DEMOCRACY & JUSTICE

COLLECTED WRITINGS

BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from ending mass incarceration to preserving Constitutional protection in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

About Democracy & Justice: Collected Writings 2014

The material in this volume is excerpted from Brennan Center reports, policy proposals, and issue briefs. We've also excerpted material from public remarks, legal briefs, congressional testimony, and op-ed pieces written by Brennan Center staff in 2014. The volume was compiled and edited by Desiree Ramos Reiner, Jim Lyons, Erik Opsal, Mikayla Terrell, and Lena Glaser. For a full version of any material printed herein, complete with footnotes, please email desiree.reiner@nyu.edu.

"The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

Justice William J. Brennan, Jr. – October 12, 1985

Introduction from the President

The Declaration of Independence proclaimed that government rested on the "consent of the governed." Every generation must find a way to give life to those ideals.

Today, the integrity of our democracy is at risk. Voter suppression laws. Vast sums of secret money. Government gripped by polarization and partisanship. A criminal justice system and surveillance practices that challenge American notions of freedom and fairness.

It feels as if the old answers have run their course. The policies offered by left and right are threadbare. If we want to solve our problems, we must fix our systems. We need a new moment of reform and revitalization.

That's where the Brennan Center comes in. We're independent. Nonpartisan. Rigorous. We rely on facts. And we forge transformative solutions.

Our cutting-edge litigation demonstrated how many new laws disenfranchise too many citizens.

We help lead the legal fight against big money in politics. Our rigorous research has documented the rise of "dark money," demolishing the underlying premise of *Citizens United*. Over time, we are confident we will convince the Supreme Court to reverse course and chart a new jurisprudence.

We continue our major initiative to help end mass incarceration. We saw in Ferguson how federal funds can steer local police for good or ill. Our reform proposal has won support from law enforcement and libertarians, and has begun to win changes in major federal programs.

A bipartisan presidential commission embraced our signature proposal to modernize voter registration, which would add 50 million to the rolls. And our plan to bring new accountability to the fight against terrorism in New York City is now law.

This volume offers a sample of this work from 2014.

In the coming year, we'll put forward a new approach to the Fourth Amendment in a digital age, a pro-voter election integrity agenda, an economic study on the costs of incarceration, and more.

In all this, we're forging a distinct model for legal change. We believe passionately that to win in the court of law, we first must win in the court of public opinion. Our mission is to move these issues of democracy and justice to the heart of our national debate — where they belong.

With these ideas, we can revitalize American democracy in 2016, 2020, and beyond.

Michael Waldman
President

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ELECTION 2014

The State of Voting in 2014

Wendy R. Weiser and Erik Opsal

America's national struggle over voting rights continues. Since the 2010 election, nearly two dozen states passed laws making it harder to vote, and many of those restrictions were in place for the first time in 2014. With several ongoing court cases changing rules right up to Election Day, Americans faced an ever-shifting voting landscape — and citizens in nearly half the country headed to the polls worse off than they were four years before.

New Laws Restricting the Vote

Election laws have long been prone to politicization, but for decades there were no major legislative movements to restrict voting. Indeed, the last major legislative push to cut back on voting rights was after Reconstruction. The first stirrings of a new movement to restrict voting came after the 2000 Florida election debacle. Indiana and Georgia passed restrictive photo ID laws in 2005 and 2006, respectively, and Arizona voters approved a ballot initiative in 2004 requiring registrants to provide documentary proof of citizenship when signing up.

But the 2010 election marked a major shift. From early 2011 until the 2012 election, state lawmakers across the country introduced at least 180 restrictive voting bills in 41 states. By the 2012 election, 19 states passed 27 restrictive voting measures, many of which were overturned or weakened by courts, citizen-led initiatives, and the Department of Justice before the election. States continued to pass voting restrictions in 2013 and 2014.

The first stirrings of a new movement to restrict voting came after the 2000 Florida election debacle.

What is the cumulative effect of this legislative movement? As of now, a few months before the 2014 midterm elections, new voting restrictions are set to be in place in 22 states.* Ongoing court cases could affect laws in six of these states. Unless these restrictions are blocked, citizens in nearly half the nation could find it harder to vote this year than in 2010.

Partisanship played a key role. Of the 22 states with new restrictions, 18 passed entirely through GOP-controlled bodies, and Mississippi's photo ID law passed by a voter referendum. Two of the remaining three states — Illinois and Rhode Island — passed much less severe restrictions. According to a recent study from the University of Massachusetts Boston, restrictions were more likely to pass "as the proportion of Republicans in the legislature increased or when a Republican governor was elected."

*Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Mississippi, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin

Excerpted from *The State of Voting in 2014,* June 2014.

Race was also a significant factor. Of the 11 states with the highest African-American turnout in 2008, 7 have new restrictions in place. Of the 12 states with the largest Hispanic population growth between 2000 and 2010, 9 passed laws making it harder to vote. And nearly two-thirds of states — or 9 out of 15 — previously covered in whole or in part by Section 5 of the Voting Rights Act, because of a history of race discrimination in voting, have new restrictions since the 2010 election. Social science studies bear this out. According to the University of Massachusetts Boston study, states with higher minority turnout were more likely to pass restrictive voting laws. A University of Southern California study suggests that legislative support for voter ID laws was motivated by racial bias.

What do these laws look like?

- **Voter ID:** A total of 13 states passed more restrictive voter ID laws between 2011 and 2014, 11 of which are slated to be in effect in 2014. Nine states passed strict photo ID requirements, meaning a citizen cannot cast a ballot that will count without a specific kind of government-issued photo ID. An additional four states passed less strict ID requirements. Eleven percent of Americans do not have government-issued photo ID, according to a Brennan Center study, which has been confirmed by numerous independent studies. Research shows these laws disproportionately harm minorities, low-income individuals, seniors, students, and people with disabilities. In Texas, for example, early data from the state showed that between 600,000 and 800,000 registered voters did not have the kind of photo ID required by the state's law, and that Hispanics were 46 to 120 percent more likely to lack an ID than whites. In North Carolina, estimates show that 318,000 registered voters — one-third of whom are African American — lack a DMV-issued ID.

Research shows voter ID laws disproportionately harm minorities, low-income individuals, seniors, students, and people with disabilities.

- **Voter Registration:** A total of nine states passed laws making it harder for citizens to register to vote between 2011 and 2014. These measures took a variety of forms. Four states have new restrictions on voter registration drives. Nationally, African Americans and Hispanics register through drives at twice the rate as whites. Three states also passed laws requiring registrants to provide documentary proof of citizenship, which as many as 7 percent of Americans do not have readily available. North Carolina eliminated highly-popular same-day registration, and Wisconsin made it harder for people who have moved to stay registered.

- **Early Voting:** Eight states passed laws cutting back on early voting days and hours. These restrictions could exacerbate lines on Election Day and are particularly likely to hurt minority voters. For example, in North Carolina, Department of Justice data show that 7 in 10 African Americans who cast ballots in 2008 voted during the early voting period, and 23 percent of them did so during the week that was cut. Many states eliminated weekend and evening hours, when minority voters are more likely to cast a ballot. According to

a study in Ohio in 2008, 56 percent of weekend voters in Cuyahoga County, the state's most populous, were black.

- **Restoring Voting Rights to People with Past Convictions:** Three states also made it harder to restore voting rights for people with past criminal convictions. These laws disproportionately impact African Americans. Nationwide, 7.7 percent of African Americans have lost the right to vote, compared to 1.8 percent of the rest of the population.

What's New in 2014

In 15 states, 2014 will be the first major federal election with new voting restrictions in place. Ongoing court cases could affect laws in six of these states. The uncertainty over these laws could lead to problems on Election Day, as they did in 2012, when voting changes, even those not in effect, contributed to long lines. We have already seen problems with new ID requirements in low-turnout primaries, such as in Arkansas this May, which could foreshadow more serious problems in November.

Improving Voting Access

There has also been some positive momentum to improve voting.

After long lines marred the 2012 election, dozens of states introduced legislation in 2013 and 2014 to improve access to the polls.

After long lines marred the 2012 election, dozens of states introduced legislation in 2013 and 2014 to improve access to the polls. Overall, laws to improve the voting process passed in 16 states, and are set to be in effect in 11 states this November. Five of these states also passed voting restrictions.

What do these laws look like?

- **Voter Registration Modernization:** A total of 11 states passed laws to modernize the voter registration system and make it easier for eligible citizens to sign up. (A number of states, like New York, implemented reforms administratively and are not reflected here.) Research shows these upgrades can increase registration rates, efficiency, and accuracy, as well as save money and curb the potential for fraud.
  - Seven states passed laws creating or upgrading online registration systems.
  - Five states added same-day registration options.
  - Two states passed laws requiring motor vehicle offices to transfer voter registrations electronically to local election offices.
- **Early Voting:** Three states expanded or created early voting opportunities, which can reduce stress on the voting system, lead to shorter lines on Election Day, and improve poll worker performance, among other benefits. Massachusetts's law will not be in effect until 2016. Missouri and Connecticut voters will also consider ballot measures to create early voting periods.

- **Pre-Registration:** Three states passed laws allowing 16- and 17-year-olds to pre-register to vote before turning 18.

- **Restoring Voting Rights to People with Past Convictions:** Delaware passed a constitutional amendment expanding opportunities for people with criminal convictions to regain their right to vote.

- **Easing Voter ID Burdens:** Oklahoma passed a law making its existing photo ID law less restrictive.

- **Access to Ballots:** Colorado expanded access for voters who speak a language other than English. Mississippi and Oklahoma also expanded access to absentee ballots.

There was also movement on the national level. The bipartisan Presidential Commission on Election Administration released a widely-praised set of recommendations to fix many of the problems persistently plaguing the voting system. These ideas included modernizing voter registration and increasing early voting opportunities. A few states — Hawaii, Illinois, Nebraska, Massachusetts, and Minnesota — adopted some of these reforms in 2014. And in Congress, Republicans and Democrats introduced a bill to strengthen the Voting Rights Act. Unfortunately, that measure appears stalled. Democrats in Congress also introduced a host of bills to modernize the voting system, reduce long lines, and increase access to the polls.

How the Supreme Court Made a Mess of Our Voting System

Michael Waldman

Two powerful judicial opinions — one from a Texas trial judge, another from an esteemed conservative jurist — and a landmark government study show the true cost of restrictive voting laws. Ultimately, the voting rights fight will be won in the court of public opinion. But these three eye-opening developments should help shape a new legal regime to protect voters.

Alexis de Tocqueville famously observed in 1835, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." That certainly describes the grand struggle over voting rights now unfolding in courtrooms across the country. And when it comes to who can vote and when, a clear message is hard to discern. In recent days, rulings, appeals, and motions have pinballed around the system, with the U.S. Supreme Court answering emergency pleas, allowing some changes to take effect and temporarily blocking others, while key appeals head their way. The latest lurch: In a decision emailed out at 5 a.m. Saturday morning, the justices let Texas implement its controversial voter ID law, the nation's strictest, just two days before early voting begins in the state.

In a zone foggy with legal rhetoric, these three documents will — and should — live on beyond the 2014 election cycle.

Amid the confusion, an important new element has emerged. The breakthrough? Facts. Two powerful judicial opinions — one from a Texas trial judge, another from an esteemed appeals court jurist — and a landmark government study have shed new light on the costs and consequences of restrictive voting laws. They answer some key questions: Are these laws malevolent? (In Texas, at least, yes.) Do they provide a benefit that outweighs their cost? (No.) Do they suppress the vote? (Alarmingly, it seems, yes.) And can we prevent fraud without disenfranchising Americans? (Yes, absolutely.)

In a zone foggy with legal rhetoric, these three documents will — and should — live on beyond the 2014 election cycle. They might even help shape a new legal regime to protect voters while protecting against fraud. They're worth a close read.

Here's some background: Over the past four years — and for the first time since the Jim Crow era — nearly two dozen states have passed new laws making it harder to vote. The laws range from cutbacks on early voting (Ohio and North Carolina), to a repeal of Election Day registration (Maine), to harsh rules requiring specific types of government identification to vote (states from Texas to Tennessee). Florida even cracked down on nonpartisan voter registration drives, forcing the League of Women Voters — hardly a Trotskyist cell! — to shut down its operations.

This article appeared in *Politico Magazine,* October 20, 2014.

In 2011, the Brennan Center for Justice calculated that the first wave of these new laws, if implemented, could have made it far harder for 5 million citizens to vote. At first, the judiciary seemed to recognize that risk. In the run-up to the 2012 election, courts around the country routinely blocked or postponed the new voting regulations. On Election Day, few of those disenfranchising laws were in effect.

Then last year, the U.S. Supreme Court stepped in. In *Shelby County v. Holder*, it gutted the landmark 1965 Voting Rights Act by neutering its requirement, under Section 5 of the law, that states with a history of discrimination clear changes to voting regulations with a court or the Justice Department. The Court was bitterly divided, 5-4. During oral argument in February 2013, Justice Antonin Scalia called the Voting Rights Act little more than a "racial entitlement." "Even the name of it is wonderful, the Voting Rights Act," he added. "Who's going to vote against that?" Ruth Bader Ginsburg, writing in heated dissent, warned that gutting the law "is like throwing away your umbrella in a rainstorm because you are not getting wet."

Predictably, many Southern states once covered by the Voting Rights Act moved swiftly to implement new, stricter voting rules. In other states, laws that had been postponed in the run-up to 2012 began to go into effect.

The result has been a paper storm of lawsuits, argued in courtrooms across the country, as voting rights groups and the Justice Department challenge these new restrictions. Much hangs in the balance: This year, 21 states will hold elections under rules enacted since 2011, seven of them for the first time. With control of the Senate and much else teetering on microscopically tight margins, laws that block eligible voters could have major effects.

That's why these new three new treatises are so important.

The first came from a courtroom in Corpus Christi, Texas. Just hours after the Supreme Court issued *Shelby County* in 2013, Texas implemented its new voter identification law. The statute was nakedly partisan and almost comically precise in its construction: Texans could show a concealed carry weapons permit, but not a University of Texas student ID. Republican Attorney General Greg Abbott rushed to put the law in place. Abbott, of course, is now the candidate for governor who might benefit from the law's conservative tilt.

The U.S. Justice Department promptly sued Texas, as did voting rights groups. (The Brennan Center, together with the Lawyers' Committee for Civil Rights and the Dechert law firm, represents the Texas NAACP and the state Mexican American Legislative Caucus in these cases.) The suits relied on Section 2 of the Voting Rights Act, which is still on the books. This section of the act prohibits voting practices that discriminate against minorities. But plaintiffs usually cannot obtain relief until after the offending law is already in effect, and shifts the burden of proof of discrimination onto the law's challengers, a much tougher standard. Previously, Section 2 had rarely been used to address voting law changes; it wasn't necessary, given the pre-clearance option. Now it was one of the few vehicles for redress left.

The clash produced a compelling nine-day trial. The lead witness was an elderly woman, Sammie Louise Bates, who testified by video. Bates grew up in Mississippi in the 1940s, and remembered smoldering as she counted out money so her grandmother could pay the state's notorious poll tax. Bates has voted regularly since she was 21. Today, she lives on Social Security and little else. After trying unsuccessfully to cast a ballot that would count in 2013, she learned she would have to pay $42 to procure birth records from Mississippi to ever vote again. Sitting at a burnished conference table in a law firm office, Bates was quizzed about why she had not quickly procured the paperwork. "I had to put $42

Longtime voter Sammie Louise Bates, who lives on Social Security and little else, couldn't afford the documents needed to get her ID. "I had to put $42 where it was doing the most good. It was feeding my family," she said. "We couldn't eat the birth certificate."

where it was doing the most good. It was feeding my family," she explained. She gazed evenly at her questioner. "We couldn't eat the birth certificate."

Last week, the judge in the case, Nelva Gonzales Ramos, issued her decision. It stretched to 147 fact-crammed pages. She found that 600,000 Texas voters lacked an appropriate ID. She found that the legislature had rammed the proposal through, turning aside any efforts to make the law less burdensome for minority and poor voters. She noted that the state had provided only 279 substitute "free" voter ID cards. And she found only two cases in the previous decade of in-person voter impersonation — the only kind of fraud that a harsh ID rule would block.

Alarmingly, the law will be enforced anyway. In Saturday's pre-dawn 6-3 ruling, the Supreme Court allowed the Texas law to stand for now. The justices offered no explanation. In recent weeks the court blocked a new voter law in Wisconsin, but allowed restrictions in North Carolina and Ohio to proceed. A common thread seems reluctance to change rules close to Election Day. Sensible enough, but as Justice Ginsburg (together with Sonia Sotomayor and Elena Kagan) vigorously noted in their dissent, the Texas case was distinct, the harm more clearly delineated by a full trial: "The greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that likely imposes an unconstitutional poll tax and risks denying the right to vote to hundreds of thousands of eligible voters." The federal appeals court will eventually consider the state's appeal of the Ramos verdict, but only after the election. In any case, by painstakingly documenting the motives and impact of the law, Judge Ramos's ruling will likely help shift the debate nationwide.

The second "truth bomb" was equally powerful, and lobbed from a more surprising direction. The backstory: In 2011, Wisconsin Republican legislators rushed through a new voting law. The ACLU sued. A trial judge blocked the law, finding it violated Section 2 of the Voting Rights Act (and the Constitution, too). An appeals court overturned that ruling. Eventually, on October 9, the U.S. Supreme Court froze the law, because it was too close to Election Day to be implemented.

Amid the legal flurry, Chicago appeals Judge Richard Posner weighed in. He wanted the trial court's ruling to be heard by a wider group of appeals judges, not just the panel of three that had already ruled. With five judges for rehearing the case with a larger panel, and five against, the tie went to the state of Wisconsin. Posner wrote a 43-page dissent. Posner is no anonymous scribbler. He is the most cited legal scholar of the 20th century, according to the *Journal of Legal Studies*. He is also a leading conservative. And he wrote the opinion *upholding* Indiana's voter ID law — a ruling affirmed by the Supreme Court in *Crawford v. Marion County* in 2008. At the time, before Indiana's milder version of voter ID had gone into effect, Posner found there were inadequate facts to justify overturning the legislature. Like other judges, too, he treated the law as a low-stakes technicality. In "Reflections on Judging," published last year, he already hinted at a change in heart, calling the new laws "voter suppression."

Posner's Wisconsin dissent is a masterpiece. With withering precision, he noted little evidence of in-person voter impersonation in the state. "Some of the 'evidence' of voter-impersonation fraud is downright goofy, if not paranoid, such as the nonexistent buses that according to the 'True the Vote' movement transport foreigners and reservation Indians to polling places," Posner wrote. In Wisconsin (as elsewhere), it costs money to obtain the underlying documents needed to procure the voter ID card. Posner is known for using cost-benefit analysis in legal analysis: Here he finds the burdens of the new law vastly outweigh possible gains. "As there is no evidence that voter-impersonation fraud is a problem, how can the fact that a legislature says it's a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?"

Posner's Wisconsin dissent is a masterpiece. With withering precision, he noted little evidence of in-person voter impersonation in the state.

Finally, he takes after the blasé opinion written by other judges who would uphold Wisconsin's law.

"The authors' overall assessment is that 'voter ID laws don't disenfranchise minorities or reduce minority voting, and *in many instances enhance it'* [emphasis added]," Posner wrote. "In other words, the authors believe that the net effect of these laws is to increase minority voting. Yet if that is true, the opposition to these laws by liberal groups is senseless. If photo ID laws increase minority voting, liberals should rejoice in the laws and conservatives deplore them. Yet it is conservatives who support them and liberals who oppose them."

Posner's blast has limited immediate legal import. It was, after all, a dissent, and from a highly technical decision on a request for a new hearing, at that. The U.S. Supreme Court already has moved beyond it. But his voice carries undeniable power. Perhaps it can help.

Does all this legal huffing and puffing matter? A third reality check, this one a careful study, suggests the stakes are high.

The nonpartisan Government Accountability Office (GAO) looked at the impact of the new strict voter ID laws. This is more novel than it might seem. Yes, a surprising number of potential voters lack needed paperwork. The Brennan Center, for example, found that 11 percent of eligible voters in the United States do not have a driver's license or similar government document, a finding confirmed by numerous other studies (and cited by Judge Posner). These laws could make it harder for many to cast their ballots. But do they really suppress the vote? That question has been harder to answer. Many factors affect turnout, and only a few states have implemented the strictest rules. Maybe those who lack identification wouldn't vote anyway.

The GAO took a hard look. Its findings about depressed turnout are, well, depressing. The authors looked at Tennessee and Kansas, compared them to similar states with different laws, and assessed a dizzying number of complicating factors. The new laws do, in fact, dampen voting — but not for everyone. Turnout dropped 1.9 percent in Kansas, and 2.2 percent in Tennessee, the report found, and the declines "were attributable to changes in those two states' voter ID requirements." Turnout fell most among African-American

Turnout dropped 1.9 percent in Kansas, and 2.2 percent in Tennessee, according to a GAO study, and the declines "were attributable to changes in those two states' voter ID requirements."

voters, young people, and new voters. *The Washington Post* calculated that's 122,000 fewer voters. Finally, a government program that works as intended!

To be clear: These reports do not suggest that there should be no requirement for identification of voters. Judge Ramos carefully compares Texas to other, less burdensome systems. And there are risks to election integrity. Chief among them is the ramshackle paper-based voter-registration system, which fails to include tens of millions of eligible voters while simultaneously including double listings and myriad other errors. Good-faith efforts to modernize elections could address fraud concerns without reducing rights and slicing off sectors of the electorate. The bipartisan Presidential Commission on Election Administration, chaired by Romney lawyer Ben Ginsberg and Obama counsel Bob Bauer, shows how to find common ground. (Though they carefully sidestepped the gnarly topic of voter ID, many of their other recommendations would drain the issue of partisan intensity.)

