforms (which might be on firmer constitutional ground) could clarify at what stage of a lawsuit the Court can step in to resolve a matter before it is fully litigated. This could be part of a broader array of legislated reforms addressing jurisdiction.

E. *Fixing Congress, the Broken Branch*

An imperial presidency and an overreaching Supreme Court have filled a yawning power gap: the failure of Congress, which is supposed to be the preeminent branch, to do its job.

It can be hard to imagine, given how large the presidency looms, but the Framers were unambiguous: Congress was supposed to be the most important branch of government.³⁸⁷ Its effectiveness has ebbed and flowed over the years. It has been marked by struggles for power between centralized leadership (such as a strong Speaker of the House) and decentralized committees, with the rank-and-file caucus members as the “swing votes.”³⁸⁸ It ceded power over time, especially on foreign policy, to the executive.³⁸⁹ It created independent expert agencies in recognition of

³⁸⁶ Shadow Docket Sunlight Act of 2025, H.R. 6816, 119th Cong. (2025); Manny Marotta, *The Shadow Docket Bill Returns—Bigger, Better and More Sunlight-Filled*, FIX COURT (Dec. 22, 2025), <https://fixthecourt.com/2025/12/the-shadow-docket-bill-returns-bigger-better-and-more-sunlight-filled> [<https://perma.cc/KV32-72TV>].

³⁸⁷ See THE FEDERALIST No. 51 (James Madison) (“In republican government, the legislative authority necessarily predominates.”).

³⁸⁸ Lee Drutman, *Matt Gaetz Is Half Right*, ATLANTIC (Oct. 9, 2023), <https://www.theatlantic.com/ideas/archive/2023/10/kevin-mccarthy-congress-freedom-caucus-matt-gaetz/675584> [<https://web.archive.org/web/20231009163856/https://www.theatlantic.com/ideas/archive/2023/10/kevin-mccarthy-congress-freedom-caucus-matt-gaetz/675584>] (“The House of Representatives itself has organized and reorganized many different ways across American history.”). See generally Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144 (1968) (tracing the evolution in the House from loose to organized structure).

³⁸⁹ See, e.g., Rebecca Ingber, Essay, *The Insidious War Powers Status Quo*, 133 YALE L.J.F. 747, 747–50 (2024); Michael Schiffer, *Congress Shrinking from the World: the Constitution’s Article I in the Shadow of Trump 2.0*, JUST SEC. (July 23, 2025), <https://www.justsecurity.org/117559/congress-power-shrinking-trump> [<https://perma.cc/M7WF-CQQA>].

its own limitations.³⁹⁰ But rarely have we seen a Congress so supine to the executive as we see today.

Congress was expected to jealously guard its own prerogatives as an essential element of checks-and-balances.³⁹¹ “Ambition must be made to counteract ambition,” as Madison put it.³⁹² Instead, in the polarized political system, it has become little more than a cheering section (or booing claque) for the president, depending on which party controls the White House.

So part of the reform agenda must squarely look at Congress itself.

What would a robust reform agenda for Congress include? The two chambers suffer from different maladies, while sharing some in common. Some steps to address partisan polarization are outside the scope of this Section. The move to primaries as the exclusive way parties choose congressional candidates (which began in the early 20th century)³⁹³ has empowered extremes within each party. This move, combined with gerrymandering in the House and the massive amounts of dark money and independent spending, has created a toxic incentive structure for lawmakers: It is rational to care less about median voters than about the risk of losing a party nomination.

Expand the House of Representatives. George Washington spoke only twice on the record during the Constitutional Convention.³⁹⁴ On the final day, he left the chair to speak in support of reducing the size of congressional districts from 40,000 to 30,000.³⁹⁵ “The smallness of the proportion of Representatives had been considered by many members of the Convention, as an insufficient security for the rights [and] interests of the people,” he was reported to have said.³⁹⁶ Today, however, each congressional district represents as many as 887,000 people.³⁹⁷ That makes direct, tactile engagement between lawmakers and constituents

³⁹⁰ See, e.g., Steve Inskeep, *Why Independent Agencies Were Created To Be Independent*, NPR (Feb. 20, 2025, at 04:23 ET), <https://www.npr.org/2025/02/20/nx-s1-5302537/history-congress-trump-independent-agencies> [<https://perma.cc/K29T-RMYP>].