Those of us who focus on protecting the right to vote must recognize that protecting election integrity is critical to the health of American democracy. Voter identification, as a concept, remains widely popular. That's understandable. I am actually for voter ID. I'm just against requiring ID that lots of Americans do not have.

Will these three eye-opening commentaries end the debate over voting? Of course not. Americans have struggled over who could cast ballots since our earliest days, when only white men with property could vote. And despite de Tocqueville's observation, the ultimate decision may not come in the courts. We don't know what the Supreme Court will say on any of these matters, when the cases reach the Court for full, rather than emergency, consideration. Ultimately, the fight for voting rights will be won in the court of public opinion. And lucky for those of us who value the right to vote as much as the integrity of the electoral system, that's where these powerful new arguments may ring loudest.

Outside Spending, Dark Money Dominate Toss-Up Senate Races

Ian Vandewalker

Citizens United *was premised on the assurance that campaign spending would be fully disclosed. Instead, that case and others loosed a flood of "dark money" that played a key role in the 2014 election.*

Most Americans know that this is an age of skyrocketing spending on elections. Less widely understood is how the source of that spending has dramatically changed in recent years, and what that means for our democracy. Outside spending — spending by those other than the candidates themselves — has increased dramatically both in dollar terms and as a percentage of total election spending. Among outside spenders, the portion coming from the political parties has diminished, as outside groups that are independent of both candidates and parties — or at least claim to be so — increase in importance.

Increasingly, outside spending is a way for those who can afford it to evade the regulation of elections — to try to influence elections without playing by the rules of our democracy.

The key players in our political system, candidates and parties, are not necessarily accountable for outside spending. And non-candidate expenditures are often lacking in transparency, leaving their effects on politics mysterious. Increasingly, outside spending is a way for those who can afford it to evade the regulation of elections — to try to influence elections without playing by the rules of our democracy.

We are now seeing the maturation of the system created by the Supreme Court's deregulatory zeal in *Citizens United v. FEC* (2010). That decision allowed corporations and unions to spend their general treasury funds on politics. While many feared the decision would result in for-profit corporations spending massive amounts directly on elections, it is now clear that the largest impact was a proliferation of outside groups dedicated to influencing elections (some of which may, in fact, be conduits for corporate money). *Citizens United* led to the creation of super PACs and an explosion in the use of nonprofit organizations to influence elections. Super PACs and nonprofits can accept unlimited contributions from individuals, corporations, and unions. Nonprofits are not required to disclose the identities of their donors.

The reality of the post-*Citizens United* world bears little resemblance to the Supreme Court's rose-colored assumptions. The Court described a system

Excerpted from two Brennan Center analyses released in October and November 2014. Research assistance provided by Eric Petry.

where immediate disclosure would keep the public informed of the potential influence of money. The reality is that most nonparty outside spending originates with hidden sources. The Court assumed that outside spending could not corrupt candidates because it comes from entities whose activity is independent of candidates' campaigns. The reality is that outside groups, some devoted to electing a single candidate, cooperate with candidates in many ways, potentially making their unlimited contributions as valuable to candidates as the direct contributions that are subject to strict caps.

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As part of a series of analyses of outside spending in the 2014 midterm elections, the Brennan Center examined outside expenditures reported to the Federal Election Commission (FEC) through Election Day in the most competitive U.S. Senate contests. "Outside spending" refers to election-focused expenditures by anyone other than the candidates. These competitive races have attracted the greatest amount of outside spending. The analysis below details not only the record amounts of outside spending in 2014, but also the dominance of "dark money groups," which are outside groups that don't reveal all the sources of their funds. For the first time, the Senate changed hands because of the victories of several candidates who were overwhelmingly backed by these groups. Ten winning candidates together benefited from $127 million in dark money — more than 70 percent of the nonparty outside spending in their favor. The victors will take their seats likely feeling grateful to interests that are hidden from their constituents and the public.

In these 11 races, there was $203 million in "dark money" spent, or spending by groups that hide the identities of some or all of their donors. The great majority — 71 percent — of the outside spending in support of the 10 winning candidates came from dark money groups.

$342 million in nonparty outside expenditures

In the 11 most competitive Senate races, there has been $342 million in spending by groups other than the candidates and the political parties. The parties spent an additional $89 million in these contests. As a comparison, in the 2012 elections, nonparty outside spending in senate races reached $259 million for all 33 contests. As with all analyses of FEC data, these totals do not include spending on ads that are not required to be reported to the FEC because they don't explicitly call for a vote and are not aired close to an election.

$127 million in dark money supported the winning candidates

"Dark money" is spending by groups that hide the identities of some or all of their donors. There was $203 million in dark money spent in these 11 races. The great majority — 71 percent — of the outside spending in support of the 10 winning candidates (counting likely winner Dan Sullivan in Alaska and excluding Louisiana, where a runoff will be held) came from dark money groups. Across these 10 contests, there was a total of $191 million in dark money and $127 million of that (or 67 percent) supported the winning candidate.

Victors' Dark Money Support – 10 Competitive Senate Races' Likely Winners

Candidate	Dark Money in Support	Dark Money as Percent of Nonparty Outside Spending in Support
Tillis (R-NC)	$22,888,975	81%
Gardner (R-CO)	$22,529,291	89%
Ernst (R-IA)	$17,552,085	74%
McConnell (R-KY)	$13,920,163	63%
Cotton (R-AR)	$12,503,284	65%
Perdue (R-GA)	$11,098,585	86%
Sullivan (R-AK)	$10,823,196	85%
Roberts (R-KS)	$8,454,938	78%
Peters (D-MI)	$4,226,674	28%
Shaheen (D-NH)	$3,478,039	35%
Total	**$127,475,231**	**71%**

Outside spending is ruled by a few wealthy donors

Nonparty outside spending is largely the domain of a small, wealthy class of donors. In contrast to the party committees, which receive large portions of their contributions from small donations of $200 or less, most of the big-spending super PACs (which, unlike dark money groups, must report their donors) get virtually none of their money from such small donors. Four of the five highest-spending super PACs all received less than one-tenth of 1 percent of their contributions from donors of $200 or less. The exception, Freedom Partners Action Fund, received slightly more than one-tenth of 1 percent from small donors.

The average contributions from donors of more than $200 for the top super PACs are significantly more than the average household income in the U.S., which is $73,000. For the top-spending super PAC, Senate Majority PAC, the average contribution of $170,525 is more than twice the national average household income. For the second-highest-spending super PAC, Ending Spending, the average contribution is more than half a million dollars, more than six times the average American household's income. Of course, we have no way of know how much the dark money groups raise from small donors or how few donors provide their funds.

What Difference Did New Voting Restrictions Make in 2014's Close Races?

Wendy R. Weiser

In several key races in 2014, the margin of victory of some candidates came very close to the likely margin of disenfranchisement due to restrictive voting laws.

The Republican electoral sweep in yesterday's elections has put an end to speculation over whether new laws making it harder to vote in 21 states would help determine control of the Senate this year. But while we can breathe a sigh of relief that the electoral outcomes won't be mired in litigation, a quick look at the numbers shows that in several key races, the margin of victory came very close to the likely margin of disenfranchisement.

North Carolina

In the North Carolina Senate race, State House Speaker Thom Tillis beat Sen. Kay Hagen by a margin of **1.7 percent**, or about **48,000 votes**.

At the same time, North Carolina's voters were, for the first time, voting under one of the harshest new election laws in the country — a law that Tillis helped to craft. Among other changes, the law slashed seven early voting days, eliminated same-day registration, and prohibited voting outside a voter's home precinct — all forms of voting especially popular among African Americans. While it is too early to assess the impact of the law this year, the Election Protection hotline and other voter protection volunteers reported what appeared to be widespread problems both with voter registrations and with voters being told they were in the wrong precinct yesterday.

Some numbers from recent elections suggest that the magnitude of the problem may not be far from the margin of victory: In the last midterms in 2010, **200,000** voters cast ballots during the early voting days now cut, according to a recent court decision. In 2012, **700,000** voted during those days, including more than one-quarter of all African Americans who voted that year. In 2012, **100,000** North Carolinians, almost one-third of whom were African American, voted using same-day registration, which was not available this year. And **7,500** voters cast their ballots outside of their home precincts that year.

More than 24,000 Kansans tried to register this year but their registrations were held in "suspense" because of a new restriction.

Kansas

In the Kansas governor's race, Gov. Sam Brownback beat back challenger Paul Davis by a margin of **2.8 percent**, or less than **33,000** votes.

But Kansans faced two new voting restrictions this year — a strict photo ID law that was put into effect right before the 2012 election, and a new documentary proof of citizenship requirement for voter registration.

What was the impact this year? We know from the Kansas secretary of state that more than **24,000** Kansans tried to register this year but their registrations were held in "suspense" because

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they failed to present the documentary proof of citizenship now required by state law. And while we do not yet have the data regarding the impact of the voter ID requirement this year, a recent study by the independent Government Accountability Office found that Kansas's voter ID law reduced turnout by approximately **2 percent** in 2012. (GAO also found that Tennessee's new law reduced turnout by up to 3 percent.) If the law's effect was similar this year, it would mean that turnout was about **17,000** voters lower than it otherwise would have been. And keep in mind that the number of Americans that don't have government-issued photo IDs that would be accepted under new laws is closer to **11 percent**. In short, the margin of victory in Kansas looks perilously close to the margin of disenfranchisement.

Virginia

In Virginia, Sen. Mark Warner eked out a victory over challenger Ed Gillespie by only **0.6 percent** of the vote, or just over **12,000** votes.

Like in Kansas, voters in Virginia faced a strict new photo ID requirement this year. According to the Virginia Board of Elections, **198,000** "active Virginia voters" did not have acceptable ID this year. While there are no studies yet on the impact on turnout in Virginia, Nate Silver estimates, based on academic studies, that in general such laws reduce turnout by about **2.4 percent**. If that were applied to Virginia this year, it would amount to a reduction in turnout by more than **52,000 voters**. That far exceeds the margin of victory here.

Florida

The Florida governor's race was decided by only a **1.2 percent** margin, with Gov. Rick Scott narrowly beating former Gov. Charlie Crist by just under **72,000** votes.

Florida has passed a host of new voting restrictions over the past few years. Perhaps the most significant for this election was a decision by Scott and his clemency board to make it virtually impossible for the more than **1.3 million** Floridians who were formerly convicted of crimes but have done their time and paid their debt to society to have their voting rights restored. Under Florida's law, the harshest in the country, one in three African-American men is essentially permanently disenfranchised. Ironically, Scott had rolled back rights that were expanded under Crist, who had established a path for people with past convictions to more easily get their voting rights restored. Under that process, more than 150,000 citizens had their rights restored before Scott changed the rules. This is part of a pattern this year of candidates benefiting from voting restrictions they helped to pass.

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It will likely be months before we have the data to assess the full impact of new voting restrictions on yesterday's elections. But we already do know that their impact is far more than the number of hot races they could have turned.

It is little solace to the more than 600,000 registered voters in Texas, who could not vote this year because they lack IDs the state will accept, that the governor's race was decided by more than 600,000 votes. For one thing, there are far more races — from state legislator to justice of the peace — that affect voters' day-to-day lives and that could have been impacted by those lost votes. But more importantly, those citizens — a number of whom were longtime voters who were turned away from the polls this year — were denied their basic right of citizenship, their ability to hold their politicians accountable, and their ability to join their friends and family to have a say over what happens in their communities. The dignitary harm comes through loud and clear when you read their stories.

Hopefully those stories — along with the big numbers — will help stem the recent tide of voting restrictions. The integrity of our elections is at stake.

After *Citizens United*: The Story in the States

Chisun Lee, Brent Ferguson, and David Earley

After Citizens United*, most focus fell on federal races. But the new world of big money is even more significant at the state level. A groundbreaking investigative report by Brennan Center attorneys shows the new reality.*

Citizens United gave the green light to unfettered money in our elections. But the ruling's logic rested on a crucial assumption: that unlimited spending would happen independent of candidates. The Court continued to recognize that coordinated spending can be corrupting and therefore is subject to reasonable limits.

Four years later, outside spending has skyrocketed, and the Supreme Court's assumptions have bumped up against the reality of American politics. Unlimited outside spenders are working "hand in glove" with candidates who have every incentive to look after their interests if elected.

At this scale, it turns out, you don't have to be a Koch brother to be a kingmaker.

This assessment comes not from a Washington watchdog, but from a state election regulator, Montana's Jonathan Motl, and it captures a national trend. While federal developments in outside spending — involving famous billionaires and candidate-specific super PACs — have received wide attention, that focus has obscured a remarkable shift at the state and local levels.

At this scale, it turns out, you don't have to be a Koch brother to be a kingmaker. In the past four years, outside spending at the state and local levels has surged, often generated by far more obscure names. Much of that spending has occurred with questionable independence from the candidates who stand to benefit. And, across the states, a wide range of approaches to regulating coordination — from dated and myopic to new and imaginative — have shown the current limits and potential future for deterring coordination between outside spenders and candidates throughout the country.

This report offers a close examination of these developments and — based on a comprehensive review of widely varying coordination laws and enforcement records in 15 states — distills a number of generally applicable recommendations for the best way forward. Section One, using government records and an extensive catalog of news reports from across the country, paints a picture of big spenders and bigger spending in the states. Since 2010, outside spending in state elections has surged. In Connecticut, Maine, Michigan, and Wisconsin — the only four states that track outside spending and held

Excerpted from *After* Citizens United: *The Story in the States,* October 2014.

competitive gubernatorial contests in 2010, as they are doing this year — outside spending through the end of this summer had shot up to 20 (Connecticut), 4 (Maine), 4 (Michigan), and 5 (Wisconsin) times its 2010 levels, the Brennan Center has found. Relatively unknown names with big ambitions have financed outside groups that spent heavily on races for statehouse, mayor, and even school board. At the state level, it is possible for a single funder to dominate the discourse and machinery of politics in a way not seen at the federal level.

Yet in contests for state or local office, the separation between outside spenders and those who would take power has been sometimes even more porous than has been reported about federal elections, as Section Two of this study will describe. Candidates' trusted associates organize super PACs to amass unlimited funds. Candidates fundraise for these affiliated, yet unrestricted, groups. Campaigns and outside groups find numerous ways to collaborate in their messaging, and to tap a common roster of strategists and other providers. Some alliances have led to legal and political scandals, while others prompted only criticism — they may have flunked the smell test but did not seem to violate any law.

Some alliances have led to legal and political scandals, while others prompted only criticism — they may have flunked the smell test but did not seem to violate any law.

Section Three of this report looks at these laws and how states have enforced them. Since *Citizens United* unleashed outside spending in 2010, the inadequacy of federal regulation to stop coordination in congressional and presidential elections has drawn wide notice. In search of other models — or cautionary tales — the Brennan Center decided to study how other jurisdictions have been grappling with the problem. We picked 15 states that seemed likely to yield the most interesting findings — most of them are hosting close top-ticket contests this year, and a few have already implemented new policies designed to better stop coordination in the super PAC age.

Our review of the states' coordination rules and enforcement histories revealed a wealth of essential, practical pointers for any policymaker, regulator, or advocate contending with the challenges of coordination. We summarize our research state by state, in order of regulatory strength, in Section Three. In most of the states, we found, laws meant to deter coordinated spending are too ambiguous, narrow, or weakly enforced. These states offer important lessons about the minimal components required for effective regulation. Even in states without the strongest rules, however, our review showed that a robust enforcement approach can catch violations. In fact, whether in strong regulation states or weak, a close read of cases — where regulators sought to prosecute actual wrongdoing or offered candidates and spenders compliance advice — reveals important insights into the daily realities of regulation. This report offers dozens of summaries of such cases.

So far, our research found, a few states — Connecticut, Minnesota, and Vermont — have embraced promising new policies to enforce the actual independence of unlimited spending. They have thought expansively about what political advertising and collaboration really entail in today's elections, encompassing the issue of candidate fundraising for supportive outside groups and other subsidiary aspects in their inquiries. The reforms reflect perceptions of major developments in the past several years.

The state law analyses in Section Three provide details about these newly implemented policies. In Section Four, the report provides a glimpse of the way forward, previewing some reforms that are pending in other localities. Philadelphia and San Diego, for instance, are considering changes to strengthen local coordination rules, and New Mexico legislators plan to push next year for passage of the state's first ever coordination law.

Even in states without the strongest rules, our review showed that a robust enforcement approach can catch violations.

To be sure, as with any regulatory regime, determined players likely will find new ways to evade both the letter and the spirit of even strengthened coordination rules. Just as political tactics evolve, even the best-designed system will have to evolve, too.

On a deeper level, it is important to acknowledge that stronger coordination regulation is far from a cure-all for the profound structural problems caused by the outsize influence of wealthy interests in American elections. The ability of the few super-rich to dominate politics, even if not in coordination with campaigns and not by bribing officials outright, is a crisis for a nation that seeks to conduct truly fair elections in which all citizens have an equal opportunity to participate.

But the Supreme Court's current jurisprudence — its theory of when governments may regulate money in politics — permits only limits that target *quid pro quo* corruption. Until that changes, our review shows that strengthening coordination rules and/or enforcement should make a meaningful difference in protecting the integrity of our existing campaign finance systems.

A tougher approach catches violations, which can deter other potentially corruptive arrangements. This deterrence is essential to making existing reforms and rules even moderately effective. Coordination regulation prevents end runs around direct contribution limits, which are meant to minimize the opportunity for *quid pro quo* corruption. It identifies connected spending that should be subject to disclosure, reinforcing laws intended to make influence transparent. And it helps candidates opt into public financing without fear of unfair competition, a reform meant to ensure more of a political voice for everyday citizens.

This report's review of increased outside spending in the high-stakes state and local arenas, recent collaboration tactics, and states' laws and enforcement approaches, provides the basis for a number of clear recommendations — some minimal, others more ambitious — for regulating coordinated spending more effectively, while preserving the constitutional freedom of speech. Generally, laws treat outside spending to promote a candidate's election as coordinated — and therefore subject to campaign contribution limits — if it is based on "substantial discussion" between the spender and the candidate. But that standard does not adequately capture the many ways collaboration occurs in the current era.

Recommendations for a modern and more effective approach are discussed in greater detail at the conclusion of this report, and include:

- **Make laws apply to a realistic universe of spending.** The weakest laws exclude huge swaths of outside spending from coordination regulation. They cover only so-called express advocacy — communications that explicitly ask voters to elect or defeat a particular candidate — rather than including the more common form of election-season advertisement that promotes or attacks candidates' stances on issues.

- **If a candidate raised money for a group, treat all spending by that group on behalf of the candidate as coordinated.**

- **Provide sensible "cooling off" periods before a candidate's former adviser may staff a group that is permitted to make unlimited expenditures to promote her election.** Otherwise, any spending in support of that candidate by a group with such staffing should be viewed as coordinated.

- **Treat as coordinated any spending to promote the election of a candidate that reproduces material produced by the candidate's campaign.**

- **Treat as coordinated any spending to promote the election of a candidate when the spender uses a consultant who has also served the candidate in a position privy to related campaign information.**

- **Publish scenario-based examples of what constitutes prohibited coordination and what does not.** Many jurisdictions provide only a basic, statutory definition of coordination, leaving candidates and spenders on their own to figure out what it means, for instance, to "consult or cooperate" and thus trigger penalties. It is useful to publish examples of prohibited activity, in realistic contexts.

- **Ensure adequate enforcement and deterrence.** Even the most comprehensive coordination law will not deter violations without adequate and sensible enforcement.

- **Allow use of firewalls under appropriate circumstances as evidence that an outside group's spending was truly independent.** Under some circumstances — such as when a vendor provides services to both a candidate and an outside group — it may be possible to mitigate the risk of coordination through the vendor's use of an adequate firewall to separate the two streams of work. In such cases, states should allow proof of a formal, written policy, prohibiting the exchange of relevant information, to be used as evidence that no coordination occurred.

Voter ID Law Turns Away Texans

Carson Whitelemons

The U.S. Supreme Court allowed Texas's strict photo ID law to stand for the 2014 election — despite a federal court decision showing the requirement intentionally discriminated against minorities. Brennan Center attorneys continue to fight the law in court. In the meantime, our investigators spoke to several eligible Texans blocked from voting because of the new restriction. Here are some of their stories.

This election, Texas once again had one of the worst turnout rates in the country, with turnout dropping approximately 5 points compared to 2010. To exacerbate this troubling trend, this year was also the first federal election in which voters had to contend with an additional barrier to the ballot box: Texas's new photo ID law, the harshest in the nation.

Voters were confused, disheartened, and even disenfranchised by a law that does not deem many forms of ID used in daily life as acceptable to cast a ballot. Their stories show the courts failed to stop a discriminatory requirement from being in place, but also that Texas's shoddy implementation of the law multiplied confusion at the ballot box.

Ahead of the 2012 election, both the Department of Justice and a federal court blocked the law, finding it harmed minority voters. But once the protections of the Voting Rights Act were removed in 2013, Texas raced to put its photo ID requirement in place, despite the court's earlier finding of discrimination.

Advocates challenged the ID law once again at a September 2014 trial, and in October, a federal district court struck down the photo ID law and held that Texas passed the requirement to intentionally discriminate against Latinos and African Americans, marking the first time a federal court has made such a finding about an ID law. U.S. District Judge Nelva Gonzales Ramos found 608,470 registered and qualified Texas voters do not have the required ID. She also found African-American registered voters are 305 percent more likely and Hispanic registered voters 195 percent more likely than white registered voters to lack photo ID that can be used to vote. Uncontroverted expert data presented at trial showed that 1.2 million eligible Texans do not have IDs that would be accepted under the new law.

U.S. District Judge Nelva Gonzales Ramos found 608,470 registered and qualified Texas voters do not have the required ID.

Despite this evidence, the 5th Circuit Court of Appeals and the U.S. Supreme Court allowed Texas's law to be implemented this fall without ruling on the merits. Voters paid the consequences. Unprotected by the courts, they contended with a photo ID requirement that left many confused as to how they would vote.

Stories from the Ground

We interviewed some voters who were unfairly affected by the law. Below are some illustrative stories of the kinds of problems Texans experienced this election. In some cases, voters are referred to by their first names in order to protect their identities.

This analysis is part of the Brennan Center's web series, *Voting 2014: Stories from the States,* which chronicles how citizens were unfairly impacted by new voting restrictions. It appeared on the Center's website, November 19, 2014.

People with IDs they believed to be valid were turned away. Texas's law, unlike other strict photo ID laws, does not allow people to vote with valid driver's licenses from other states, even though this is a trusted form of identity for many other common transactions. Even a Texas driver's license is insufficient if it has been expired more than 60 days, a requirement that particularly impacts the elderly.

- Diana F's mother is elderly — she will be 95 soon — and she has voted her whole life. Her mother was very upset when she learned about the voter ID law. Her driver's license had expired because she can no longer drive, and the free ID option would be difficult to obtain because of transportation limitations.

- Chris Ponce was not able to vote because his Texas driver's license had expired in August, just weeks before the cutoff. Despite having his expired state-issued photo ID, his voter registration card, and even his birth certificate, the poll workers would not let him vote.

- Krystal Watson, a student at a historically black college, was not allowed to cast a ballot because she had a Louisiana driver's license and a Wiley College ID, but not the ID required by the law.

Some poll workers gave voters entirely incorrect information about the new law, improperly turning them away.

Poll workers gave incorrect information to voters, and public education around the law remained inadequate. Texas did not sufficiently prepare election staff to implement the photo ID requirement, despite the law originally passing in 2011. While some poll workers gave voters entirely incorrect information about the new law, improperly turning them away, even more common was a failure to provide information that would help them eventually vote. Poll workers in these cases failed to tell voters about the free ID alternative or the option of voting via provisional ballot. Because Texas has spent little on public information efforts, Texans were especially reliant on election officials to inform them of the law's contours.

- Lee Calvin Molina had an expired ID within the 60-day window allowed by the Texas law, but was turned away by poll workers who did not properly understand and administer the law. He was able to vote because an experienced campaign volunteer later told him the poll worker was wrong, and he went back to cast a ballot.

- Because disabled voters may have trouble getting photo ID, they are entitled to a permanent exemption from the requirement. Pamela Curry obtained this exemption and got a new registration card indicating she does not need photo ID when voting. When she went to vote this election, she was incorrectly told that she would need other ID. She was only able to vote because she knew the rules and insisted that the poll workers call the elections office to find out they were wrong.

- Rebecca Molina, a volunteer who was helping voters get to the polls, saw lifelong voters blocked from casting ballots. Ms. Molina observed an election official not only refuse to allow an elderly voter to cast a ballot with an expired license, but even saw her raise her voice at the voter when she asked why she could not vote in the way she always had in the past.

- Sandra McCartney was told her military ID was inadequate, even though that is legally one of the accepted forms of identification. She eventually gave up and used her driver's license. But she says if she did not have her driver's license, she might have been stopped from voting entirely: "What if I had only had my military ID?"

The "free ID" alternative proves costly and in some cases, almost impossible to obtain. As of October 30, Texas had issued only 371 free IDs, a woefully inadequate number considering the hundreds of thousands of registered voters without acceptable ID under the new law. Even

if the ID itself is free, for many people the cost of obtaining the underlying documents necessary to get it is prohibitive. These IDs, or Election Identification Certificates (EICs), are distributed by the Department of Public Safety (DPS), an agency not used to performing any sort of election administration. The connection to law enforcement also discourages voters who are afraid that outstanding tickets or child support payments could cause further problems and bring scrutiny or fees they could not afford.

- Jesus Garcia went to the Weslaco DPS office twice and both times was unable to get an ID. His birth certificate was stolen and he does not have a copy. He wants to get identification, but to get both a replacement birth certificate and a new ID would be more than $30 combined.

- Katie, a voter from Frisco, Texas, went to a DPS office to obtain an EIC and was incorrectly told by several employees that DPS did not issue them at all. She eventually suggested they issue her a driver's license (for a fee) instead. She didn't want to pay, but she said it was clear no one knew what they were doing at the DPS.

- Dr. Kathleen Quinn, a woman who travels back and forth from Georgia to Texas, was turned away at the polling place she had gone to for years because she had a Georgia driver's license. Her husband ended up driving from New Orleans to Mississippi in order to obtain the documentation she would need to get an EIC.

- Sammie Louise Bates, a witness at the Texas trial, supports her family on approximately $300 in Social Security income per month. She has spent months saving up the necessary $42 to obtain her birth certificate from Mississippi, which would allow her to apply for a new photo ID. She was unable to vote in the November election because she still does not have an ID accepted under the Texas law.

Judicial Election Spending Soars

The Brennan Center teamed up with Justice at Stake to track TV ad spending in judicial elections, which once again shattered records in 2014.

TV ad spending in state Supreme Court elections by outside groups, political parties, and candidates has surged to more than $13.8 million since January, surpassing the $12.2 million spent on TV advertising in the 2010 midterm elections, according to an analysis by the Brennan Center for Justice and Justice at Stake of estimates provided by Kantar Media/CMAG.

The 2014 judicial elections delivered a new round of special interest money, attack ads, and partisan politics into America's courtrooms, shattering several state records and increasing political pressure on state justices. For the first time, a powerful national political group, the Republican State Leadership Committee, systematically invested in Supreme Court and lower court contests across the country — an effort that was unsuccessful in almost all its targeted states, including North Carolina, Missouri, Tennessee, and Montana.

Outside groups poured an estimated $4.9 million into TV ad buys to influence Supreme Court races in 2014.

Additionally, voters endorsed a ballot measure that would serve to head off contested judicial elections in Tennessee, and rejected a Florida initiative that would have given the governor the power to prospectively appoint replacements for sitting justices before the end of his or her term.

Outside groups poured an estimated $4.9 million into TV ad buys to influence Supreme Court races in 2014. In 2010, interest groups spent $2.5 million on TV ads. When state political party spending is included, total non-candidate TV ad spending jumped to more than $8.2 million (or 59 percent of total spending) this year, compared to $6 million (or 49 percent of total spending) in 2010.

Leading the pack of outside groups in TV spending is the Republican State Leadership Committee (RSLC), which purchased TV ads under its own name and also bankrolled massive advertising efforts by local groups in North Carolina and Tennessee. Altogether, the RSLC purchased an estimated $720,000 in TV ads in Montana and Illinois and contributed more than $1.4 million to local groups in Tennessee and North Carolina, which spent extensively on TV ads. A runner-up was an Illinois group called Campaign for 2016, funded by plaintiffs' lawyers in the state, which spent over $1.1 million on TV ads against incumbent Illinois Justice Lloyd Karmeier. Illinois saw the greatest outside group TV ad spending in 2014, at more than $1.7 million.

The Brennan Center and Justice at Stake issued this spending analysis, November 5, 2014.

The Michigan Republican Party, which spent an estimated $3.2 million on TV ads, was the top TV spender among political parties and also the overall top TV spender nationally. The only other political party spending in judicial elections documented in 2014 was from the Ohio Republican Party, which spent $100,000 on ads. No Democratic Party TV spending was documented in any Supreme Court races.

Republican State Leadership Committee Spends Millions

The RSLC, which launched its "Judicial Fairness Initiative" earlier this year to elect conservative judges and judicial candidates, poured $3.4 million into supreme and county court races in five states since January. In addition to TV ads, its spending supported phone banking and direct mail, and the group was behind what was arguably the harshest attack ad of the cycle: a spot accusing North Carolina's Justice Robin Hudson of coddling child molesters, which attained national notoriety.

The RSLC saw largely unfavorable results after voters cast their ballots this year:

- In Montana, the RSLC spent nearly $470,000 on TV ads, mailers, and other electioneering on behalf of Lawrence VanDyke, who was defeated by Justice Michael Wheat, state disclosures show.

- The RSLC gave Justice for All NC a total of $1.3 million for the primary and general election, according to state disclosures. Justice for All NC spent an estimated $210,000 in TV advertising in support of candidate Mike Robinson, who was defeated by incumbent Justice Cheri Beasley. Justice for All NC also spent almost $700,000 during the primary on an attack ad against incumbent Justice Robin Hudson. She defeated Superior Court Judge Eric Levinson on Election Day.

- The RSLC spent more than $200,000 on a direct mail effort in Tennessee opposing the retention of three Tennessee Supreme Court Justices, Gary Wade, Cornelia Clark, and Sharon Lee, calling them too liberal for Tennessee and linking them to the Affordable Care Act. The RSLC also gave $140,000 to the Tennessee Forum, a group that aired ads accusing the three justices of being "liberal on crime." Voters retained all three justices in August.

- In the Cole County, Missouri, circuit court race, prosecutor Brian Stumpe, backed by RSLC funding that reached nearly $300,000, according to state disclosure reports, failed to unseat Judge Pat Joyce. The court's jurisdiction includes challenges to the constitutionality of state laws and the language of ballot measures. "Is there a negative backlash? Clearly," said Stumpe.

- The RSLC spent more than $960,000 on TV advertising and phone banking in support of Illinois Justice Lloyd Karmeier, who successfully sought retention to a new 10-year term, according to state disclosures.

Several States Set New TV Spending Records

In 2011-12, the first full election cycle since *Citizens United,* an explosion of independent spending helped fuel the costliest election cycle for TV spending in judicial election history. In 2014, more state records were set, according to an analysis of candidate fundraising and TV data from 2000-2014.

- In Illinois, TV ad spending for and against the retention of Justice Karmeier hit $1.7 million, a record for retention elections in Illinois (which uses contested elections to fill vacant seats and retention election for sitting justices). Campaign for 2016, heavily supported by trial lawyers, spent more than $1.1 million against his retention. Justice Karmeier's 2004 election holds the state record for airtime in a contested election, at $6.8 million.

- In Tennessee, a record $1.5 million in TV spending was pumped into three Supreme Court retention races in which Justices Cornelia Clark, Sharon Lee, and Gary Wade retained their seats.

- Total TV ad spending in a hard-fought Montana Supreme Court election rose to a record $330,000, with numerous groups, including the RSLC and Americans for Prosperity, contributing. (Estimates for TV ad spending in Montana are available only beginning in 2008.)

- In North Carolina, where the legislature repealed a successful public financing program for judicial campaigns last year, candidate fundraising for four high court seats hit a record $3.8 million for the primary and general election.

Not only did spending by outside groups increase since 2010, outside spending also became more prevalent.

Total estimated TV spending for the two-year 2013-14 election cycle was an estimated $14.8 million, falling short of the 2009-10 record of $16.8 million. Notably, two states with historically high spending did not have contested elections in 2013-14, Pennsylvania (which held retention elections for two justices in 2013) and Alabama (where no candidates were opposed in the general election).

Outside Groups Spend in More Races in 2014

Not only did spending by outside groups increase since 2010, outside spending also became more prevalent. In 2014, outside groups engaged in spending in every state where TV ads were aired in the general election, and in seven of nine states overall (counting primaries and elections held before November). In 2010, in comparison, only 7 of the 13 states saw TV ads sponsored by outside groups.

National groups were major outside spenders in judicial races around the country. In addition to the Republican State Leadership Committee, other national groups weighing into state judicial races in 2014 included Americans for Prosperity, the Center for Individual Freedom, and the Law Enforcement Alliance of America.

At the same time, judicial candidates with alleged connections to "special interests" were regularly attacked in TV ads this year. In Montana, Ohio, and Illinois, candidates were accused of being owned or influenced by special interests. An ad aired by Montanans for Liberty and Justice said candidate Lawrence VanDyke was "in the pocket of out of state special interests," while incumbent Justice Michael Wheat aired an ad urging voters to "tell these corporations that neither your vote, nor my seat, are for sale." Both VanDyke and Ohio Justice Judith French were targeted with graphically similar TV ads depicting photos of their faces tucked into businessmen's cash-lined suit pockets.

How the Roberts Court Won the 2014 Election

Wendy R. Weiser and Lawrence Norden

By dismantling voting protections and campaign finance regulations, the five-member majority of the U.S. Supreme Court was the true winner in November 2014 — even before the ballots were counted.

There is still suspense over what will happen on Election Day, with control of the Senate hanging in the balance. But regardless of who wins, we already know the 2014 election belongs to the U.S. Supreme Court.

This is the first election where the country will experience the full impact of the Court's recent decisions rewriting the ground rules of our democracy. When the Court dismantled our laws regulating money in politics and gutted core voting rights protections, we knew those decisions would have consequences. But only now are we seeing the full scope of their impact: a return to pre-Watergate, pre-Civil Rights era practices. Cash from unknown sources is flooding the most important races, while state politicians have instituted new barriers to the ballot box for millions of Americans. Regardless of who wins, the integrity of our elections has been undermined.

For the first time in decades, citizens in nearly half the country will find it harder to vote. In 14 states, 2014 is the first major election with new voting restrictions in place. For many working class, minority, elderly, and young Americans, voting is now more difficult and expensive. For some, it is impossible. In Texas, for example, 608,000 registered voters do not have the photo ID now required to cast a ballot. A disproportionate number of them are black and Hispanic. Some have already been turned away at the polls.

While the voice of ordinary citizens grows fainter, the voice of the 0.2 percent of Americans who spend the vast majority of money in federal elections — often anonymously — is louder than ever. Outside campaign spending has shattered previous records, with new groups like super PACs and "dark money" groups that do not disclose their donors dwarfing the spending of ordinary citizens and sometimes even candidates themselves. In many key races it is impossible for us to know who is buying our elections.

This is the first election where the country will experience the full impact of the Court's recent decisions rewriting the ground rules of our democracy.

These are not abstract problems. They could determine results — even control of the Senate. In nine competitive races, more than $162 million has come from "dark money" groups. In North Carolina, where Sen. Kay Hagan is being challenged by state house speaker Thom Tillis, citizens are for the first time voting under one of the harshest new election laws in the country — a law Tillis helped craft. The impact could be significant. In the last midterms, 200,000 voters cast ballots during early voting days now cut. More than one-quarter of all African Americans who voted in 2012 did so during those days.

This article appeared at The Huffington Post, November 3, 2014

At the same time, outside money, much from undisclosed sources, has swamped the Tar Heel State. The contest is on track to become the most expensive Senate race in history. While both candidates have received significant sums from dark money groups, Tillis stands out. As of October 1, such groups spent more than $12 million in his favor. This is more than all spending on behalf of both major candidates in the last North Carolina Senate race.

These trends can be directly traced to recent decisions by the five conservative Supreme Court justices.

Exhibit A is *Citizens United.* That notorious 2010 decision approved unlimited corporate spending in elections. But its impact went further. It also unleashed a host of new entities to influence elections, including "candidate-specific dark money groups" that support particular candidates while shielding donors' identities. In *McCutcheon v. FEC,* decided earlier this year, the Court articulated its radical new vision of democracy: The use of large political contributions to obtain "ingratiation and access" to officeholders, the Court said, embodies "a central feature of democracy." Indeed, it is more central now than it has been in decades — thanks, in no small part, to these decisions.

The Court's strained vision of democracy has shaped the voting landscape as well. Its 2008 decision upholding Indiana's strict voter ID law emboldened states to start cutting back on voting access. The doozie came last year in the *Shelby County* decision, which dismantled a core provision of the Voting Rights Act designed to stop discriminatory voting changes in certain states from taking effect. The Court reasoned that circumstances had changed such that those federal protections were no longer justified. But the real changed circumstance was the Court's decision.

This is the democracy the Roberts Court has brought us — one in which politicians feel free to deprive targeted constituencies of the vote and special interests feel free to buy up elections.

It not only has been interpreted as a green light for states to press harsher new voting laws, but also has eliminated a key tool to fight such laws. Immediately after the Court announced its decision, five states rushed forward with new restrictions that would have been blocked under the old law.

Texas's harsh new voter ID law is a prime example. Passed in 2011, that law was blocked in 2012 under the now-defunct portion of the Voting Rights Act because it discriminated against minorities. Even though this finding was never reversed — indeed another court recently found the law was purposefully discriminatory — the ID requirement is now in effect for 2014.

This is the democracy the Roberts Court has brought us — one in which politicians feel free to deprive targeted constituencies of the vote and special interests feel free to buy up elections. But this new normal does not have to last. American history is full of examples of the Court changing course, especially in the face of negative public opinion. Given the clear damage to our democracy and sustained public outrage, we are hopeful this Court — or at least the next one — will eventually turn around.

But for now, while political partisans may have a tense and long election night, the Supreme Court's five-member majority will not. This year, anyway, they've already won.

Congress Must Keep Its Voting Rights Promise

Nicole Austin-Hillery

Congress missed its chance to restore a key Voting Rights Act protection in 2014. A generation after President Lyndon B. Johnson signed this landmark law, our nation is in danger of reneging on the promise that every citizen can freely cast a ballot.

Congress went home last week without tackling several critical issues facing our country. This is common in an election year. But this year should have been different. For the first time in nearly five decades, Americans will go to the polls in November without a key protection under the Voting Rights Act, which the U.S. Supreme Court gutted last year in *Shelby County v. Holder*. When Congress comes back in September, leaders of both parties must act to ensure every citizen can freely cast a ballot.

Today, on the 49th anniversary of the signing of the Voting Rights Act, it's worth looking back at how far our nation has come on voting discrimination and race, and how we can move forward together to ensure equality and justice for all.

The America we knew in 1965 was vastly different than the one we know now. The civil rights struggle showed our country through a black and white prism. President Lyndon Baines Johnson spoke of this race divide when he signed the VRA, which made it illegal for states to discriminate based on race in voting.

"The stories of our Nation and of the American Negro are like two great rivers," he said, "flow[ing] through the centuries along divided channels." Only after the Civil War, Johnson remarked, did the two rivers begin "to move toward one another." And a century later, the VRA would allow the two currents to "finally mingle and rush as one great stream across the uncertain and the marvelous years of the America that is yet to come."

The Voting Rights Act was designed to help African Americans in the South participate in our democracy. But in the 50 years since, it has been modernized to include many more citizens who need our help, just as Johnson and Congress intended. It was expanded to include Latinos and helped protect them from restrictive voting and redistricting maneuvers. It now includes Native Americans, and has helped protect polling places on tribal lands. And it also safeguards Asian Americans, who can receive ballots in their native languages in states across the country.

Only by allowing myriad voices to speak out at the ballot box can we begin to solve the vital human rights challenges facing America today.

America is no longer made of two great rivers, flowing along divided channels. We are now a grand delta flowing into the great American ocean. And just as our country is more racially diverse now than it was 49 years ago, it also faces more expansive challenges. I was reminded of this during a recent visit to the newly-minted National Center for Civil & Human Rights, where I saw how the freedoms and protections that were of concern to 1965 America have expanded to include so many other fundamental issues.

Our criminal justice system houses 25 percent of the world's prisoners, despite having only 5 percent

This article appeared at BillMoyers.com and ACSblog, August 6, 2014.

of the world's population. People of color are much more likely to fall victim to this system of mass incarceration. Our education system routinely fails inner-city and rural kids, who are poorer and more diverse than the rest of the country. And while same-sex marriage victories have swept through courtrooms across the nation, discrimination is still a serious problem in the LGBT community.

The link between civil and human rights — a nexus that was practically foreign 49 years ago — is now undeniable. Voting rights is the glue that holds that bond together.

If we are to remain and grow as a democracy, we must continue to strengthen and expand the voting franchise. Only by allowing myriad voices to speak out at the ballot box can we begin to solve the vital human rights challenges facing America today.

The Voting Rights Act has never been a partisan issue. It passed by a wide margin and was last reauthorized in 2006, nearly unanimously.

But Congress left town without moving forward on a bill to help modernize and strengthen it in the wake of last year's Supreme Court ruling. The Voting Rights Amendment Act was introduced in January by Rep. Jim Sensenbrenner (R-Wis.) and Sen. Patrick Leahy (D-Vt.). The Senate held one hearing on the bill, but the House has failed to act. In signing the VRA 49 years ago, LBJ explained how the Civil War marked a promise that was never fulfilled. "Today is a towering and certain mark that, in this generation, that promise will be kept," he said.

A generation later, our nation is in danger of reneging on that promise. It is time for Congress to act.

MASS INCARCERATION & JUSTICE

Shifting Law Enforcement Goals to Reduce Mass Incarceration

Hon. Eric H. Holder, Jr.

After Ferguson, criminal justice reform is at the center of public debate. Attorney General Eric Holder embraced several Brennan Center reforms while keynoting our full-day conference in September. Holder lauded the Center's "landmark" study urging federal prosecutor offices to make reducing incarceration and recidivism top goals — and pledged the Justice Department would make some of the proposed changes immediately.

We gather this afternoon just over a year after the launch of the Justice Department's Smart on Crime initiative — a series of important changes and commonsense reforms I set in motion last August. Already, these changes are fundamentally shifting our response to certain crime challenges — particularly low-level, nonviolent drug offenses. And this initiative is predicated on the notion that our work as prosecutors must be informed, and our criminal justice system continually improved, by the most effective and efficient strategies available.

After all — as I've often said — the United States will never be able to prosecute or incarcerate its way to becoming a safer nation. We must never, and we will never, stop being vigilant against crime — and the conditions and choices that breed it. But, for far too long — under well-intentioned policies designed to be "tough" on criminals — our system has perpetuated a destructive cycle of poverty, criminality, and incarceration that has trapped countless people and weakened entire communities — particularly communities of color.