³⁹¹ See THE FEDERALIST No. 51 (James Madison).

³⁹² *Id.*

³⁹³ See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 298–99 (2011).

³⁹⁴ John P. Kaminski & Michael E. Stevens, *Speeches, Motions, and Committee Assignments in the Constitutional Convention*, UNIV. WIS.-MADISON: CTR. FOR STUD. AM. CONST. (May 18, 2021), <https://csac.history.wisc.edu/2021/05/18/speeches-motions-and-committee-assignments-in-the-constitutional-convention> [<https://perma.cc/3QS4-GB2M>].

³⁹⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 200, at 644.

³⁹⁶ *Id.*

³⁹⁷ *Historical Apportionment Data (1910–2020)*, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/data/tables/time-series/dec/apportionment-data-text.html> [<https://perma.cc/L9QH-3JC6>] (average district population in 2020 varied between Montana, with a population of 542,000, and West Virginia, with 897,000).

increasingly out of reach. Larger districts heighten the need for campaign cash. They also muffle representation.³⁹⁸

One solution would be to expand the House. The current size of 435 members was set by the Permanent Apportionment Act, a statute enacted in 1929.³⁹⁹ Political theorist Danielle Allen writes:

As a result, we are the only Organization for Economic Cooperation and Development democracy that hasn't continuously adjusted the size of its legislative assembly over the past century. It also gives us the highest representation ratio of any OECD country by a long measure. Both the German Bundestag and the British Parliament are larger than our House of Representatives, even though their populations are roughly one-quarter or one-fifth of ours.⁴⁰⁰

Were districts to revert to the size envisioned by Washington, the House would have over 10,000 members, which is of course impractical. Other formulas have been proposed. One legislative proposal would expand the House to 585 people, for example.⁴⁰¹ Smaller districts would more nearly approximate the benefits of proportional representation, too. Jesse Wegman and Lee Drutman argue that a larger House would diminish polarization.⁴⁰² Critics, on the other hand, observe that larger throngs of people do not enhance the subtlety of debate or manageability.⁴⁰³

³⁹⁸ See AMERICAN ACADEMY OF ARTS & SCIENCES, *OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY* 23 (2020), https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose.pdf [<https://perma.cc/5Z4Y-NBYU>].

³⁹⁹ Permanent Apportionment Act of 1929, Pub. L. No. 71-13, 46 Stat. 21 (codified as amended at 2 U.S.C. § 2a).

⁴⁰⁰ Danielle Allen, *The House was Supposed to Grow with Population. It Didn't. Let's Fix That*, WASH. POST (Feb. 28, 2023, at 07:55 ET), <https://www.washingtonpost.com/opinions/2023/02/28/danielle-allen-democracy-reform-congress-house-expansion> [<https://web.archive.org/web/20230319184745/https://www.washingtonpost.com/opinions/2023/02/28/danielle-allen-democracy-reform-congress-house-expansion>].

⁴⁰¹ Restoring Equal and Accountable Legislators in the House Act (REAL House Act), H.R. 622, 118th Cong. § 2(a) (2023). Another proposal uses a mathematical formula that would expand the House as the population grows. See Equal Voices Act, H.R. 643, 118th Cong. § 2(a) (2023).

⁴⁰² See Jesse Wegman & Lee Drutman, *How to Fix America's Two-Party Problem*, N.Y. TIMES (Jan. 14, 2025), <https://www.nytimes.com/interactive/2025/01/14/opinion/fix-congress-proportional-representation.html> [<https://web.archive.org/web/20260210234054/https://www.nytimes.com/interactive/2025/01/14/opinion/fix-congress-proportional-representation.html>].

⁴⁰³ See, e.g., Jonathan Bernstein, *Enlarging the House Won't Fix U.S. Politics*, BLOOMBERG OP. (Dec. 10, 2021, at 07:30 ET), <https://www.bloomberg.com/opinion/articles/2021-12-10/the-case-against-a-larger-house-of-representatives> [<https://web.archive.org/web/20211211073526/https://www.bloomberg.com/opinion/articles/2021-12-10/the-case-against-a-larger-house-of-representatives>].