In recent decades, the effects of these policies — and the impact of the "truth-in-sentencing" mindset — have been dramatic. Although the United States comprises just 5 percent of the world's population, we incarcerate almost one-quarter of its prisoners. The entire United States population has increased by about one-third since 1980. But the federal prison population has grown by almost 800 percent over the same period. Spending on corrections, incarceration, and law enforcement has exploded, consuming $260 billion per year nationwide. And the Bureau of Prisons currently commands about one-third of the Justice Department's overall budget.

Perhaps most troubling is the fact that this astonishing rise in incarceration — and the escalating costs it has imposed on our country, in terms both economic and human — have not measurably benefited our society. We can *all* be proud of the progress that's been made at reducing the crime rate over the past two decades — thanks to the tireless work of prosecutors and

Holder delivered these prepared remarks at the Brennan Center's conference, *Shifting Law Enforcement Goals to Reduce Mass Incarceration,* held at NYU School of Law, September 23, 2014.

the bravery of law enforcement officials across America. But statistics have shown — and all of us have seen — that high incarceration rates and longer-than-necessary prison terms *have not* played a significant role in materially improving public safety, reducing crime, or strengthening communities.

In fact, the opposite is often true. Two weeks ago, *The Washington Post* reported that new analysis of crime data and incarceration rates — performed by the Pew Charitable Trusts, and covering the period of 1994 to 2012 — shows that states with the most significant drops in crime *also* saw reductions in their prison populations. States that took drastic steps to reduce their prison populations — in many cases by percentages well into the double digits — saw crime go down as well. And the one state — West Virginia — with the greatest increase in its incarceration rate actually experienced an *uptick* in crime.

As the *Post* makes clear: "To the extent that there is any trend here, it's actually that states incarcerating people have seen *smaller* decreases in crime." And this has been borne out at the national level, as well.

Since President Obama took office, both overall crime and *overall incarceration have decreased approximately 10 percent — the first time these two critical markers have declined together* in more than 40 years.

Since President Obama took office, both overall crime *and* overall incarceration have decreased by approximately 10 percent. This is the first time these two critical markers have declined together *in more than 40 years*. And although we have a great deal of work to do — and although, last year, some states continued to record growth in their prison populations — this is a signal achievement.

We know that over-incarceration crushes opportunity. We know it prevents people, and entire communities, from getting on the right track. And we've seen that — as more and more government leaders have gradually come to recognize — at a fundamental level, it challenges our commitment to the cause of justice.

Fortunately, I can report today that we are *finally* moving in the right direction, at least at the federal level. Over the past year, the federal prison population declined by roughly 4,800 inmates — the first decrease we've seen in many decades.

Even more promising are new internal projections from the Bureau of Prisons. In a dramatic reversal of prior reports — which showed that the prison population would continue to grow, becoming more and more costly, overcrowded, and unsafe — taking into account our new policies and trends, our new projections anticipate that the number of federal inmates will fall by just over 2,000 in the next 12 months — and by *almost 10,000* in the year after.

This is nothing less than historic. To put these numbers in perspective, 10,000 inmates is the rough equivalent of the combined populations of *six* federal prisons, each filled to capacity. Now, these projected decreases won't result in any prison closures, because our system is operating at about 30 percent above capacity. But my hope is that we're witnessing the start of a trend that will only accelerate as our Smart on Crime changes take full effect.

Clearly, criminal justice reform is an idea whose time has come. And thanks to a robust and growing national consensus — a consensus driven not by political ideology, but by the promising work that's underway, and the efforts of leaders like Sens. Patrick Leahy, Dick Durbin, Mike Lee, and Rand Paul — we are bringing about a paradigm shift, and witnessing a historic sea change, in the way our nation approaches these issues.

As the Brennan Center and many others have recognized — and as your landmark report makes crystal clear — it's time to shift away from old metrics and embrace a more contemporary, and more comprehensive, view of what constitutes success.

Of course, for these changes to become permanent, we'll need to rely on the dedication — and the leadership — of federal prosecutors in Washington and in all 94 of our United States attorney's offices. As a career prosecutor myself — and as former U.S. attorney for the District of Columbia — I have always had the utmost confidence in, and respect for, these hardworking men and women. And that's why, as attorney general, I've consistently advocated policies that push discretion out into the field.

The Smart on Crime initiative is in many ways the ultimate expression of my trust in the abilities — and the judgment — of our attorneys on the front lines. And although some have suggested that recent changes in charging and sentencing policies might somehow undermine their ability to induce cooperation from defendants in certain cases, today, I want to make it abundantly clear that nothing could be further from the truth.

As I know from experience — and as *all* veteran prosecutors and defense attorneys surely recognize — defendant cooperation depends on the certainty of swift and fair punishment, *not* on the length of a mandatory minimum sentence. Like anyone old enough to remember the era before sentencing guidelines existed and mandatory minimums took full effect, I can testify to the fact that federal guidelines attempted to systematize the kinds of negotiations that were naturally taking place anyway. As our U.S. attorney for the Western District of Wisconsin, John Vaudreuil, often reminds his colleagues, even without the threat of mandatory minimums, it remains in the interests of *all* attorneys to serve as sound advocates for their clients — and for defendants to cooperate with the government in exchange for reduced sentences.

Far from impeding the work of our prosecutors, the sentencing reforms I've mandated have strengthened their discretion. The contention that cooperation is somehow dependent on mandatory minimums is tied to a past at tension with the empirical present, and is plainly inconsistent with history, and with now known facts. After all, as the Heritage Foundation observed earlier this year: "The rate of cooperation in cases involving mandatory minimums is comparable to the average rate in *all* federal cases."

Of course, as we refine our approach and reject the ineffective practice of calling for stringent sentences against those convicted of low-level, nonviolent crimes, we *also* need to refine the metrics we use to measure success; to evaluate the steps we're taking; and to assess the effectiveness of new criminal justice priorities. In the Smart on Crime era, it's no longer adequate — or appropriate — to rely on outdated models that prize only enforcement, as quantified by numbers of prosecutions, convictions, and lengthy sentences, rather than taking a holistic view.

As the Brennan Center and many others have recognized — and as your landmark report on *Federal Prosecution for the 21st Century* makes crystal clear — it's time to shift away from old metrics and embrace a more contemporary, and more comprehensive, view of what constitutes success. This means developing a new system of assessment — because, as you've noted, what gets measured is what gets funded and what gets funded is what gets done. That's why I want to commend this organization — and each of our Blue Ribbon Panelists, including some of our very best sitting and former U.S. attorneys — for examining new ways for the Justice Department to leverage our resources to better serve America's communities.

Your concrete recommendations — that federal prosecutors should prioritize reducing violence, incarceration, and recidivism — are consistent with the aims of the Smart on Crime initiative. The new metrics you propose — such as evaluating progress by assessing changes in local violent crime rates, numbers of federal prisoners initially found in particular districts, and changes in the three-year recidivism rate — lay out a promising roadmap for us to consider. And my pledge to you today is that my colleagues and I will not merely carefully study this critical report — we will use it as a basis for discussion, and a vital resource to draw upon, as we engage in a far-reaching process to develop and codify new success measures — with the aim of cementing recent shifts in law and policy.

One of the key points underscored by your report — and emphasized under the Smart on Crime approach — is the need for the Justice Department to direct funding to help move the criminal justice field toward a fuller embrace of science and data. This is something that we — and especially our Office of Justice Programs and Bureau of Justice Assistance — have taken very seriously throughout the Obama administration. And nowhere are these ideals more fully embodied — or more promisingly realized — than in our Justice Reinvestment Act and Second Chance Act programs.

As we speak, the states that participate in Justice Reinvestment are making fundamental policy reforms that aim to reduce unnecessary confinement, save taxpayer dollars, and reinvest funding in strategies proven to enhance community safety. A report issued in January highlighted 17 states that are projected to save $4.6 billion over 10 years. Another study, in June, highlighted seven states that have achieved substantial reductions in three-year recidivism rates. And these successes are notable not only for their magnitude, but for the political consensus that drove them.

Thanks to bipartisan support from Congress, funding for the Justice Reinvestment Initiative has more than quadrupled this year. That, on its own, is an extraordinary indication of the power and importance of this work. And this additional funding is allowing us to launch a new challenge grant program — designed to incentivize states to take the next major step in their reform efforts.

Today, I am pleased to announce that five states — Delaware, Georgia, Louisiana, Ohio, and Oregon — will be receiving these grants, which can be used to expand pre-trial reforms, to scale up swift and certain sanctions, to institute evidence-based parole practices, or a number of other options. I am *also* pleased to announce that five states have been selected to receive new funding under the Second Chance Act to help reduce recidivism. Georgia, Illinois, Iowa, Minnesota, and Vermont will each be awarded $1 million to meet their recidivism reduction goals. And each will be eligible for an additional $2 million over the next two years if they do so.

In addition to these and other Second Chance awards, our Office of Juvenile Justice and Delinquency Prevention is providing $7 million in Second Chance Act funding to support re-entry demonstration programs and other important efforts at the juvenile level. A further $1.8 million will support a new Juvenile Reentry Legal Assistance Program through our partners at the Department of Housing and Urban Development. And we'll soon be launching a broader partnership with HUD — a partnership rooted in the Pay for Success model championed by the Brennan Center — to focus on finding permanent supportive housing for those returning from incarceration.

The Justice Department has transferred $5 million to HUD for this program, which will announce the competition in the coming months. Together, these exciting efforts reaffirm our commitment to strengthening America's justice system at every level. They underscore our determination to help people get back on the right path. But they're only the beginning — because, beyond our Smart on Crime reforms and our emphasis on evidence-based practices, I believe the federal government has an even broader and more critical role to play in securing the fundamental promise of equal justice under law.

As we saw all too clearly last month — as the eyes of the nation turned to events in Ferguson, Missouri — whenever discord, mistrust, and roiling tensions fester just under the surface, interactions between law enforcement and local residents can quickly escalate into confrontation, unrest, and even violence. These tensions simmer every day in far too many communities across the country. And it's incumbent upon *all* of America's law enforcement officers and leaders to work with the communities they serve to defuse these charged situations by forging close bonds, establishing deep trust, and fostering robust engagement.

The situation in Ferguson has presented leaders across the nation, and criminal justice and civil rights leaders in particular, with a moment of decision — and a series of important questions that can no longer be avoided. Will we allow this time — *our* time — to be defined by division and discord? Or will we summon the resolve, the fortitude, and the vision to reassess — and even to remake — our system, through cooperation, consensus, and compassion?

Will we again turn a blind eye to the hard truths that Ferguson exposed, burying these tough realities until another tragedy arises to set them off like a powder keg? Or will we finally accept this mandate for open and honest dialogue, reach for new and innovative solutions, and rise to the historic challenge — and the critical opportunity — now right before us?

These questions are not rhetorical. And as we seek to address them, we must take into account the preconceived notions that certain people may bring to interactions with police — preconceptions that may be informed by generations of experience; by the totality of what it has meant to be a person of color in the United States. We must consider corresponding notions that police may bring to interactions with certain communities and individuals. And we must never lose sight of the immense and unyielding difficulties inherent in the law enforcement profession — from the training they receive to the risks these brave men and women incur every time they put on their uniforms; from the dangers they face, and the split-second decisions they often must make, to the anguish of family members who awaken at night to the sound of a ringing telephone — hoping for the best, but fearing tragic news about a loved one out walking the beat.

As the brother of a retired law enforcement officer, I understand well how challenging — and how thankless — their vital work can be. As our nation's attorney general, I will *always* be proud — and steadfast — in my support for law enforcement personnel and their families, who make tremendous and often unheralded sacrifices every single day to keep us safe. And as an African-American man — who has been stopped and searched by police in situations where such action was not warranted — I also carry with me an understanding of the mistrust that some citizens harbor for those who wear the badge.

So today, it's time to ask ourselves — as a nation — are we conducting policing, in the 21st century, in a manner that is as effective, as efficient, as equitable, and as just as is possible? It's time to build on the outstanding leadership that so many local police are providing — and the reform efforts that are underway in St. Louis County and elsewhere — by making this work a focused, national priority.

Just last week, the Justice Department launched a substantial effort to do just that — by establishing a National Initiative for Building Community Trust and Justice to promote credibility, to enhance procedural justice, to reduce implicit bias, and to support racial reconciliation. Separately, President Obama has directed federal agencies to carefully review programs that may provide military equipment, or funding for military equipment, to local police — a process that remains ongoing. Through a range of other programs like the president's "My Brother's Keeper" initiative — and the department's regular interactions with exemplary law enforcement executives across the country — my colleagues and I are doing important work to resolve tensions and promote mutual understanding; to bridge divides and spark constructive dialogue; and to ensure — above all else — that *everyone* who comes into contact with the police is treated fairly.

It's time to ask ourselves — as a nation — are we conducting policing, in the 21st century, in a manner that is as effective, as efficient, as equitable, and as just as is possible?

This is important, and in some cases life-changing, work. But I believe we need to take these efforts even further. That's why, under the leadership of our COPS Office, the Justice Department is working with major police associations to conduct a broad review of policing tactics, techniques, and training — so we can help the field swiftly confront emerging threats, better address persistent challenges, and thoroughly examine the latest tools and technologies to enhance the safety, and the effectiveness, of law enforcement. Going forward, I will support not only continuing this timely review, but expanding it — to consider the profession in a comprehensive way — and to provide strong, national direction on a scale not seen since President Lyndon Johnson's Commission on Law Enforcement nearly half a century ago.

In this ongoing effort, and in so many others — as we seize this important moment, renew our determination to combat crime, and accept the historic opportunities now before us — my colleagues and I will continue to look to the Brennan Center, and each of the leaders in this audience, for guidance, for edification, and for frank and honest advice. We will continue to rely on the experience, and the thoughtful consideration, that you have brought to today's discussion — and to countless others over the past two decades. And we will always be both proud and humbled to count you as partners, and as essential allies, in the considerable work ahead.

I want to thank you all — once again — for your leadership, your vision, and your unwavering commitment to the mission we share. I look forward to building on this dialogue in the weeks and months to come. And I am optimistic — despite the challenges we face and the obstacles we must confront — about where your efforts will take us, and all that we will achieve — together — for the exceptional nation we all love.

Federal Prosecution for the 21st Century

Lauren-Brooke Eisen, Nicole Fortier, and Inimai M. Chettiar

Prosecutors are in a uniquely powerful position to bring change, since they make decisions about when and whether to bring criminal charges, and make recommendations for sentencing. After extensive discussions with a Blue Ribbon Panel of current and former prosecutors, the Brennan Center proposed reorienting the way prosecutors' "success" is measured around three core goals: reducing violent and serious crime, reducing prison populations, and reducing recidivism.

FOREWORD

Hon. Janet Reno

As a former United States attorney general, I care deeply and passionately about our country's criminal justice system. The Department of Justice should be justifiably proud of the sharp decrease in crime that has occurred over the last 20 years. The United States is safer than it has been in decades. Violent crime is down. Property crime is down. And abuse of crack cocaine is down. What was once seen as a plague, especially in urban areas, is now at least manageable in most places.

This report provides a blueprint for federal prosecutors to establish a new set of priorities to better reduce crime and reduce incarceration, while modernizing criminal justice.

To bring about these decreases, we employed a number of strategies, from putting more police on streets to supporting and working with groups like the Partnership for a Drug-Free America and Crime Stoppers. While programs like these played an important role in reducing crime, one unfortunate side effect was an explosion in incarceration. To be sure, there are a great many people who are in prison for very good reasons. But many are behind bars for sentences that are too long or for offenses that may not warrant prison.

Those laws were passed and implemented with the best of intentions. But we now know that it is possible to decrease crime without drastically increasing incarceration. In a rare moment of bipartisan agreement, policymakers from the left and the right are joining together to create new, smart policies that will ensure continued public safety while also preventing unnecessary incarceration. These policies range from making sure that we have a sound, predictable, tough yet rational sentencing structure to diverting more people to innovative programs, such as drug courts.

These reforms will require changes in laws, both in Washington and in state capitals around the country. But many reforms can be implemented on the front line of the criminal justice system by the thousands of men and women I had the privilege of leading: America's prosecutors.

Prosecutors play a distinct and important role in criminal justice. They go to work each day determined to protect the public, armed with three basic qualities: ability,

Excerpted from *Federal Prosecution for the 21st Century,* September 2014.

integrity, and courage. They can lead the way to advance thoughtful, sensible approaches that have a real impact on violence and crime, while also reducing unnecessary prosecution and incarceration. Many are already doing so.

This report provides a blueprint for federal prosecutors to establish a new set of priorities to better reduce crime and reduce incarceration, while modernizing criminal justice. It also puts forth practical recommendations to create incentives to drive practices toward these priorities. Federal prosecutors, in particular, are uniquely positioned to lead the country toward this shift. Prosecutors and law enforcement across the country should be encouraged to give strong consideration to this approach.

EXECUTIVE SUMMARY

This new approach would reorient prosecutor incentives and practices toward the twin goals of reducing crime and reducing mass incarceration. The Brennan Center convened a Blue Ribbon Panel of leading current and former federal prosecutors to inform the recommendations of this report.

Setting clear priorities for success can encourage prosecutors to move toward more effective and just practices.

Prosecutors drive critical decisions in the criminal justice system. They make decisions about when, whether, and against whom to bring criminal charges, as well as make recommendations for sentencing and set the terms of plea negotiations. As such, they are in a uniquely powerful position to bring change to the criminal justice system. Historically, prosecutors have focused their role on enforcing the law. Many prosecutors, however, are beginning to see their role more broadly. They are increasingly exploring how to define their work to converge with the growing consensus that the country can simultaneously protect public safety and reduce incarceration.

Part I of this report explains how federal prosecutors can help lead the way toward change. Because the 94 U.S. attorneys' offices span the nation, they can help shift practices in states and localities as well. Part II puts forth recommended 21st century priorities for federal prosecutors. Setting clear priorities for success can encourage prosecutors to move toward more effective and just practices. The report recommends three core priority goals, which were discussed with enthusiasm at the Blue Ribbon Panel:

- Reducing violence and serious crime;
- Reducing prison populations; and
- Reducing recidivism.

Though critical, these priorities are not exhaustive. There are other considerations as prosecutors continue efforts to improve the communities they serve. U.S. attorneys may choose to pursue additional priorities that hinge on the unique challenges of each district. To that end, this report puts forth several optional priorities:

- Reducing pretrial detention;
- Reducing public corruption; and
- Increasing coordination.

Once priorities are established, success measures can help prosecutors target their progress toward these goals and keep their offices on target. Success measures are clear, concrete data points about performance outcomes that quantify progress toward goals. This report provides optimal success measures for each recommended priority, which can be implemented at the office level or the individual attorney level.

Figure 1: Success Measures for Core Priorities for Federal Prosecutors

	U.S. Attorney's Offices	Individual Attorneys
Reducing Violence and Serious Crime	Change in violent crime rate Percent of violent (and serious) crime cases on docket, compared to last year Percent of community reporting feeling safe (optional)	Percent of violent (and serious) crime cases on docket Conviction rate for violent crime cases
Reducing Prison Populations	Percent of defendants sentenced to incarceration, compared to last year Percent of sentenced defendants for whom downward guidelines departures were recommended compared to last year Number of federal prisoners that originated from district, compared to last year Percent of national federal prison population originating from district	Percent of defendants sentenced to incarceration Percent of sentenced defendants for whom downward guideline departures were recommended
Reducing Recidivism	Percent of prisoners convicted of a new crime within three years of release compared to last year Percent of prisoners convicted and sentenced to incarceration for a new crime within three years of release, compared to last year	Percent of prisoners convicted of new crime within three years of release Percent of prisoners sentenced to incarceration for new crime within three years of release

Creating Incentives to Drive Toward Priorities

There are several ways to implement new priorities. Part III of this report provides one powerful method that would shift office-wide and individual incentives to drive practices toward priorities: Success-Oriented Funding. As explained in previous Brennan Center reports, Success-Oriented Funding is a policy model that ties government funding as tightly as possible to clear priorities that drive toward the twin goals of reducing crime and reducing mass incarceration. Grounded in basic principles of economics and management, Success-Oriented Funding provides incentives to achieve these priorities, thereby changing practices and outcomes. It can be applied to all criminal justice agencies, actors, and funding streams.

The model first requires priorities that underscore the goals of reducing crime and reducing mass incarceration. These priorities for federal prosecutors are explained in Figure 1. The model then requires

clear, concrete success measures that show whether progress has been made toward achieving those priorities.

Success-Oriented Funding can apply specifically to federal prosecutors by linking new priorities and success measures to dollars, including budgets, salaries, and financial rewards at the office or individual level. Notably, it can also apply indirectly, through office or individual evaluations even without direct financial rewards or consequences. This more subtle form of Success-Oriented Funding can often be the most potent.

U.S. attorneys' offices can apply this approach as a best practice within their own offices. The Department of Justice can also implement this approach, making priorities and success measures consistent across U.S. attorneys' offices.

Success-Oriented Funding can apply specifically to federal prosecutors by linking new priorities and success measures to dollars, including budgets, salaries, and financial rewards at the office or individual level.

This report recommends:

- U.S. attorneys implement, as a best practice, self-evaluations of their offices using success measures for priorities;
- U.S. attorneys change individual prosecutor evaluations to include similar success measures;
- The Justice Department adds success measures for core priorities when evaluating U.S. attorneys' offices;
- The Justice Department modifies the model individual prosecutor evaluation form to include similar success measures;
- The Justice Department provides additional funding for U.S. attorneys' offices that achieve certain success measures; and
- Additional reforms, such as using the bully pulpit, expanding training and interview practices, expanding access to data, and increasing coordination for federal grant dollars.

By implementing these recommendations, federal prosecutors can shift outcomes to better reduce crime, dispense justice, and reduce incarceration. This shift in practices can help spur momentum for a similar shift in state and local practices in these districts.

BLUE RIBBON PANEL MEMBERS

- **Hon. James E. Johnson,** Co-Chair, Brennan Center Blue Ribbon Panel for Federal Prosecutors; Partner, Debevoise & Plimpton LLP; Member and former Chair, Brennan Center for Justice Board of Directors; former Undersecretary for Enforcement, U.S. Department of the Treasury; former Assistant U.S. Attorney and Deputy Chief of the Criminal Division, Southern District of New York.
- **Hon. G. Douglas Jones,** Co-Chair, Brennan Center Blue Ribbon Panel for Federal Prosecutors; Attorney, Jones & Hawley P.C.; former U.S. Attorney for the Northern District of Alabama.
- **Hon. Lanny A. Breuer,** Vice Chairman, Covington & Burling LLP; former Assistant Attorney General, Criminal Division, U.S. Department of Justice.
- **Hon. Zachary W. Carter,** Corporation Counsel, New York City; former U.S. Attorney, Eastern District of New York.
- **Hon. Paul J. Fishman,** U.S. Attorney, District of New Jersey; former Chair, Attorney General's Advisory Committee; former Associate Deputy Attorney General, U.S. Department of Justice.
- **Hon. Barry Grissom,** U.S. Attorney, District of Kansas.
- **Hon. Walter C. Holton, Jr.,** Principal, Holton Law Firm; former U.S. Attorney, Middle District of North Carolina; former Member, Attorney General's Advisory Committee.
- **David Patton,** Executive Director and Attorney-in-Chief, Federal Defenders of New York.
- **Hon. Kenneth A. Polite, Jr.,** U.S. Attorney, Eastern District of Louisiana; former Assistant U.S. Attorney, Southern District of New York.
- **Hon. Timothy Q. Purdon,** U.S. Attorney, District of North Dakota; Member, Attorney General's Advisory Committee.
- **Hon. Stephen C. Robinson,** Partner, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates; former Judge, U.S. District Court for the Southern District of New York; former U.S. Attorney, District of Connecticut; former Principal Deputy General Counsel and Special Assistant to the Director, U.S. Federal Bureau of Investigation.
- **Paul Shechtman,** Attorney, Zuckerman Spaeder LLP; former Director of Criminal Justice, State of New York; former Assistant U.S. Attorney, Southern District of New York.
- **Jeremy Travis,** President, John Jay College of Criminal Justice; former Director, National Institute of Justice, U.S. Department of Justice; former Chief Counsel, U.S. House Judiciary Subcommittee on Criminal Justice; former Deputy Commissioner for Legal Matters, New York City Police Department.
- **Hon. William D. Wilmoth,** Member, Steptoe & Johnson PLLC; former U.S. Attorney, Northern District of West Virginia.
- **Norman Wong,** Deputy Director and Counsel to the Director, Executive Office for U.S. Attorneys, U.S. Department of Justice; former Assistant U.S. Attorney, Eastern District of California.

Why Wasn't Prison Justice on the Ballot?

Inimai M. Chettiar and Abigail Finkelman

Although criminal justice reform won wide support, the 2014 candidates were largely silent on the matter. But that may change ahead of 2016.

Criminal justice reform has wide bipartisan support — at least in theory. But until voters demand it, politicians will continue to ignore an embarrassing system.

Whichever party wins control of the U.S. Senate, voters can wince at the prospect of continued polarization and gridlock. But one issue, intriguingly, seems ripe for genuine bipartisan cooperation: criminal justice reform. Yet, partly because it has become less controversial, discussions about criminal justice policy have been absent from the campaign trail. This silence creates the risk that a moment of promise will become a missed opportunity for change.

Yet, by and large, candidates have steered clear of criminal justice reform this election cycle.

The fact that criminal justice policy is not a campaign issue is, itself, noteworthy. Consider it Sherlock Holmes's dog that didn't bark. For decades, politicians vied to be the most punitive, from the 1977 New York City mayoral race, which improbably turned on the issue of the death penalty (over which a mayor has no power) to the 1994 referendum that passed "three-strikes-and-you're-out" in California. The 1988 presidential race is rightly remembered for its focus on demagogic and racially coded appeals.

"By the time we're finished," George H. W. Bush's strategist Lee Atwater bragged, "they're going to wonder whether Willie Horton is Dukakis's running mate."

But times have changed, and "tough on crime" has been replaced with "smart on crime." In the last decade, states as disparate as Texas, New York, Kentucky, and California have instituted reforms to reduce their prison populations and ease up their harsh sentencing laws. The White House just launched a major initiative to implement a more modern, sensible drug policy. Even Congress passed a law reducing the disparity between crack and powder cocaine sentences. And Americans overwhelmingly support eliminating mandatory minimum sentences for nonviolent drug offenders.

Yet, by and large, candidates have steered clear of criminal justice reform this election cycle. Perhaps they're fearful of being painted as soft on crime. Or perhaps they simply don't care enough about the issue to take a position.

Check out the issues pages of the websites of Senate candidates in the hottest races. Neither Michelle Nunn nor David Perdue, the two major Senate candidates in Georgia, talk about criminal justice reform. Neither do Mark Udall and Cory Gardner in Colorado. Or Joni Ernst and Bruce Braley in Iowa. In fact, you'd have to look far to find a candidate who makes even the most pro forma nod to the issue.

And that's too bad, because not only is criminal justice important on its own, but because it impacts so many other important issues. Voters consistently list the

This article appeared at The Daily Beast, November 1, 2014.

economy and inequality as top concerns. The current system of mass incarceration costs governments around $260 billion annually; that's about half the 2014 federal deficit.

In fact, it's among the largest drivers of economic inequality in the United States. Finding employment or housing can be nearly impossible with a criminal record. Locking up the primary breadwinner can push a family from working-class to impoverished. And children growing up with incarcerated parents too often get pulled into the system themselves.

The system itself is rife with inequality, from gender (women are the fastest-growing subset of the incarcerated population) to race (one in three black men will spend time behind bars) to sexuality (LGBT youth are incarcerated at a rate up to three times as high as their straight peers).

Politicians and candidates cannot be allowed to remain silent on one of the largest human rights issues on American soil. But they also can't be allowed to limit themselves to bromides about wanting reform without laying out next steps, and taking them. After all, some officeholders still resist needed changes, even as others link arms for reform.

Sens. Rand Paul (R-Ky.) and Cory Booker (D-N.J.) may have drawn wide attention and praise for their REDEEM Act. But the Smarter Sentencing Act of 2014, which went further and was co-sponsored by Ted Cruz and Elizabeth Warren, among others, was blocked by a bipartisan group of senators. Similar battles are unfolding in state legislatures.

But, as always, there's a way to get legislators to change their actions: threaten to kick them out.

We've missed the chance to make mass incarceration an issue in 2014. But a few weeks ago, Bill Clinton predicted the issue would play prominently in the 2016 presidential election. Let's hope he's right. But such a drastic change in election politics won't happen unless we demand to know where candidates stand on criminal justice. We must ask why they're holding up bills, and if they're only paying lip service to reform.

We need to know what they will do — or why they're not doing anything — so that the United States no longer wears the scarlet letter of being the largest jailer in the world. And if they can't answer, hold them accountable.

Way Too Early to Declare Victory in War Against Mass Incarceration

Andrew Cohen and Oliver Roeder

Some commentators contend a recent drop in prison admission rates means America has turned a corner on mass incarceration. A close look at the statistics shows we are not yet at the tipping point.

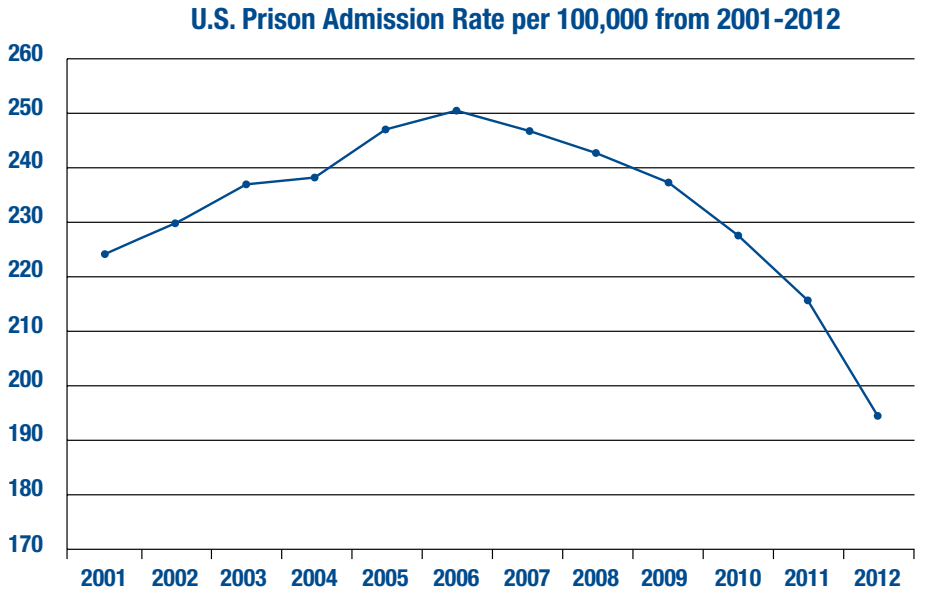
At *The Week*, Ryan Cooper summarized some dramatic statistical work about mass incarceration undertaken by Keith Humphreys, the Stanford University professor and former Obama administration senior advisor for drug policy. The headline of the piece, "The plummeting U.S. prison admission rate, in one stunning chart," was accompanied by Cooper's pronouncement that "whatever the reason" for the drop it "is certainly great news." Some of the same optimism was expressed over the weekend, in *The New York Times* Book Review section, by David Cole, the esteemed Georgetown law professor who has written so eloquently recently about many of the greatest injustices in American law. Reviewing Columbia University Professor Robert Ferguson's excellent book, "Inferno," Cole proclaimed that "we may be on our way out of the inferno" and that "it is just possible that we have reached a tipping point" in the fight against mass incarceration.

It is far too early, as a matter of law, of policy, and of fact, to be talking about a "plummeting" prison rate in the United States.

Would that it were so. It is far too early, as a matter of law, of policy, and of fact, to be talking about a "plummeting" prison rate in the United States or to be declaring that the end is in sight in the war to change the nation's disastrous incarceration policies. There is still far too much to do, far too many onerous laws and policies to change, too many hearts and minds to reform, too many families that would have to be reunited, before anyone could say that any sort of "tipping point" has been spotted, let alone reached. So, to respond to Humphreys's work, we asked Oliver Roeder, a resident economist at the Brennan Center for Justice, to crunch the numbers with a little bit more context and perspective. What follows below ought to shatter the myth that America has turned a corner on mass incarceration. The truth is that many states continue to experience more incarceration than before, the drop in national incarceration rates is far more modest than Humphreys suggests, and the trend toward reform could easily stop or turn back around on itself. Check out Roeder's work:

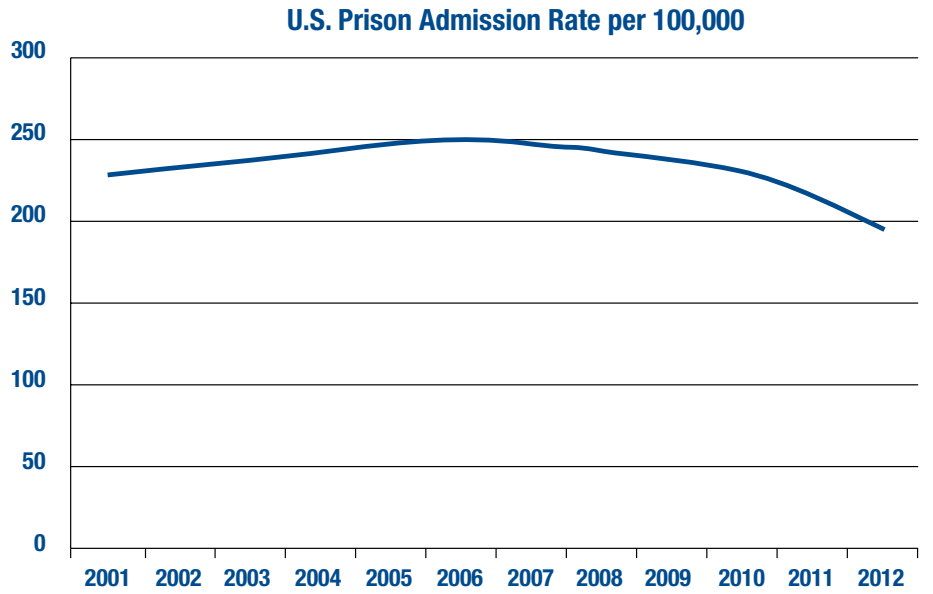
This article appeared on the Brennan Center's website, May 21, 2014.

Here's the graph from the *The Week* post:



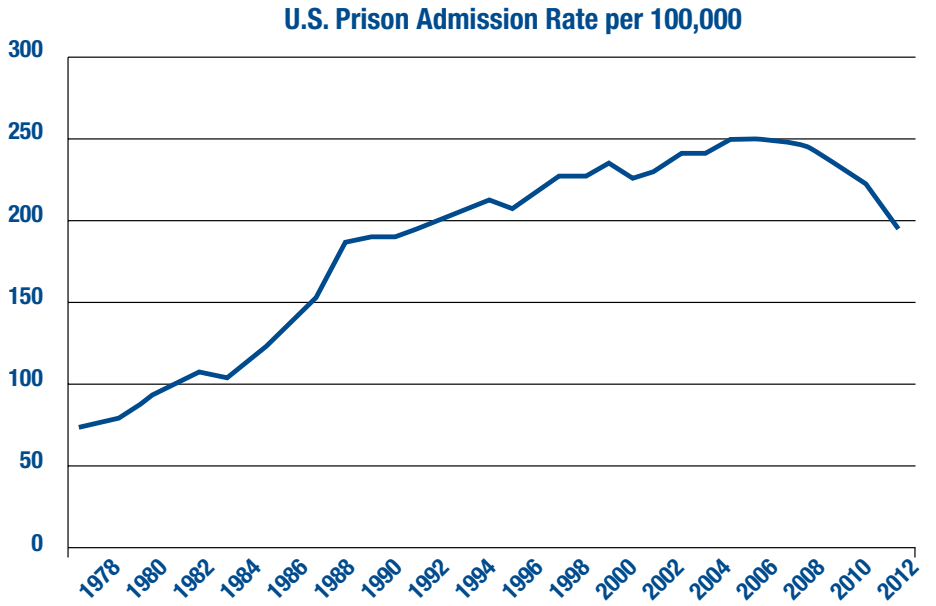
The piece, citing Keith Humphreys/SameFacts.com, describes the admission rate as "plummeting." While the admission rate has been going down since 2006, "plummeting" may be overstating the case, and the graph itself is somewhat skewed.

Here is the exact same information, presented with a more sensible vertical axis:



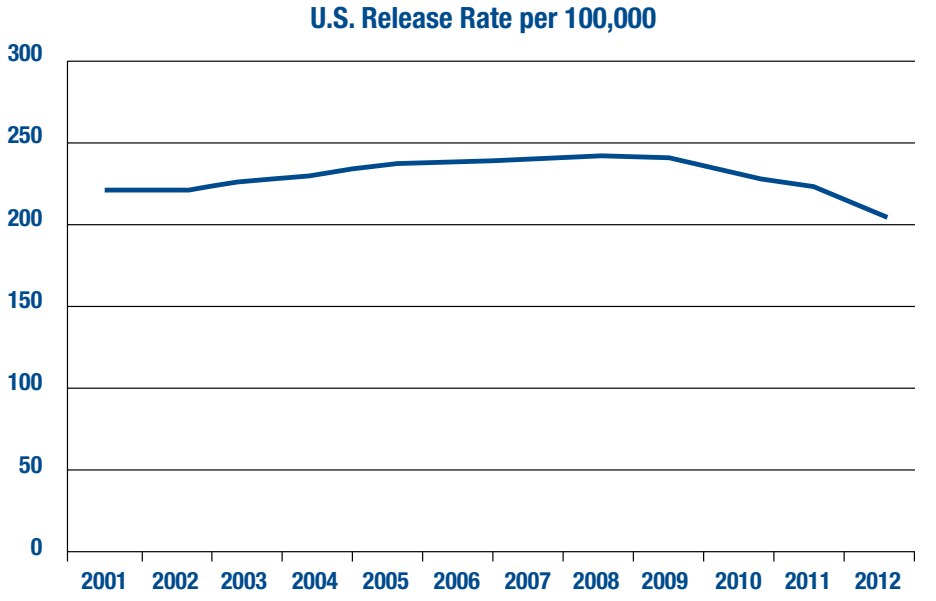
One wouldn't describe that as "plummeting," I wouldn't think. The admission rate *is* down 22 percent since its peak in 2006.

Here it is again, just this time with more years:

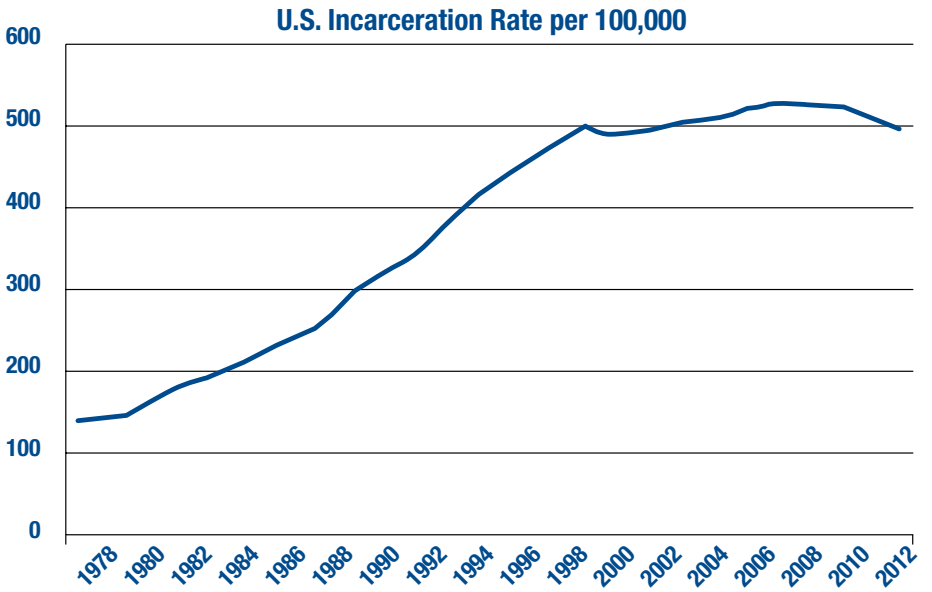


Again, yes it's going down, but 2012's admission rate still looks pretty high, historically speaking.

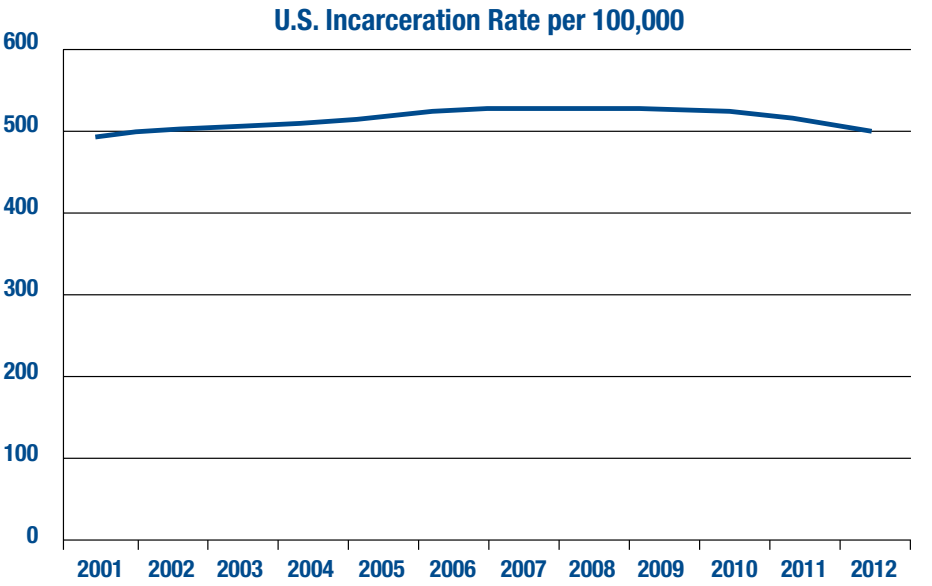
Another consideration is the *release* rate. It's also going down:



The *incarceration* rate, probably what we care about most, is of course a function of the admission rate and the release rate. If the admission rate and the release rate are dropping simultaneously, the effect on the incarceration rate itself would be ambiguous. So, let's see what's actually been going on with the incarceration rate. Of course, we've all seen this picture before:

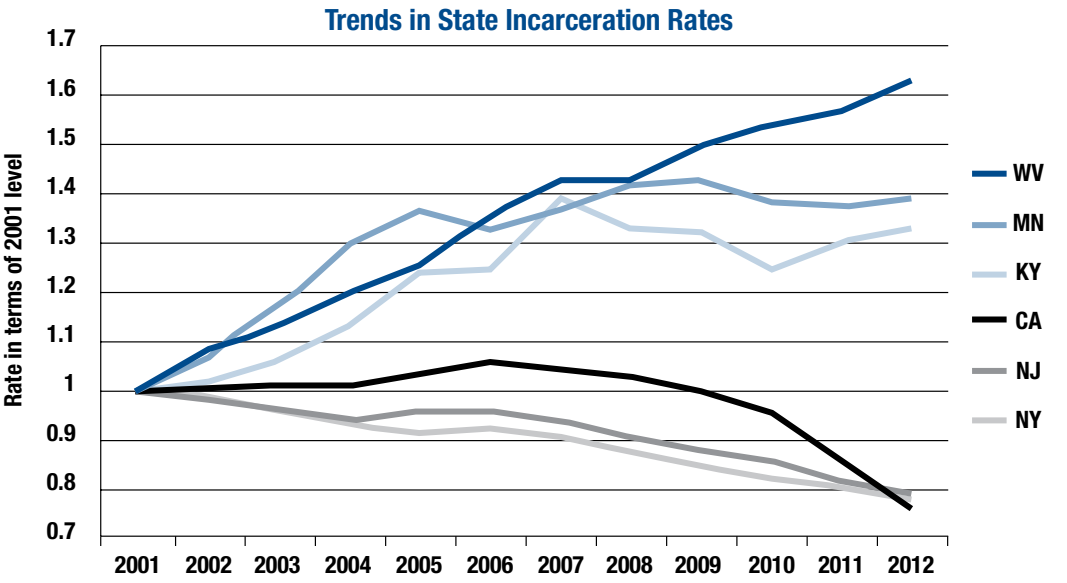


Or, zooming in to show its recent history:



So yes, the incarceration rate is decreasing, but no, not by much. It's down 5.5 percent since its 2007 peak. Since 2001, it's up 1.6 percent. An unscientific word for this trend would be "flat."