Address the filibuster. The U.S. Senate now requires, in effect, 60 votes to enact basic legislation.⁴⁰⁴ This was not always so. The Framers rejected a supermajority requirement, having seen the risks during the Articles of Confederation.⁴⁰⁵ Throughout the country's history the filibuster was used sparingly, most notably to block civil rights legislation.⁴⁰⁶ Since the early 2000s, it has become the norm for all legislation.⁴⁰⁷ In some statutes, exceptions allow for majority vote, including for budget bills.⁴⁰⁸ Lawmakers have created exceptions: Supreme Court Justices can be confirmed by majority vote, as can lower court judges, under the so-called "nuclear option."⁴⁰⁹ It takes only 51 votes to confirm a Supreme Court Justice, who can strike down a law while merely suggesting that Congress act,⁴¹⁰ but 60 votes to enact remedial legislation.⁴¹¹ That has the democratic formula precisely backwards.

Proposals for ending or reforming the filibuster take different forms. Some are specific to individual pieces of legislation: Had the Democrats won a "trifecta" in 2024, they pledged to create an exception that would have enabled the Freedom to Vote: John R. Lewis Act to pass with a majority.⁴¹² Others would change Rule 22.⁴¹³ Former Senator Tom Harkin, for example, proposed that the first cloture vote would require 60 to overcome; the second would require 57; the third, 53; and finally a bill could pass with a majority.⁴¹⁴ This would preserve ample debate and create opportunities for opposition, but eventually would ensure that on a few bills a year, the minority voice does not become a minority veto.

⁴⁰⁴ 60 votes are required for cloture, which ends debate and allows a measure to be brought up for final passage with a majority vote. S. COMM. ON RULES & ADMIN., 113TH CONG., STANDING RULES OF THE SENATE, R. XXII (2013).

⁴⁰⁵ THE FEDERALIST No. 22 (Alexander Hamilton); Caroline Fredrickson, *The Case Against the Filibuster*, BRENNAN CTR. FOR JUST. (Oct. 30, 2020), <https://www.brennancenter.org/our-work/research-reports/case-against-filibuster> [<https://perma.cc/EFH3-9WTF>].

⁴⁰⁶ See, e.g., Fredrickson, *supra* note 405.

⁴⁰⁷ *Id.*; see also VALERIE HEITSHUSEN, CONG. RSCH. SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 8 (2017) (noting how "filibusters are not the extraordinary and unusual occurrences they once were").

⁴⁰⁸ MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE 9–38 (2017).

⁴⁰⁹ See *id.* at 190; Fredrickson, *supra* note 405.

⁴¹⁰ Fredrickson, *supra* note 405.

⁴¹¹ S. COMM. ON RULES & ADMIN., 113TH CONG., STANDING RULES OF THE SENATE, R. XXII (2013).

⁴¹² Patrick Marley, *Democrats Signal Voting Rights Bills Will Top the Agenda If Harris Wins*, WASH. POST (Aug. 22, 2024), <https://www.washingtonpost.com/politics/2024/08/22/kamala-harris-voting-rights-legislation-senate>.

⁴¹³ See *id.*

⁴¹⁴ 159 CONG. REC. S233, S249 (daily ed. Jan. 24, 2013) (statement of Sen. Tom Harkin).

Term limits or age limits. Congressional term limits could ensure greater circulation of leadership (though it is worth noting that leadership no longer is so reliant on the seniority system that Congress was known as the land of “protocol, alcohol, and Geritol”—and the method of choosing chairs derided as the “Senility System”⁴¹⁵). The public strongly supports congressional term limits, for many of the same reasons it supports Supreme Court term limits.⁴¹⁶ Congressional terms are, in fact, limited: House members must be “rehired” every two years, and Senators every six.⁴¹⁷ With the decline of the seniority system, leadership depends less on long tenure. Mike Johnson became Speaker of the House just eight years after he was first elected in 2016,⁴¹⁸ and Hakeem Jeffries became Minority Leader in 2023 after being first elected in 2012.⁴¹⁹ The Senate, by contrast, saw Mitch McConnell preside as Republican leader even as his faculties grew impaired.⁴²⁰ Charles Schumer has served in Congress since 1980.⁴²¹ The challenge may turn less on tenure in office than on age. The median age of Senators is now 64.7 years.⁴²² House members typically are 57.5 years old.⁴²³ The median age of the U.S. population is 39—old by global standards, but juvenile by the standards of Congress.⁴²⁴ President

⁴¹⁵ MARK GREEN WITH MICHAEL WALDMAN ET AL., WHO RUNS CONGRESS? 108–09, 278 (4th ed. 1984).