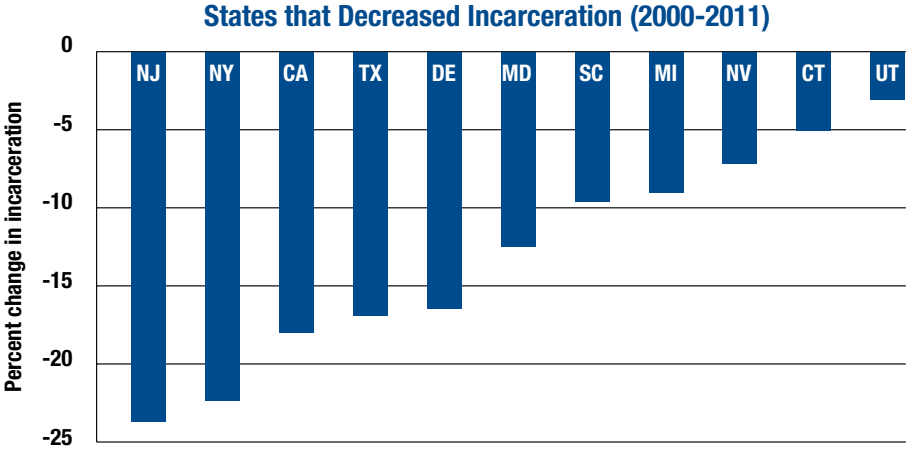
As for individual states' incarceration rates, experiences over the past decade have varied greatly. Since 2001, West Virginia's incarceration rate has increased almost 63 percent, while California's has dropped more than 23 percent. (These are the biggest increases and decreases, respectively.) Here are a few notable *state trends*:



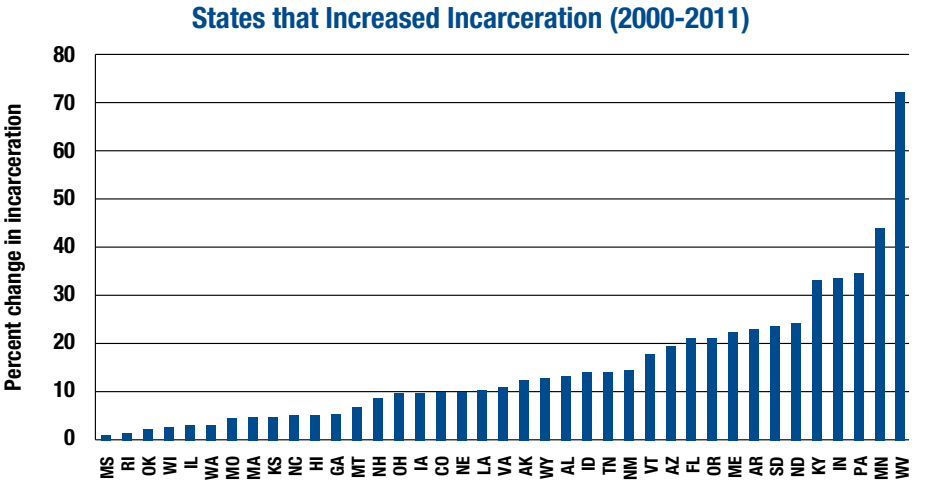
These are the states with the most extreme increasing and decreasing incarceration trends. So they can be compared easily, the graph is in terms of the states' 2001 incarceration level (i.e., the 2001 level = 1). California, New Jersey, and New York have dipped over 20 percent from their 2001 levels, while West Virginia, Minnesota, and Kentucky have seen over 30 percent increases.

Incarceration is a state-specific issue in other senses as well. Clearly the trends can vary dramatically, but so can the rates themselves. In 2012, Louisiana's incarceration rate was 873, while Maine's was 159.

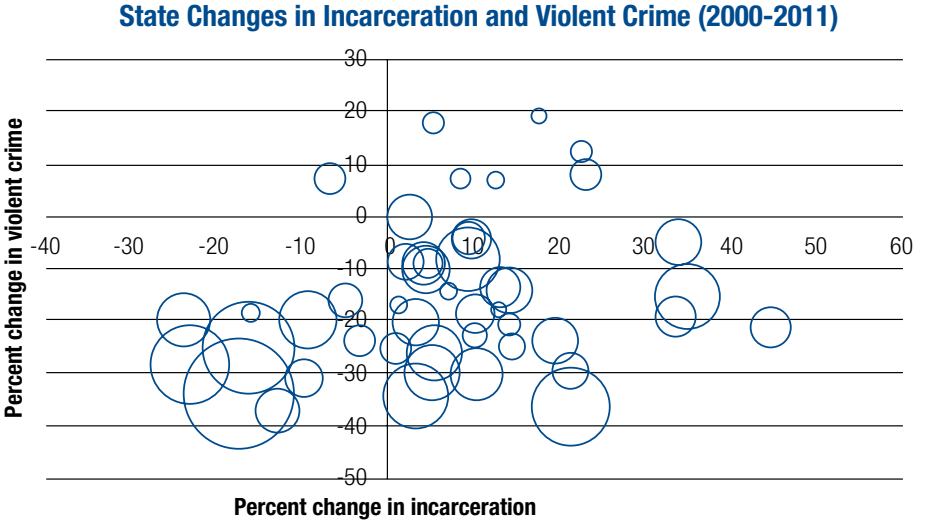
Eleven states decreased incarceration over the period 2000-2011. The rest increased it. Here are the ones that decreased it, and by how much:



Here are the ones that increased it, and by how much:



Here are the states arranged by their changes in incarceration and in crime over the 2000s. The circles (the states) are sized by population:



States on the left saw reductions in incarceration, states on the right saw increases. States on the top saw increases in crime, states on the bottom saw decreases. Importantly, states in the *lower left* quadrant saw reductions in both incarceration *and* crime in the 2000s. (And these are big states: CA, NY, MI, TX, NJ.) This is also a bit of evidence for the "incarceration does not decrease crime" hypothesis.

So what's the story? Well one thing it isn't is crime. There is a body of evidence that indicates that crime doesn't really affect incarceration. Incarceration, rather, is a policy choice, largely independent of the actual level of crime in the world. (The incarceration rate is not a result of one single policy choice, of course, but rather is a function of many policy choices that compose essentially our willingness or propensity to incarcerate.) Admissions and thus incarceration were increasing because of increased willingness to incarcerate, or reliance on incarceration. I don't have a good sense as to why admissions and incarceration have been dipping lately, but it does seem to be driven by a minority of (typically large) states.

Enhancing Public Safety, Reducing Incarceration

What role should prosecutors and police play in criminal justice reform? Should their goal be simply to enforce and prosecute to their fullest authority, or should they also strive to reduce unnecessary incarceration? How can federal funding help modernize local enforcement nationwide? America's leading policy and criminal justice experts grappled with these questions and more at a Brennan Center conference last fall.

Timothy Purdon talked about the recent shift among federal prosecutors from a reactive to proactive model. Purdon is the U.S. Attorney for the District of North Dakota and a Member of the Attorney General's Advisory Committee.

For a long time, the model of being a prosecutor was the prosecutor sat in his or her office and waited for law enforcement officers to bring an investigation to them. The prosecutor would look at it, charge the case, and, oftentimes, move forward with the goal of trying to get as much prison time as possible for the crime in question. It's a very reactive model. That model is one that is changing within the Department of Justice and has been changing for the last four or five years. Shortly after he was confirmed, Attorney General Eric Holder gave a speech in which he had a remarkable line, one that's guided me and I think some of the other prosecutors here, that a United States attorney and an assistant United States attorney must be more than a *case processor.* They need to be *community problem solvers.*

Certainly as prosecutors we're responsible for the enforcement and the prosecution of violations of federal laws. That is our bedrock principle and it's something we take very seriously every day. But that's just one leg of a three-legged stool for a prosecutor. The other two legs are crime prevention — support for viable crime prevention programs in communities — and re-entry. Of the people that our offices send to federal prison, 95 percent of them come home to their home communities at some point. If we don't find a way to support re-entering offenders and reduce recidivism rates, we're not going to make communities safer. Again, a shift away from conviction and length of sentence to "is the community you're serving more safe today because it's your turn on the watch?"

These remarks are excerpted from the Center's conference on prosecutor reform at NYU School of Law, September 23, 2014.

G. Douglas Jones explained how politicians and prosecutors must work to reorient criminal justice priorities. Jones is a former U.S. Attorney for the Northern District of Alabama.

The U.S. attorney's role is now much bigger than simply enforcing the laws. We have to figure out ways to reorient the guidelines and the priorities of U.S. attorneys offices. It's a different climate within the criminal justice system and it's going to take courage from both our political leadership and the prosecutors, regardless of the administration, in a bipartisan effort to come up with new solutions that don't require prosecutions and incarceration.

We've already seen the Supreme Court make the sentencing guidelines discretionary, but prosecutors are still having a difficult time understanding their role. Now they have this new sense of discretion, they don't have to just look at a case and say, "Well, this fits within this guideline, so this is what we'll recommend." They'll look at a much broader picture, they'll look at that defendant, they'll look at the same factors that a judge might look at in sentencing under the code. The attorney general and his Smart on Crime initiative is a huge step in the right direction for federal prosecutors. But make no mistake: We have a climate change, a culture change, that we have to address, not just within the Department, but within our political system and our communities, to make sure that we're doing things smart and efficient because every budget in the country is being busted by all of the law enforcement and incarceration and prison system issues that we face in this country today.

Barry Grissom discussed the recent shift to provide more prosecutorial discretion. Grissom is the U.S. Attorney for the District of Kansas.

One of the issues we have as prosecutors in this environment is breaking an institutional mindset. "We've always done it this way." Particularly if you're a prosecutor who grew up or came to the Department during the time of mandatory guidelines, it really was: "You get two points for this. You're going to work with us? You get something for this. You're going to do between this many months and this many months." The issue of prosecutorial discretion went out the window and that's how they matured as prosecutors. One of the challenges we now have is to institutionalize the notion that you have great leeway. You can look to the guidelines *as guidelines*. That has been a real challenge for us, but I know with the attorney general's leadership we have had a number of our lead prosecutors in all of our offices meet with the attorney general, meet with various folks in management, to impress upon our line prosecutors that this change is coming.

Kenneth Polite spoke about a local initiative that reduces recidivism by teaching returning citizens skills and partnering with the nonprofit and business community to help them find jobs. Polite is the U.S. Attorney for the Eastern District of Louisiana.

The United States leads the world in incarceration. My state happens to lead this country in incarceration. What we have been doing, focusing exclusively on enforcement as our only tool as prosecutors, simply is not working. I think we all can agree that a major part of this issue of reducing recidivism rests on providing long-term, stable employment to these individuals as they return to our communities. What we've tried to do is engage the business community, talk to them about the perceived and actual risk of employment in the re-entering community, and some of the incentives that are out there to encourage employment — things like the workforce tax credit, the federal bonding system through the Department of Labor. But our office is not stopping there.

We have an initiative called "30 2+2," which is really a re-entry collaboration between some of our nonprofit organizations and businesses in the community where we encourage 30 local businesses to hire two returning citizens for a two-year period. We're looking for businesses that represent a diversity of our industries in the state of Louisiana, but we're also looking for businesses that are committed to providing

long-term employment opportunities for these individuals, not simply for a six-month period. Then we're partnering with a re-entry initiative housed out of the state penitentiary in Angola. In that program, inmates are getting trained in a hard skill, things like welding, 19 different areas of hard skills. They are getting over 100 hours of cognitive and life skills, things like parenting, financial management, drug treatment, drug education. Ultimately, they are getting their GEDs or high school equivalencies. Once they return from that, what we're hoping to do is provide this "30 2+2" initiative as a pipeline where they walk out of prison, day one, with a long-term, stable job before they return back to our communities.

Paul Fishman talked about why prosecutors must serve different communities in different ways. Fishman is the U.S. Attorney for the District of New Jersey, former Chair of the Attorney General's Advisory Committee, and former Associate Deputy Attorney General for the U.S. Department of Justice.

One thing we've done is started a re-entry court, which focuses on high-risk returning federal prisoners to New Jersey. Why the high-risk ones? Because the high-risk ones are most likely to come back. The low-risk ones don't need the same kind of attention. We invite them into the program and we tell them we will give them intensive supervision through the probation department, they will be in court every two weeks at 5:00 p.m. on Tuesday to meet with the judge personally, we will pay attention to what they're doing, how they're doing, and always asking them the question, "What do you need?" Our goal is to take these people who have paid their dues, went to prison for crimes they committed that were serious, for which they should have gone to prison, make no mistake, but are now out, and we think they need a second chance. It's a fabulously inspiring program. We graduated our first six folks in July. My plea is, as you talk about these issues, think about how we're going to fund them, because it's not cheap — it's cheaper than jail, but if we save the money on the back end, are we going to spend it on the front end?

Lanny Breuer remarked that he was honored to help the Obama administration reduce the racial disparity in sentencing for drug crimes. Breuer is Vice Chairman at Covington & Burling LLP. He is a former Assistant Attorney General for the Department of Justice's Criminal Division.

For several decades, we saw an enormous disparity at the federal government between the way we were prosecuting those who were incarcerated for selling crack cocaine and those who were incarcerated for selling powder cocaine. That was because when these laws first came into effect people thought crack was different, but the result was a disparity that became more and more evident — young African-American men were going to jail because they tended to be involved with crack, and white men and others were going to jail for far less when they were doing the exact same thing, selling powder and selling crack. That became more obvious and what we needed was leadership. Many administrations have been lobbied for it, families of the people in jail have lobbied for it. There was a recognition that this needed to be changed and no one did it. Then I was fortunate enough to become assistant attorney general for this attorney general and this president. They said we were going to change it. I had the privilege to go before the Congress and argue for the first time in history, the administration was saying you have to change this, you have to have parity one-on-one. Ultimately the law was changed, not at one-to-one, but the disparity has changed dramatically.

David Keene described why ideas, not ideology, must drive criminal justice reform. Keene is a founding member of Right on Crime and Opinion Editor of* The Washington Times*. He's a former President of the National Rifle Association, former Chair of the American Conservative Union, and a Board Member of the Constitution Project.

The question as you approach criminal justice issues is not whether there are too many people in prison or not enough people in prison or whether the laws are too harsh or the laws are too lean — the real question is what works? We formed Right on Crime because we thought it was time for people regardless of their

political orientation or their ideological direction or stance to start looking at these problems realistically. Because the system clearly is not working when the United States becomes the premier jailer of the entire world, where 1 in 100 adults are serving time or have served time in a penal institution.

We've done most of our work at the state level. We've had great success working with Democrats, Republicans, conservatives, and liberals, and with governors who are concerned about the way their systems are working or not working, and the cost of those systems. We got involved because we wanted to make sure the question of what works and what doesn't work, and what's humane and what isn't humane, had to be discussed in terms of that rather than in terms of where one stands on the political spectrum or what one can do to advance his or her career as a prosecutor, politician, or whatever.

Anthony Batts discussed successful programs he's used to reduce incarceration. Batts is Commissioner of the Baltimore Police Department.

In Baltimore, and the cities I've been in, I've tried to push organizations to be progressive. I've tried to push organizations toward having academic information coming in and focusing on what works. Not the flavor of the day, not what mythology is, but based on empirical data, based on the best practices that work for police agencies. Within Baltimore today we have programs like Cease Fire. Overly simplified, we focus on gangs and groups, and the individuals that make up those groups, gangs, or crews. We call them into a room. We sit down and we say, we know who you are. We have all my federal partners — ATF, DEA, etc. If anyone in this group becomes violent, we're going to crush the entire group. But what we really want you to do is step over to the velvet glove side where we have services that can support you, get you out of the life, and help you move on and have a fruitful environment. It has worked in 65 other cities and locations from New Orleans to Chicago to Camden to Newark.

Cyrus Vance explained how his office hired outside consultants to help study and address racial bias. Vance is District Attorney for the Borough of Manhattan in New York.

I commissioned the Vera Institute shortly after I came into office to do a racial bias review of the Manhattan DA's office. They issued a technical report about two months ago. Ultimately, I was pleased with Vera's conclusions. It confirmed what I believed to be so: The lawyers in our office are treating the cases squarely and fairly. But the Vera report did indicate there was a racial disparity in certain key case processing elements, one related to bail, and one related to amount of time for misdemeanor convictions, that there was a statistically significant difference between young African-American men and women, and whites, Asians, and Latinos. I worked within the office to understand what levers are pulled that result in these statistical differences and how we could address them. We have brought in a consulting firm, who started working within our office to address implicit bias in our decision-making as prosecutors, recognizing that none of us feel like we are biased. Yet, the statistics may, at the end, show that the institution has, in fact, got a statistical difference that at least must be examined and corrected, and that's what we're trying to do. Without the Vera study, we would not have brought in an outside agency to help us deal with this issue of implicit bias in our office. It is not often that prosecutors invite consultants in to pour through their thousands of records to look at the issue of race, but I'm glad we did it, we are learning from it, and I think it'll make our work better as we go forward.

Douglas Gansler said community prosecution is one clear way to enhance safety while keeping people out of prison. Gansler is the Attorney General of Maryland.

When I was in the United States attorney's office in D.C., we started something called community prosecution. It actually started in the early 1980s in Portland from a local district attorney, and has taken many different forms around the country. What it does, is it bootstraps off of community policing and

puts prosecutors in the neighborhoods, in the communities. It recognizes the prosecutor's job is not to get convictions, but to make sure we prevent crime, we intervene in potential crimes, and that the right thing happens in each and every case. Sometimes that means putting somebody in jail for the rest of their lives, and sometimes it means figuring out a way to get that person back onto the streets.

Jeremy Travis spoke about how federal law incentivizes states to put away more citizens. Travis is President of the John Jay College of Criminal Justice.

Part of the 1994 Crime Act incentivizes the federal government, through funding to states, to increase the length of sentences. Under the Violent Offender Incarceration Truth-in-Sentencing provisions, it provides *billions* of dollars to states to build more prisons *only if* the state changed their sentencing policies to keep people in prison longer. We've all caught up, as a nation, to this notion of Truth-in-Sentencing, which was a great misleading label. Here we have the federal government, in an odd twist on federalism, paying state governments to change their sentencing policy to be more punitive. And guess what? Those people stayed in prison for a long time after that money ran out, and none of it was for operating expenses. So the federal government knows how to do this and knows how to do it in some pernicious way. The question we face now: Can the federal government be equally muscular in helping states reduce mass incarceration as it was in helping the 28 states that bought into the promise of more money for longer sentences?

Robert Greenstein gave examples of how well-designed financial incentives can change a state's policy behavior. Greenstein is the President of the Center on Budget and Policy Priorities.

There is really strong evidence that well-designed, well-implemented financial incentives — where the federal government is incentivizing certain types of behaviors on behalf of state governments — can be extremely effective. Between 2009 and 2013, the federal government provided performance bonuses through the Children's Health Insurance Program (CHIP) to states that did two related things. Number one: To qualify for a performance bonus the state had to implement at least five of eight measures that had been tested and proven effective in increasing the percentage of children eligible for health insurance through either Medicaid or the CHIP program who actually enrolled. Second: There had to be results! Between 2009 and 2013, we had a recession, we had significant increases in unemployment, and we had continued erosion of employer-based coverage. One would've expected that the number of uninsured children would have, at a minimum, stayed the same and very possibly increased as the number of low-income children swelled and the poverty rate went up. The opposite occurred. The number of uninsured children dropped from 6.4 million to 5.2 million. The performance bonuses are widely credited with having had a major impact here. For example, in 2012 alone, 23 states got performance bonuses for both adopting measures to increase enrollment and actually increasing enrollment among children.

People sometimes can look at performance bonuses and, if the dollar amounts are small, they might say, "Why would a state change its behavior? The dollar amount isn't that large." State officials, both civil servants and political appointees, really like to be able to say — and get the headline — "Our state achieved these goals. It was recognized for exemplary performance and it received a federal bonus of X million dollars." The headline isn't dramatically different if it's $5 million or a $100 million, it's a positive either way. The power of well-designed financial incentives can be very strong.

Neera Tanden talked about how the private and public sector can work together to solve funding problems. Tanden is President of the Center for American Progress.

Social impact bonds are a funding innovation that started in the UK, and it is a model of the private and public sector working together. From a progressive point of view, we looked at these issues because we are facing fewer and fewer resources at the federal level and yet, in so many areas, our need is greater and greater.

The social impact bond as the model is: a governmental agency circumscribes the problem that should be solved and, essentially, a private sector actor commits to solving the problem. If they do so, they negotiate a price for the solution and if they are able to solve the problem itself, they recoup savings of some amount. If they don't, they bear the risk of the cost. There are various iterations of that model and the first, primary example in the criminal justice space is Riker's Island. Goldman Sachs has a four-year social impact bond program where they're focused on reducing recidivism of males between 16 and 18, and that's ongoing. It looks very promising, but we have to measure these things as we go. Massachusetts has also developed a social impact bond for both reducing homelessness and recidivism as well.

Mark Earley discussed how states would shift criminal justice priorities if funding incentives changed. Earley is the former Attorney General of Virginia, former President of Prison Fellowship, and a Signatory of Right on Crime.

States love to get federal dollars. If strings came attached to federal dollars into the criminal justice system, which basically said, "You get this money and you get to keep it only if you meet measurable performance criteria that are going to keep the public safe, reduce incarceration, and reduce recidivism," that would have a really, really big effect. A lot of the money that has come to states 10, 20, 30 years ago was all focused on law enforcement, sweeping up the streets, putting people behind bars. If the money got redirected, it would have a profound effect. The report that has been issued today and that the attorney general commented on has some really profound implications for state government. And as most of you know, most of the people who are incarcerated in the United States are state prisoners, they're not federal prisoners, so that's where most of the mass incarceration is occurring.

Gene Sperling described the struggle to assess reform in the budgeting process. Sperling is former Director of the White House National Economic Council.

Let me say something about one of the frustrations a lot of us have with budgeting and investment, which is particularly strong in this area. When you take your intro economics class they teach you what a public goods problem is. It's basically the idea: "When do you need the government?" Well, you need the government because sometimes no individual can capture the benefits of an investment, so we'll underinvest. No individual company can capture the benefits of basic research, so we have to have the National Institutes of Health. When you look at criminal justice it's like you have a public goods problem within a public good. Nobody who invests in long-term reduction of cost to crime, violent crime, incarceration, can actually capture that.

That happens for three reasons. One is the federal-state issue Mark Earley spoke about, which is: If you, at the state, decide, "Boy! We're going to really invest in things that prevent incarceration!" you're going to find that the costs happen right up front in a yearly budget. But the benefits come out over long periods of time, and they will be captured by the federal government, by the state government, by the private sector, by people who aren't hurt. So even though we know that an investment in this area has huge returns to society, no one person, even within the government, can capture that. The second problem is the long-term nature of it. There's a study in the *Journal of Quantitative Criminology* estimating that if you can take one 14-year-old and turn them from avoiding a life of violent crime it saves $3.2 million to $5.8 million. Now, the reason this becomes very important is that if you were a pension fund and you could do an investment that was going to have serious returns over 15, 20 years, you would make that investment. The point I'm making is nobody can make that decision because those benefits are so long spread. We don't have a way of doing an investment budget in the federal government, but even if we did, the benefits would be spread so broadly in the society.

How the Federal Government Can Reshape Law Enforcement

Nicole Fortier

The Michael Brown and Eric Garner tragedies prove the federal government must promote less punitive behavior by local police nationwide. Shifting funding incentives is one clear path forward.

President Barack Obama's program to boost trust in police departments and increase accountability in policing by getting buy-in from law enforcement and the public is both smart and necessary. But he can, and should, do more.

To avoid tragic deaths such as Michael Brown's in Ferguson and Eric Garner's in New York, we need to go beyond demanding accountability from police. We need to get to the root of the problem: law enforcement's emphasis on stops, arrests, and the use of force to reduce crime. Instead, we need reforms that reduce unnecessary arrests and incarceration while keeping our communities safe.

Law enforcement, researchers, and advocates now agree we can reduce crime and violence without intruding on individual rights and without high arrest and incarceration numbers.

Overpolicing has been encouraged by government policies. A series of laws in the 1980s and 1990s criminalized behavior and increased penalties for other crimes. In particular, Congress called on police to intensify the "war on drugs." Police responded by forming drug task forces and increasing the number of drug-related arrests and seizures. Do we need these policies to keep us safe? No.

Law enforcement, researchers, and advocates now agree we can reduce crime and violence without intruding on individual rights and without high arrest and incarceration numbers. Local police play a vital role, one the country — and communities of color — need. In fact, polls show urban, majority-minority communities believe hiring more police can help reduce crime.

Nationally, law enforcement officers are open to reforms, including in New York City, where Police Commissioner Bill Bratton has endorsed giving officers discretion to write summonses rather than arrest people for possessing small amounts of marijuana. And in Washington, proposals to reduce harsh sentences for nonviolent drug crimes have brought together big-city Democrats and Tea Party Republicans.

The president seeks to reverse the consequences of outdated criminal justice policies. One aspect of his plan focuses on the federal government's role in encouraging overpolicing through the money it sends to state and local law enforcement.

For decades, the federal government has provided equipment to police worth billions of dollars. Concerns about those programs were raised after police in Ferguson wore riot gear and carried military-grade weapons at protests. Obama has mandated a review of federal programs that provide that assistance to give them better coordination, oversight, and community engagement.

This article appeared in *Newsday,* December, 6, 2014

But the review, while valuable, leaves out much of the $4 billion the federal government sends to law enforcement annually, often with no clear goals for how those resources should be used. Consequently, the funds flow on autopilot, and end up promoting overpolicing and overincarceration. For example, the Byrne JAG program evaluates recipients on the number of kilos of cocaine seized, but not on how much drug crime dropped, leading to overemphasis on seizures over programs with proven records of reducing drug crime rates.

A Brennan Center report proposed a way to modernize the programs: Tie federal dollars to reducing both crime and incarceration, and give police flexibility to choose the best practices in their jurisdictions. Proven crime-reduction programs, including mental health and drug treatment, and community policing, are the path to 21st century policing.

The federal government plays a powerful role in law enforcement policy. Many grants pay for important programs that help control crime, and it's vital that taxpayer money support our police smartly, not blindly.

Ferguson Is Not Fallujah

Faiza Patel and Michael Price

As lawmakers consider issues relating to the use of military equipment by police, they should also examine the erosion of community policing and community trust in many police departments.

The shooting of Michael Brown in Ferguson, Missouri, has sparked a long overdue discussion about the militarization of local police. The funds and equipment funneled to police departments to fight the "war on drugs" and the "war on terror" have given cops access to military hardware that seems inappropriate for their role in America's communities. But these "wars" have also changed the attitude of some police departments who seem to regard the populations they are sworn to protect as insurgents who need to be put down. The reform efforts currently on the table don't go far enough in curtailing equipment transfers and completely fail to address how counterinsurgency tactics have become part of American policing.

The funds and equipment funneled to police departments to fight the "war on drugs" and the "war on terror" have given cops access to military hardware that seems inappropriate for their role in America's communities.

Congressional concern over the militarization of police has focused on the Defense Department's "1033 Program," which provides surplus military gear — machine guns, grenade launchers, helicopters, and tanks — to state and local police. In 2013 alone, the 1033 Program transferred nearly $450 million worth of military equipment designed for the battlefields of Iraq and Afghanistan to civilian police. Lawmakers, including Sen. Carl Levin (D-Mich.), have pledged to review the program while Rep. Hank Johnson (D-Ga.) and Sen. Claire McCaskill (D-Mo.) are considering new legislation that would impose some limits on the flow of arms from the Pentagon.

But the proposals do not go nearly far enough. The bill, for one, would still allow local police to obtain military gear for counterterrorism purposes, an expansive caveat. Moreover, its narrow focus on the 1033 Program does not address other sources of federal funding and military equipment for local police.

The Department of Justice (DOJ), for example, operates the "High Intensity Drug Trafficking Areas Program," which doled out more than $238 million in 2013 to help police fight drug crimes and terrorism. In New York City, for example, police used the money to purchase surveillance vehicles and computer systems to store reams of innocuous information about law-abiding Muslims. The DOJ also provides assistance to local police through the "Edward Byrne Memorial Justice Assistance Grant (JAG) Program," which, among other things, provides funding for body armor, lethal weapons, helicopters, and even GPS tracking devices. The Department of Homeland Security (DHS) runs the "Homeland Security Grant Program," which last year gave more than $900 million in counterterrorism funds to state and local police. According to a 2012 Senate report, this money has

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been used to purchase tactical vehicles, drones, and even tanks with little obvious benefit to public safety. It also funds state and local "fusion centers" operating Suspicious Activity Reporting (SAR) programs, which have not been especially useful in preventing terrorist attacks, but strain community-police relations and raise serious civil liberties concerns.

Overall, in 2013, the DOJ and DHS programs gave nearly $1.5 billion to state and local police departments for military-grade equipment, programs, and personnel — $1 billion more than the Pentagon handed out. Congress would do well to investigate these other funding streams as well while it is reviewing the Defense Department program.

Lawmakers should examine the erosion of community policing and community trust in many police departments.

State and local governments can also exercise their oversight authority to ensure that local police forces do not morph into standing armies. In Seattle, for example, the local police obtained two Draganflyer X6 drones using federal grant money from DHS. When the city council learned of the purchase from the media, the public outcry from residents and privacy advocates was so fierce that the mayor ordered the police to get rid of the drones. (Seattle gave them to Los Angeles.) The Seattle City Council passed an ordinance requiring prior legislative approval for any city department intending to acquire surveillance equipment. Local governments should follow the example of Seattle to exercise democratic control over the use of federal funding for police equipment.

It is equally important to find ways to combat the consequences of the war paradigm: the encouragement of a mindset that views residents as potential threats rather than potential partners. This approach is fundamentally at odds with community policing strategies that emphasize building trust and cooperation between the police and the people they serve, which have long been at the center of the DOJ's stated philosophy. Federal dollars should flow to support — rather than undermine — this goal.

As lawmakers consider issues relating to the use of military equipment by police, they should also examine the erosion of community policing and community trust in many police departments.

To be sure, it is important to protect police officers from harm, and in limited situations, that might mean the use of body armor or a SWAT team. But as a general rule, the focus should be on how the police can protect the people they serve, not the other way around.

Ferguson is not Fallujah, and the slow slide from policing to counterinsurgency needs to stop.

DEMOCRACY REFORM

Finally, Reason for Optimism on Voting Laws

Wendy R. Weiser

After years of pitched battles over who can vote, two bipartisan initiatives provided hope in 2014. The recommendations of a presidential commission and a House bill to restore the Voting Rights Acts offered ways to improve voting both sides can support.

Everyone knows that Washington is mired in gridlock. But on what has been one of our most partisan, divisive issues, something strange is happening in our nation's capital.

After three years of pitched battles in the states over who can vote and how much trouble they should have to go through to do so, two bipartisan initiatives out of Washington, D.C., are providing real hope that reform may be around the corner.

On Wednesday, the bipartisan Presidential Commission on Election Administration, co-chaired by the lawyers for Barack Obama and Mitt Romney's presidential campaigns, issued a report recommending critical reforms to tackle long lines and other election challenges. And last week, a bipartisan group in Congress introduced a bill to fill the hole created by the Supreme Court's 2013 decision gutting the heart of the Voting Rights Act.

These are two serious bipartisan efforts to fix our voting system's biggest problems. These proposals aren't perfect; there is much more we need to do. But, if enacted, they would represent a dramatic step forward.

The problems these efforts target are widespread. According to a survey by the presidential voting commission, nearly 50 percent of Americans live in precincts that had long lines in 2012. And long lines are just the most visible manifestation of an aging voting system in need of reform. There are also the 3 million Americans who were not able to vote because of voter registration problems, and the millions more whose votes did not count because of issues with voting machines, poll sites, or misguided state requirements. All this points to the need to bring our system into the 21st century.

To make matters worse, over the past few years, half the states passed laws making it harder to vote. Discrimination was a significant factor: Researchers from the University of Massachusetts found that the states most likely to introduce and pass voting restrictions were those where minority and low-income turnout had increased most since the last presidential election. Those states previously singled out for special oversight under the Voting Rights Act were among the worst offenders. The provision the Supreme Court neutered had been a significant weapon against discriminatory laws: In 2012 alone, it stopped more than 15 discriminatory voting changes from going into effect, and deterred many more. Now it's gone.

These are two serious bipartisan efforts to fix our voting system's biggest problems. These proposals aren't perfect; there is much more we need to do. But, if enacted, they would represent a dramatic step forward.

As President Obama said regarding the chaos and long lines on election night 2012, "We need to fix that." And despite the past few years' partisan

This op-ed appeared at *The Atlantic*, January 23, 2014.

bickering, the presidential commission assures us that our voting problems are both "identifiable and solvable."

One of the commission's significant findings is that the worst voting problems are common nationwide, and there are common solutions "that should fit all." It calls on states to modernize a few areas most in need of reform: voter registration, early voting, polling-place management, and voting machines and ballots. The voter-registration proposals are especially critical — though only a starting point — since the current registration system is by far our biggest source of election-administration problems. Based largely on paper records, the system is rife with errors and leads to confusion, disenfranchisement, and long lines. If states harness existing technology to modernize the voter registration system, we can get more eligible voters registered, save money, and improve accuracy and efficiency.

There is reason to believe that states will be receptive to the commission's recommendations. Although the lead-up to the 2012 election saw widespread efforts to restrict voting rights, 2013 ushered in a countertrend of improving voter access. It's true that the movement to cut back on voting rights did not end. But many states pushed forward with positive voting reforms as well, with 10 states passing laws making it easier to vote, many along the lines recommended by the Commission. Voter-registration reform has been especially popular. Interestingly, while voting restrictions passed almost exclusively in Republican-controlled states, voting improvements passed in Republican, Democratic, and mixed-control states. The appetite to improve the voting system can transcend partisanship.

The appetite to improve the voting system can transcend partisanship.

Of course, it's not enough for the voting system to run well for most voters if it still allows discrimination against some. Traditionally, the Voting Rights Act has risen above partisan politics. The act has been reauthorized four times on a bipartisan basis — in 2006, by votes of 98-0 in the Senate and 390-33 in the House. Hopefully, last week's bipartisan bill to restore it will similarly succeed.

Voting rights should not be a partisan issue. America needs an election system that works well for everyone, and doesn't tolerate discrimination against anyone. The voting commission's report and the Voting Rights Amendment Act are an important start. It is heartening to see two of the most important initiatives to fix our voting problems so soon after 2012, in bipartisan form. Now it's up to Congress and the states to seize this opportunity and move us forward. There is a bipartisan path out of this mess. Now is the time to take it.

New York Still Needs Public Financing

Frederick A. O. Schwarz, Jr. and Gerald Benjamin

A strong drive for political reform fell just short in New York State. Gov. Andrew Cuomo and legislators failed to enact small donor public financing for state elections. Then, for good measure, they shot down the Moreland Commission to Investigate Public Corruption. Much controversy ensued. By year's end, unfortunately, no new major reforms were enacted.

The swirl of attention around Gov. Cuomo's shuttering of the Moreland Commission is an easy distraction. Like a magician's trick, it takes our attention off of where it should really be focused: on the commission's crucial recommendations for campaign finance reform.

We need to ask once more how we can achieve these reforms, which are crucial to deterring politicians' misbehavior and improving governance in New York State.

With the number of public officials forced from office for criminal or ethical reasons mounting, Cuomo last summer appointed a Moreland Commission of top prosecutors and civic leaders. They were to investigate corruption in government and recommend concrete remedies.

And they did — before Cuomo closed their doors. Now, claims of high-level political interference are flying in the deal that led to the shutdown. But interference or no, the Moreland Commission produced a wide-ranging exposé of New York's pay-to-play politics.

For example, in its interim report, the commission uncovered multiple emails from lobbyists and others advising their clients they needed to make five-figure donations to get legislation passed or killed. These are amounts that exceed what many New Yorkers earn in a year.

A statewide public financing system to elevate average New Yorkers' voices in our elections, buttressed by other comprehensive reforms, will reduce the power of big money special interests.

"Again and again," the commission noted in its report, "our investigations have uncovered evidence showing that access to elected officials comes at a price, and that the fight over legislation is often between entities with vast financial resources at their disposal ... the majority of New Yorkers are shut out of the political process."

A statewide public financing system to elevate average New Yorkers' voices in our elections, buttressed by other comprehensive reforms — like lower limits on how much one person can contribute to a political candidate (now at an outrageous $60,800 for statewide candidates per election cycle) and strong independent enforcement of campaign finance laws — will reduce the power of big money special interests.

Schwarz is the Center's chief counsel and former New York City corporation counsel. Benjamin, who was staff director of Mario Cuomo's State Constitution Revision Commission, is director of the Center for Research Regional Engagement and Outreach at SUNY New Paltz. This op-ed appeared in New York's *Daily News*, August 18, 2014.

Is it remotely possible that such a far-ranging reform could become law? Here's the good news: The state legislature came tantalizingly close in the last two years to passing just the kind of reforms Moreland recommended.

No more shying away. No more vague promises of reform. New Yorkers can demand those seeking to serve in the legislature work to ensure passage of comprehensive campaign finance reform next year.

There are two reasons the Moreland commissioners — many of whom began their tenure skeptical of public financing — came to see it as the single best way forward.

First, their investigations revealed the scope of Albany's big-money problem. "New York's campaign finance laws and practices," they wrote, "enable special interests and wealthy individuals to flood the political process with enormous amounts of money," corrupting the process and leaving average citizens with little sway over policy decisions.

New York City has successfully used a similar public financing system for years. It works.

Second, they came to understand how a public financing system that matches small donations with public money could fundamentally alter this equation.

At the cost of a few cents a day per New Yorker, candidates for office could actually raise more money for their campaign by appealing to the mass of their average constituents than they could through backroom meetings with a few big funders.

The effect would extend beyond campaigning. Once elected, those who secured office by using public financing would have every incentive to push legislation that benefits the thousands of men and women they were elected to represent.

Goodbye, tax loopholes for elite special interests. Hello, passing legislation to improve the lives of the millions of New Yorkers who cannot afford million-dollar contributions.

New York City has successfully used a similar public financing system for years. It works.

A 2012 report by the Brennan Center and Campaign Finance Institute found almost 90 percent of the city's census blocks groups were home to people who gave $175 or less to a City Council candidate — compared to only 30 percent that were home to someone who gave to a candidate for State Assembly.

We know that once financial contributions are made, additional engagement follows. This is a crucial antidote to forces that generate cynicism and alienation from public life.

Andrew Cuomo had his chance to get campaign finance reform done this year. He proposed legislation and put it in the budget, but at the last minute pronounced it unachievable.

It is now up to the legislature to act.

New Momentum to Restore Voting Rights

Sens. Rand Paul (R-Ky.) and Ben Cardin (D-Md.)

One democracy reform has gained encouraging new prospects. Millions of Americans have lost the right to vote because of a criminal conviction in their past. The Brennan Center convened a bipartisan panel of experts from the faith, law enforcement, and civil rights communities to discuss the current state of voting rights restoration.

Rand Paul, *U.S. Senator, Kentucky, Republican*

There've been a lot of reasons why people can't vote or have been prevented from voting. Some of these are historic reasons and some of them are still with us, some of the things I think we've come a long way. In the last presidential election, African Americans actually voted at a higher percentage than Caucasians in Mississippi and other places. This isn't to say that there's not a problem.

The largest impediment to both voting and employment in our country is the criminal justice system.

To me, actually, the problem really revolves a lot around the criminal justice system, because you now have nearly 5 million people in the country who are prevented by law from voting, and I think this is something we should address. The largest impediment to both voting and to employment in our country is actually the criminal justice system. When you look at it people say, "Oh, well these must all be really bad people." Well some of them are people who just made youthful mistakes. I'll give you an example. I have a friend of mine whose brother, 30 years ago, grew marijuana plants at school. He must have been pretty successful, because he got a felony conviction for whatever he was growing, and he still can't vote in Kentucky. And when he has to fill out an application for work, he has to check a box that says he's a convicted felon. I think really we need to do something about all of this, and I've become very interested in the criminal justice issues.

I have a bill, and so does Sen. Cardin. Ours are both with the same goal but with slightly different parameters as to what the bill is. We chose just to take the nonviolent felons thinking that, number one, it's an easier thing to approach the American public and convince them of, is to take people who have committed nonviolent felonies, served their time, and then get them the right to vote back. Sen. Cardin's bill is just more expansive. It doesn't limit the people as far as what type of crime they've committed, if they've served their time. I think there are valid reasons to support both bills, and I think both are a step in the right direction — it just depends on how big a step you want to take in trying to fix this problem.

From remarks delivered at a Capitol Hill event, held in the Dirksen Senate Office Building, sponsored by the Brennan Center and the American Civil Liberties Union, July 22, 2014.

Ben Cardin, *U.S. Senator, Maryland, Democrat*

Re-entry is an issue that has been on our agenda for a long time. President Bush in 2008 provided leadership for the passage of the Second Chance Act. The legislation expanded prison re-entry initiatives by providing job training, placement services, transitional housing, drug treatment, medical care, and faith-based monitoring. President Bush said at the time, "We believe that even those who have struggled with a dark past can find brighter days ahead. One way we act on that belief is by helping former prisoners who have paid for their crimes. We help them build new lives as productive members of our society." Today we have a real dichotomy of views among different states as to what they do. One thing President Bush implied by his statement is that if we're going to give a person full rights and expect full responsibility from them, then we should give them the right to vote.