⁴¹⁶ In one recent survey, congressional term limits are the most popular of the reforms tested: 87% support, and only 12% oppose. PEW RSCH. CTR., AMERICAN’S DISMAL VIEWS OF THE NATION’S POLITICS 87 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf [<https://perma.cc/SG7B-SQQ4>]. A “[m]aximum age limit for elected officials in Washington, D.C.” came in second, with 79% support and 20% opposition. *Id.* Voter identification requirements had 76% support, and Supreme Court age limits had 74% support. *Id.*

⁴¹⁷ U.S. CONST. art I, § 2, cl. 1; *id.* § 3, cl. 1.

⁴¹⁸ See *About*, U.S. CONGRESSMAN MIKE JOHNSON, <https://mikejohnson.house.gov/about> [<https://perma.cc/FLB9-LSAU>].

⁴¹⁹ *Hakeem Jeffries*, BALLOTPEDIA, https://ballotpedia.org/Hakeem_Jeffries [<https://perma.cc/4HV8-KD6D>].

⁴²⁰ See, e.g., Manu Raju & Melanie Zanona, *McConnell Said He Plans to Stay as Leader as He Addressed His Health in Closed-Door Meeting*, CNN (Sep. 6, 2023, at 14:34 ET), <https://www.cnn.com/2023/09/06/politics/mitch-mcconnell-closed-door-meeting> [<https://web.archive.org/web/20230929233637/https://www.cnn.com/2023/09/06/politics/mitch-mcconnell-closed-door-meeting>].

⁴²¹ See *About Chuck*, S. DEMOCRATIC LEADER CHUCK SCHUMER, <https://www.schumer.senate.gov/about/biography> [<https://perma.cc/GG75-BBNT>].

⁴²² Drew DeSilver, *Age and Generation in the 119th Congress: Somewhat Younger, with Fewer Boomers and More Gen Xers*, PEW RSCH. CTR. (Jan. 16, 2025), <https://www.pewresearch.org/short-reads/2025/01/16/age-and-generation-in-the-119th-congress-somewhat-younger-with-fewer-boomers-and-more-gen-xers> [<https://perma.cc/Z6QA-28YE>].

⁴²³ *Id.*

⁴²⁴ Kristie Wilder & Paul Mackun, *An Aging Nation: U.S. Median Age Surpassed 39 in 2024*, U.S. CENSUS BUREAU (June 26, 2025), <https://www.census.gov/library/stories/2025/06/metro->

Joe Biden was 82 when he left office; Donald Trump will be the same age in his last year in office.⁴²⁵ Highly visible examples of congressional decrepitude include Senator Dianne Feinstein, who chaired a major committee while unable to fulfill her duties,⁴²⁶ and a Republican House member who spent her last year in office tucked away in an assisted living facility without constituents being told.⁴²⁷

Strengthening Capability. Some of the steps needed to enable Congress to play its proper role require new institutions within the branch. For example, Former Speaker of the House Newt Gingrich dismantled or weakened many of the expert bodies that had enabled Congress to legislate with greater precision, or at least more effectively perform oversight. For example, the Republicans, upon taking control in 1995, eliminated the Office of Technology Assessment (OTA), which had “provided members with impartial analysis of technology and science issues. It was time to eliminate that agency, [Gingrich] claimed, because it was ineffective and major tech decisions should be made by the private sector.”⁴²⁸ Political scientist Maya Kornberg of the Brennan Center reports that “Gingrich’s reforms in the 1990s stunted Congress for many years to come.”⁴²⁹ At a time of convulsive change involving scientific and engineering knowledge—from COVID to artificial intelligence—Congress has been hobbled by lack of access to expertise.⁴³⁰ The Supreme

areas-median-age.html [https://perma.cc/SK9M-NNSF]; *Global Median Age*, DATABASE.EARTH (July 11, 2024), https://database.earth/population/median-age [https://perma.cc/KT8C-NB8F].

⁴²⁵ Victoria Bisset, Hannah Dormido & Álvaro Valiño, *Trump Is the Oldest Person To Be Elected President: U.S. Presidents, by Age*, WASH. POST (Nov. 8, 2024, at 08:35 ET), https://www.washingtonpost.com/politics/2024/11/08/oldest-us-presidents-trump [https://web.archive.org/web/20241111020741/https://www.washingtonpost.com/politics/2024/11/08/oldest-us-presidents-trump]

⁴²⁶ Jane Mayer, *Dianne Feinstein’s Missteps Raise a Painful Age Question Among Senate Democrats*, NEW YORKER (Dec. 9, 2020), https://www.newyorker.com/news/news-desk/dianne-feinsteins-missteps-raise-a-painful-age-question-among-senate-democrats.

⁴²⁷ Michael Schaffer, *A Congresswoman With Dementia Stopped Coming to Work. The DC Press Corps Never Noticed.*, POLITICO MAG. (Mar. 14, 2025, at 10:00 ET), https://www.politico.com/news/magazine/2025/03/14/kay-granger-dementia-dc-media-00210317 [https://perma.cc/L2PC-RC7H].

⁴²⁸ Darrell M. West, *It Is Time to Restore the U.S. Office of Technology Assessment*, BROOKINGS INST. (Feb. 10, 2021), https://www.brookings.edu/articles/it-is-time-to-restore-the-us-office-of-technology-assessment [https://perma.cc/75A3-7FEK]; see BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT 69–70* (1996).

⁴²⁹ MAYA L. KORNBERG, *STUCK: HOW MONEY, MEDIA, AND VIOLENCE PREVENT CHANGE IN CONGRESS 70* (2026).

⁴³⁰ See MAYA KORNBERG & MARTHA KINSELLA, BRENNAN CTR. FOR JUST., *BUILDING SCIENCE AND TECHNOLOGY EXPERTISE IN CONGRESS 1–3* (2023), https://www.brennancenter.org/media/11875/download/2023%20Congress%20Science%20Technology.pdf [https://perma.cc/TC7Q-6E2P].

Court's 2023 ruling in *Loper Bright Enterprises v. Raimondo*, overturning *Chevron* deference,⁴³¹ will compel Congress to enact more exacting and precise legislative language, if its policy choices are to be implemented by agencies and respected by courts.

At the very least, it has been suggested that Congress should reestablish the OTA.⁴³² Doing so can also strengthen the role of the Government Accountability Office (GAO), by ensuring that the President cannot appoint or fire its head, thus making clear it is a congressional agency engaged in legislative oversight. The Librarian of Congress oversees the Congressional Research Service (CRS), as well as the libraries, copyright office, and other functions deemed to be executive in nature,⁴³³ and Trump dismissed the Librarian in 2025.⁴³⁴ It may make sense to remove the leadership of CRS, at least, from the executive branch altogether.

CONCLUSION: LESSONS FROM HISTORY

This is a full agenda—just some of what we must do to clean up the wreckage.

To be sure, declaring the need for reform is easy—achieving it is hard. There have been other periods, too, when reform seemed needed, and the political stars aligned, but nothing happened.

I have a personal story to tell: In 1993, I was 32 years old and serving as Special Assistant to the President for Policy Coordination for Bill Clinton. Ross Perot had just won 19% of the vote in the 1992 election. Political reform was among his top issues. On Election Day in Little Rock, Arkansas, the president-elect vowed,

of all the things that [Perot] said, I think perhaps the most important . . . is the need to reform the political system, to reduce the influence of special interest and give more influence back to the kind

⁴³¹ 603 U.S. 369, 412–13 (2024).

⁴³² EMILY G. BLEVINS, CONG. RSCH. SERV., R46327, *THE OFFICE OF TECHNOLOGY ASSESSMENT: HISTORY, AUTHORITIES, ISSUES, AND OPTIONS* 35–39 (2020).

⁴³³ For example, the D.C. Circuit ruled that the Copyright Office is subject to the Administrative Procedures Act. *Med. Imaging & Tech. All. v. Libr. of Cong.*, 103 F.4th 830, 837 (D.C. Cir. 2024) (citing 17 U.S.C. § 701(e)).

⁴³⁴ See Andrew Limbong, *Librarian of Congress Firing Is Latest Move in Upheaval of U.S. Cultural Institutions*, NPR (May 9, 2025, at 16:36 ET), <https://www.npr.org/2025/05/09/nx-s1-5393737/carla-hayden-fired-library-of-congress-trump> [<https://perma.cc/LD8M-W982>].

of people that are in this crowd tonight by the tens of thousands and I will work with him to do that.⁴³⁵

Campaign reform was identified as a top four priority for the new administration, and I was put in charge of passing it (a bad sign).

The first meeting of the new president with Democratic congressional leaders was on this topic, in fact, just two weeks after the inauguration. We met in the Cabinet Room. Clinton implored the lawmakers to act. He had been on the campaign trail, he said, and he saw how strong the sentiment was for reform. It would be something that would show politicians had heard the message of the voters. Senate Majority Leader George Mitchell spoke enthusiastically about this and pledged to pass it (interestingly, even moderate senators supported reform, since they all had opponents, many of whom were very well funded). Speaker of the House Tom Foley spoke. “Mr. President, we are going to do this—we are going to do it our way, but we are going to do it,” he said with a whiff of condescension. He paused and then he said: “Of course, it’s going to be very hard for Rosty [Ways and Means Chairman Dan Rostenkowski] to whip the guys on this and the tax bill at the same time, but we’re going to do it.” The unspoken message was: *If you dare to push this cockamamie reform on us, we will mess up your tax bill so badly you won’t recognize it.*

As I wrote in my memoir, “Clinton slumped in his seat, passively taking notes. There was no table-thumping, no LBJ-like harangue about the need for action.”⁴³⁶ The lawmakers demanded time, an effective delay that killed the plan. The House and Senate each passed the legislation but never met in a conference committee. Tom Foley lost his seat to a reform-minded challenger, the first Speaker of the House to lose his seat in over a century. Dan Rostenkowski went to prison for corruption.⁴³⁷

Typically, a third-party candidacy reflects the fracturing of an existing majority coalition, and the movement led by former Republican Perot was no exception. Whichever party coopts that breakaway segment of the electorate can forge a new majority. In 1932, Franklin Roosevelt’s Democrats absorbed formerly Republican progressives and supporters of the 1912 Progressive insurgency.⁴³⁸ That’s what the Republicans did after

⁴³⁵ President William J. Clinton, Address in Little Rock, Arkansas Accepting Election as the 42nd President of the United States (Nov. 3, 1992).

⁴³⁶ MICHAEL WALDMAN, POTUS SPEAKS: FINDING THE WORDS THAT DEFINED THE CLINTON PRESIDENCY 51 (2000).

⁴³⁷ *Dan Rostenkowski, Ex-Rep. Sent to Prison, Dies*, CBS NEWS (Aug. 11, 2010, at 16:51 ET), <https://www.cbsnews.com/news/dan-rostenkowski-ex-rep-sent-to-prison-dies> [https://perma.cc/A9TT-XUJK].

⁴³⁸ Many of Franklin D. Roosevelt’s key advisors were former Republicans or had backed the 1912 Progressive Party. See T.H. WATKINS, RIGHTEOUS PILGRIM: THE LIFE AND TIMES OF HAROLD

1968, when George Wallace won 14% of the vote.⁴³⁹ Those voters helped produce Richard Nixon's landslide in 1972. Yet in 1993 and thereafter, the Democrats did not act to coopt the Perot faction. Those angry independent voters? They are the Ross Perot voters, their needs unmet, three decades later—still angry, still politically homeless, still those who decide the course of our politics. They helped produce the Republican “Contract With America” takeover of Congress just two years later, the Obama victory in 2008, and Trump's wins in 2016 and 2024.⁴⁴⁰

Three lessons arise. First, reform moments come fleetingly. They require fast action—before discredited forces of the status quo regroup and regain momentum.

Second, it is impossible to untangle this from party politics—and we should not attempt to do so. Some academics and commentators have put forward the notion that political reform only works if it has equal initial support from both parties.⁴⁴¹ That's nice, but far from essential. Throughout history, big change has often happened on a party line vote or driven by one party with follow on assent from the other.⁴⁴² The Fifteenth Amendment was a Republican Party initiative.⁴⁴³ The National Voter Registration Act (NVRA)⁴⁴⁴ was passed by a Democratic Congress in 1993 after being vetoed by President George H.W. Bush. Despite its partisan pedigree, it is unassailed even amid all the fighting over the franchise. By contrast, the last time the Voting Rights Act was reauthorized,⁴⁴⁵ it passed the Senate 98-0—yet within a few years, was

L. ICKES, 1874–1951, at 113–46 (1990); JOHN C. CULVER & JOHN HYDE, *AMERICAN DREAMER: THE LIFE OF HENRY A. WALLACE* 101–02 (2000).

⁴³⁹ KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY: UPDATED EDITION* 539 (2014) (“The long-range meaning of the political upheaval of 1968 rests on the Republican opportunity to fashion a majority among the 57 percent of the American electorate which voted to eject the Democratic Party from national power.”).

⁴⁴⁰ See Timothy P. Carney, *Ross Perot Showed Us the Hidden Populist Voter*, AM. ENTER. INST. (July 10, 2019), <https://www.aei.org/articles/ross-perot-showed-hidden-populist-voter> [<https://perma.cc/2EJ3-GNAS>].

⁴⁴¹ See, e.g., Richard L. Hasen, Opinion, *No One Is Coming to Save Us From the ‘Dagger at the Throat of America’*, N.Y. TIMES (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/opinion/trump-democracy-voting-jan-6.html> [<https://web.archive.org/web/20230227192018/https://www.nytimes.com/2022/01/07/opinion/trump-democracy-voting-jan-6.html>].

⁴⁴² Michael Waldman, Opinion, *Why Voting Rights Isn't (Usually) Bipartisan*, POLITICO MAG. (Jan. 13, 2022, at 13:01 ET), <https://www.politico.com/news/magazine/2022/01/13/voting-rights-partisan-history-527036>.

⁴⁴³ WALDMAN, *supra* note 47, at 66–68.

⁴⁴⁴ National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified at 52 U.S.C. § 20501–20511).

⁴⁴⁵ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. The Senate vote was 152 CONG. REC. S7949, S8012 (daily ed. July 20, 2006) (roll call vote no. 212).

demolished by the Supreme Court and vilified by the very Republicans who had voted for it.⁴⁴⁶

Third, to repeat, the reform action will come in the halls of power, the chambers of Congress, in the streets—but not in the courts. What we can hope for is that the federal courts get out of the way of change and allow the democratically elected branches to do their thing.

As Benjamin Cardozo urged, a judge should rule interstitially—not serve as a legislator. “*He is not a knight-errant*,” Cardozo wrote, “*roaming at will in pursuit of his own ideal of beauty or of goodness*.”⁴⁴⁷

Perhaps it is unrealistic to dream of a brighter era of constructive reform. Every day we shudder at new signs that our system has cracked up, that an executive is thrusting toward authoritarianism, that Congress and the courts are supine. Major law firms, universities, and media institutions crumble. Yet the past year has seen something else, something far more hopeful, in trial courtrooms, in grand juries, in the streets of Minneapolis, and many other places: a civic response to corruption and overreach. As in earlier eras, a “fierce discontent”⁴⁴⁸ can produce not just a defense of democracy but something new and better. If we do our part, this time of challenge and even despair can mark the beginning of a new reform era.

As Thomas Paine wrote in *Common Sense*, “We have it in our power to begin the world over again.”⁴⁴⁹

⁴⁴⁶ Bethany Irvine & Abby Livingston, *Texas John Cornyn and Ted Cruz Join GOP Senators to Block Voting Rights Bill That Would Have Protected Voters of Color*, TEX. TRIB. (Nov. 3, 2021, at 18:07 CT), <https://www.texastribune.org/2021/11/03/federal-voting-bill-texas-2> [<https://perma.cc/Z6NN-GPL6>] (“Prior to [Shelby County], members of both parties—including Cornyn—overwhelmingly voted to reauthorize the Voting Rights Act as recently as 2006. But in the last year, Republicans have put up nearly uniform opposition to rewrite the preclearance angles of the law in a way that would pass muster with the Supreme Court.”).

⁴⁴⁷ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1949).

⁴⁴⁸ Roosevelt, *supra* note 27.

⁴⁴⁹ PAINE, *supra* note 1, at 42.