In 35 states convicted individuals may not vote while they are on parole. In 11 states a conviction can result in lifetime disenfranchisement. Several states require prisoners to seek discretionary pardons from governors or actions by the parole or pardon board in order to regain the right to vote. Several states deny the right to vote to individuals convicted of certain misdemeanors. An estimated 5.8 million citizens in the United States, or about 1 in 40 adults, currently cannot vote as a result of a felony conviction. I say that knowing that only 25 percent of that number are actually incarcerated. So, we have around 4 million people who are out in the community who have been disenfranchised.

This is one of the Jim Crow laws of our time. Let me just give you some of the demographics here to understand how this unfairly affects minority communities. In six states — Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia — more than 7 percent of the total population is disenfranchised. Eight percent of the African-American population, or 2 million African Americans, are disenfranchised. Currently, 1 out of every 13 African Americans are rendered unable to vote because of a felony disenfranchisement, which is a rate four times higher than the non-African-American population. In the Latino population you have similar numbers: 17 percent of Latino men will be incarcerated during their lifetime, in contrast to less than 6 percent of the non-Latino population.

So this truly is a Civil Rights Act issue. It is a right of having people franchised to determine their representatives. The Democracy Restoration Act that I sponsored with Sens. Harry Reid, Patrick Leahy, Dick Durbin, Sheldon Whitehouse, Cory Booker, Tom Harkin, and Bernie Sanders says in federal elections — and we deal only with the federal elections, that's all the authority we have here in Washington to deal with — if you have completed your sentence in prison and you are released, you have the right to vote. It's very easy to make that determination. We think that is the right way to proceed. I think that's consistent with the values of America.

But it's also in our self-interest to do this. Recidivism rates will decline if people are fully engaged in their community, and a way to be fully engaged in their community is being able to participate in elections — they have a vested interest. For all those reasons, I believe this is the right policy. I think it's the right time. And, Sen. Paul, I thank you for your leadership on this issue, because we share a common goal and that is to get a bill to the president of the United States for signature. And that means we're going to have to listen to each other, and all of us are going to have to listen to each other and work out a way that we can advance this issue. I'm certainly prepared to do that, and I thank you for your willingness, and I hope as a result of this opportunity today that we'll come closer together with a strategy so that we can correct this terrible injustice that we currently have in our society.

Why Long Lines on Election Day?

Christopher Famighetti, Amanda Melillo, and Myrna Pérez

Lack of poll workers and low numbers of voting machines are key contributors to long voting lines, and precincts with more minorities experienced longer waits, the Brennan Center found in a new study. This analysis explores the causes of long lines that have plagued millions of Americans — and proposes new ideas to fix them.

The images of voters standing in long lines at the polls in the November 2012 election generated much attention from the media, the public, and from the president. Accounts of individuals waiting for hours to cast a ballot inspired both admiration for those determined to make their vote count, and dismay at a ramshackle election administration system.

The number of voting machines and poll workers could affect how long voters have to wait in line, and which voters have to wait longer.

In early 2013, President Barack Obama convened a bipartisan commission to address the problem of long lines and determine best practices for local election officials. According to the commission's findings, 10 million people waited longer than half an hour to vote in 2012. The commission concluded that no voter should wait more than 30 minutes, and issued recommendations for election officials to improve the casting of ballots. Almost two years after the 2012 election, however, policymakers have done little to prevent long lines from recurring. This study offers fresh data to guide reform efforts.

What causes long lines at the polls? Unexpected surges in turnout could be an easy, and in some ways, an accurate answer, but the story is more complex. This study finds that the resources distributed to polling places are a key contributor to long lines. Which precincts have the most voting machines? Do they have enough poll workers? Do they comply with minimum state requirements for how those resources must be allocated? Importantly, this study suggests that the answers to those questions could affect how long voters have to wait in line, and which voters have to wait longer. Many of the lines that manifested on Election Day in 2012 could have been mitigated with planning that looked at factors known before the day of the election, like the number of registered voters and the level of resources allocated to each polling place for Election Day.

Little research has assessed how resource allocation contributes to delays. This analysis attempts to fill that gap by analyzing precinct-level data from states where voters faced some of the longest lines in the country: Florida, Maryland, and South Carolina. Specifically, this study assesses whether and how machine and poll worker distribution contributed to long lines in those states during the 2012 presidential election.

Excerpted from *Election Day Long Lines: Resource Allocation,* September 2014.

Given the media coverage and political commentary in the wake of the 2012 election suggesting a racial component to the problem of long lines, we also sought to understand what role, if any, race played in predicting where long lines might develop. Accordingly, we examined the interplay between resource allocation, race, and long lines across each state. We also examined those same factors in each county so that strong trends in particular counties would not create the appearance of a statewide trend.

Each state studied presents its own nuances and qualifications. There were no perfectly uniform findings. That said, there are unmistakable patterns that emerge:

- **Voters in precincts with more minorities experienced longer waits.** This mirrors findings from two prior studies, suggesting a genuine problem that needs to be addressed. For example, in South Carolina, the 10 precincts with the longest waits had, on average, more than twice the percentage of black registered voters (64 percent) than the statewide average (27 percent).

- **Voters in precincts with higher percentages of minority voters tended to have fewer machines.** This is the first multi-state study to assess voting machine allocation by race, and the findings are consistent with two county-level studies. In Maryland, by way of illustration, the 10 precincts with the lowest number of machines per voter had, on average, more than double the percentage of Latino voting age citizens (19 percent) as the statewide average (7 percent).

- **Precincts with the longest lines had fewer machines, poll workers, or both.** This is the first multi-state study to assess machine and poll worker allocation. Our findings are consistent with the one other study of machine allocation, which focused on one particular county. In Florida, for example, the 10 precincts with the longest lines had nearly half as many poll workers per voter as the statewide average.

- **There is widespread non-compliance with existing state requirements setting resource allocation.** Both Maryland and South Carolina set certain requirements for what polling places are supposed to provide voters, but we found that only 25 percent of the precincts studied in South Carolina and 11 percent of the precincts in Maryland complied with these requirements.

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In the three studied states, race had a statistically significant relationship with line length and resource allocation on Election Day. Because all voters should be able to cast a ballot without excess delay, we recommend:

States take major steps to ensure that all polling places have sufficient voting machines and poll workers.

- Policymakers and election officials should identify effective standards for the allocation of resources. There are different ways to set standards. Some states are like Maryland and South Carolina in that they allocate resources by setting maximum limits on the number of registered voters that can be served by a machine or poll worker. Other allocation standards set a maximum acceptable wait time and expect resources to be set to comply with that wait time. For example, the presidential commission determined that no voter should generally wait longer than 30 minutes. This analysis did not evaluate the strength or weaknesses of either approach, but it did demonstrate that there was a greater variation in distribution of machines and poll workers in Florida counties (and even among polling locations in the same county), which has no standards, than in Maryland and South Carolina, which has some resource allocation standards.

- Legislators must provide election officials the means, including financial resources, to responsibly equip polling locations. Election administrators are responsible for ensuring that counties have enough voting machines and that those machines are working properly. They are also responsible for recruiting and training enough poll workers. To achieve this, they must have sufficient resources. Election administration must be appropriately funded.

States pay special attention to precincts with high numbers of minority voters, which tend to get fewer such resources.

- Election officials must ensure that resource allocation is done in an equitable and non-discriminatory manner. Great care must be taken to monitor how polling place resources are distributed, and to identify and eliminate any disparities in allocation based on race.

- Election officials should standardize the reporting practices for the allocation of Election Day resources. Good data is essential for appropriate management and allocation of polling place resources. Unfortunately, relevant data is not consistently retained or made readily accessible. For example, the Maryland State Board of Elections was able to provide data on the number of voting machines per precinct, but was unable to provide the number of poll workers per precinct. South Carolina was able to provide machine allocation numbers for each precinct, while poll worker data could only be obtained county-by-county. In Florida, requested data had to be collected on a county-by-county basis. Improvements in election administration should include a requirement that data be made available and collected in a standardized fashion through the collaboration of state and local election offices. This should also apply to other data that would help election officials make resource allocation decisions, such as the time it takes a voter to check in at a polling location and how long it takes a voter to cast a ballot.

- Election officials should have a plan for making last-minute adjustments to accurately target and serve potential voter turnout on Election Day. Election officials should be able to predict, with some degree of accuracy, potential turnout before Election Day and plan resource allocation accordingly. In Florida, we were able to calculate how many Election Day eligible voters there were based on the number of people who voted early and absentee. Unexpected outcomes and glitches will occur, however, even with the best-laid plans, and election officials need the flexibility to make last-minute adjustments.

Legislators and election officials enforce existing standards for resource allocation.

- Many of the precincts with longer wait times in this analysis were not in compliance with their state's standards for resource allocation. Our findings indicate, generally, that precincts with more resources per voter had shorter lines.

- States should periodically review their standards to ensure they are appropriate. States should enforce existing standards to ensure that all precincts are in compliance.

Reforms Today to Curb Big Money

Lawrence Norden

The Supreme Court's Citizens United *decision unleashed an era of unprecedented pay-to-play politics. Long-term constitutional change must be part of the answer. But there are immediate steps that can be taken to curb the outsize influence of big donors and super PACs and restore voters' trust in their political institutions.*

Four years ago today, the Supreme Court ushered U.S. democracy into a new age of big money and pay-to-play politics. In *Citizens United v. Federal Election Commission,* the court ruled in favor of unlimited independent political spending by corporations and other outside groups, which ultimately led to the creation of "super political action committees," or super PACs. The consequences were immediate and clear: Outside campaign spending exploded, making politicians more beholden than ever to their biggest donors, and creating an appearance of political corruption that threatens to further undermine voters' trust in U.S. democracy.

Although overturning the *Citizens United* decision would be the most direct path to undoing big donors' newest power to secure special treatment, that is unlikely without a shift in the court's membership. For the foreseeable future, reasonable people will continue to debate the constitutional question of what kind of spending is protected by the First Amendment and who — or what — can exercise that right. The good news is that, even absent a new Supreme Court decision, other steps can be taken to restore protections against undue donor influence and voters' trust in their political institutions.

The problem isn't just that *Citizens United* has caused political spending to rise, although the $1 billion spent by outside groups in the 2012 election is more than the total outside spending reported in the preceding 30 years combined. It's also that the type of "independent" super PAC spending the decision encouraged is often closely tied to candidates themselves.

In 2012, super PACs run by former staffers and close advisers supported Mitt Romney, Barack Obama, and many other presidential candidates. The model will be ubiquitous in 2014. One legislator's former chief of staff now running a super PAC boasted: "I know the donors. I know his operation."

Close political advisers, longtime associates, or others with clear access to elected officials should be barred from running super PACs that collect money to spend on those officials' campaigns.

We need stronger barriers against coordination between candidates and "independent" groups. Close political advisers, longtime associates, or others with clear access to elected officials should be barred from running super PACs that collect money to spend on those officials' campaigns. This is an action Congress or the Federal Election Commission can take.

This op-ed appeared in *The Christian Science Monitor,* January 21, 2014.

The best way forward is legislation establishing a national public financing system that matches small donations.

Voters also deserve to know who is trying to influence them. The Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC) must help ensure there is clear disclosure of who is donating to independent groups. This will help give voters the information they need to understand exactly what a group is hoping to get out of a candidate's election.

In particular, the IRS needs to issue clear rules on what constitutes "campaign-related political activity" and ensure that organizations cannot use their tax-exempt nonprofit status to hide political donors. To its credit, the IRS has started this process by proposing new rules, but many details must still be worked out. The SEC must also consider a rule requiring public companies to disclose information about their political spending. Shareholders, and the public, have a right to know if corporations are pushing a political agenda.

But only comprehensive reforms to the structure of the campaign finance system can truly restore fairness, transparency, and accountability to U.S. elections. The best way forward is legislation establishing a national public financing system that matches small donations. This will elevate the voices of average voters and allow politicians to avoid dependence on the biggest donors.

Pushing federal-level legislation through will be tough. But citizens can take action at the state and municipal level. In New York City, public campaign financing adopted more than 15 years ago has drastically changed the way candidates raise money: Instead of focusing almost exclusively on big donors, candidates spend more time raising small donations from people in their communities.

Candidates frequently claim to be unhappy about outsized, outside spending but say nothing can be done in light of *Citizens United*. Yet Democratic Sen. Elizabeth Warren and Republican Scott Brown defanged super PACs in their 2012 Massachusetts Senate contest when they signed the "People's Pledge," whereby each agreed that if either campaign benefited from a third-party ad, it would pay a penalty to a charity chosen by the other side. The result was a cessation of outside spending.

To be sure, the People's Pledge was a good idea, but it hasn't been replicated in a major contest. And relying on candidates to police themselves is not enough. Such agreements will not curb the growing influence of the biggest outside spenders. Broader systemic changes are still required.

In just four years, *Citizens United* has shifted U.S. democracy drastically in favor of wealthy political contributors. Clearer coordination rules, stronger disclosure, and, ultimately, public campaign financing constitute common-sense solutions to help put average voters back in charge.

Stop Hiding the Ball on Corporate Political Activity

Ciara Torres-Spelliscy

It's time for corporations to start telling their owners — the shareholders — what they're spending on politics.

Shareholders want corporations to quit hiding the ball on how corporate dollars are spent on politics. This proxy season, investors kept up the pressure to learn more about corporate political activity — both classic campaign spending as well as lobbying expenditures — through a spate of shareholder proposals.

According to one 2014 Proxy Preview, shareholders filed 126 proposals on corporate political activity this season, including asking for more transparency for political spending and lobbying. Chair of the Securities and Exchange Commission (SEC) Mary Jo White has addressed shareholder proposals generally, encouraging corporate managers to listen to shareholder proposals. Speaking at the Stanford University Rock Center for Corporate Governance in June 2014, she stated: "[L]ook thoughtfully at the proposals shareholders are submitting to your company.... Look at the voting results at shareholder meetings — the percentage of votes for a shareholder — supported resolution or against a management — supported resolutions are important, irrespective of whether the resolution is approved, or not."

Joe Schmo off the street can't just get a proposal on a corporate proxy — the ballot where shareholders vote annually on key matters of corporate concern like re-electing the board of directors. Rather, under the SEC's gatekeeping Rule 14a-8, to get on the corporate proxy, a shareholder must have continuously held at least $2,000 in market value or 1 percent of the company's securities for at least one year by the date the shareholder's proposal is submitted. To keep the proposal on the proxy year after year, shareholder proposals must garner at least 3 percent of the total vote the first year, 6 percent of votes in the second year, and 10 percent the third year.

Over 125 companies are voluntarily disclosing their political spending.

This proxy season, there was a particular interest by shareholders in corporate lobbying, which makes perfect sense. Corporate lobbying can signal a corporation's appetite for risk as revealed by a working paper by Benjamin M. Blau, Tyler J. Brough, and Diana W. Thomas, entitled *Corporate Lobbying, Political Connections, and the 2008 Troubled Asset Relief Program.* This paper found: "Firms that lobbied had a 42 percent higher chance of receiving TARP [bailout] support than firms that did not lobby. Similarly, politically connected firms had a 29 percent higher chance of receiving [bailout] support than non-connected firms." In other words, lobbying firms may be taking existential risks to the point of needing governmental bailouts to survive.

During this year's proxy season, shareholder majorities endorsed proposals at Lorillard and at Valero Energy — where a majority voted for disclosure of lobbying — and at Dean Foods

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— where a majority voted for disclosure of campaign spending.

Aside from these majority votes, there have been some very high-percentages votes in favor of more political transparency. At Duke Energy, for example, 49.3 percent voted for campaign spending disclosure. If the corporations refuse to budge on the disclosure issue, these high votes mean they are likely to have a similar battle with investors on their hands next year.

According to the Center for Political Accountability, over 125 companies are voluntarily disclosing their political spending. This is in response to years of high votes on transparency in what is now nearly a decade-long campaign to bring sunlight to corporate political spending.

The Center for Public Integrity looked at the spending by voluntarily reporting companies earlier this year and found that "roughly 83 percent of the $173 million in self-reported funds flowed to trade associations, including major political players like the [U.S.] Chamber [of Commerce], America's Health Insurance Plans, and the American Petroleum Institute."

In other words, if the companies that are voluntarily disclosing their spending stop disclosing, there will be no way to know if they continue to give, since corporations are not generally spending through transparent PACs. This is an issue because so much money in American politics is untraceable. A $2.5 million donation by Chevron in 2012 was an exception that proved the rule. In 2012, $300 million was spent in dark money in the federal election alone. And OpenSecrets.org finds that 2014 is on track to be the darkest election yet.

This may be one of the things driving proposals to change SEC rules by the U.S. Chamber of Commerce — one of the biggest dark money trade groups that spends in American elections. The Chamber is trying to flip Rule 14a-8 on its head to make it harder for shareholders to file proposals and to increase the threshold of the percentage of votes required to resubmit a shareholder resolution year after year.

Shareholders are sick of the shell game of trying to guess which firm is spending corporate dollars on politics. More firms need to step up and let their shareholders know the truth. After all, if this spending is for shareholders' benefit, why do corporate insiders persist in hiding the ball from their own investors?

CONSTITUTIONAL CHANGE

A New Money in Politics Jurisprudence

Michael Waldman

The U.S. Supreme Court has found seven campaign finance laws unconstitutional since 2006. In response, the Brennan Center convened distinguished legal scholars and advocates to fundamentally rethink the framework for regulating money in politics.

We are at a signal moment in the long struggle for democracy in America — and the long struggle to make sure the Constitution serves not as an obstacle to democracy but as an enabler of it. A number of us have recognized for a long time that it would be deeply valuable, even vital, to rethink the long term jurisprudence of money and politics. Now the Supreme Court gives us no choice.

When the Brennan Center was founded almost two decades ago, one of the central and initial steps it took was to suggest that *Buckley v. Valeo* should be reconsidered or overturned. Now, a recent string of decisions leaves *Buckley* in tatters. The entire edifice that has governed the role of money in elections and the interplay between the First Amendment and these other values has been largely knocked down.

At the Brennan Center, we are working on a long-term drive to change the constitutional doctrine governing money in politics.

So what can we do? This is not going to be a kvetch session about *McCutcheon v. FEC* or anything else. We've all had various opportunities to either praise or vent, to take note of the incredible narrowing, in that opinion, of what corruption means. Basically, what's left is if you've got "American Hustle" or Abscam — an actual video of somebody handing over a suitcase with cash — then that's corruption. But most of the things that might concern us are, as the justices said, "a central feature of democracy."

What we hope to do is what Abraham Lincoln urged Americans to do in another time of constitutional rethinking. As he said then: "As our case is new, we must think anew and act anew. We must disenthrall ourselves, and then we shall save our country."

One of the key ways to disenthrall ourselves is to recognize there are really deep complex questions and that if there ever were simple answers they're not in evidence any longer. The folks here emphatically do not share necessarily the same views about how to interpret the First Amendment, how to interpret the Constitution, or what even the ultimate policy goals should be. So, the first thing we hope is there will be no self-censorship.

These remarks were delivered at a Brennan Center conference, *Money in Politics 2030: Toward a New Jurisprudence,* May 1, 2014.

What does thinking anew mean? The good news is there is a really wide array of alternative approaches to constitutional thinking, alternative jurisprudential arguments beyond *Buckley*, and certainly beyond the Court's current interpretation of the law, that have been percolating since *Citizens United*. Many of us have had the chance to talk about these issues, but as these alternate approaches start to gel, there are really interesting and important questions to ask about them.

A great place to start is "electoral integrity." That is the alternative to a narrow reading of corruption. It was embraced by the four dissenters in *McCutcheon*, which we think is really the first time that there's been such a significant break in *that* direction from the *Buckley* framework. What does this powerful concept mean? How can it be deepened? What are the implications of it? What could it be applied to beyond the four corners of a case like *McCutcheon*?

What about our old friend "corruption"? It's still the rationale the Court will accept as the justification for campaign finance regulation. But even before it was narrowed as much as it was in *McCutcheon*, there are real questions to be asked, research to be done, and arguments to be made about how to define corruption and how to argue that something is or is not corrupt. There is learning that can brought in from other disciplines and parts of the law — antitrust, securities law, behavioral economics — all these ways that people think about what corruption is that is not just a *quid pro quo* or handing over a check. And given that the Court still very often is in thrall to an originalist approach, what can we learn from what the Founders thought about corruption? We've certainly seen some amicus briefs and some research, but there's more to be done. When you realize that James Madison himself helped form the first political party in part because of concern over the First Bank of the United States and its potential corrupting influence, there is ground to be made up and work to be done.

And what about "equality," in the context of the Court's jurisprudence and arguments? It's "he who must not be named." Political equality is at the heart of America's civic religion, and it's massively powerful with the public, yet the one thing you can't do is mention it in a brief or in a court when it comes to a campaign finance case. How can we square that circle? Or should we *try* to square that circle? How can you win in the court of public opinion — which is the precursor to winning in the court of law — without finding a way to incorporate what is both a real argument and also a really powerful argument? Are there other underlying values that should be expanded out as usable theories? Burt Neuborne has talked about democracy as one of the subtexts of the Constitution. Justice Stephen Breyer has, too. How can that be built in, how does that tie up with electoral integrity? There are really exciting alternate models that are being thought about.

Lincoln also urged us to act anew. At the Brennan Center, we are working very hard to be part of a long-term drive to change the constitutional doctrine, to mount the kind of campaign to see *Citizens United,* certainly, but even the mistaken elements of *Buckley* and other cases, overturned by the court, or at least no longer the way the Constitution was read and interpreted.

And in thinking about this we will draw sometimes inspiration and sometimes valuable lessons from other recent successful drives for constitutional change. I just finished writing a book on the Second Amendment. The drive toward *Heller* was a classic example of how to win constitutional change. We've seen it in marriage equality in a breathtakingly short period of time, but again a classic. We saw it in the drive to get these cases before the Supreme Court waged by James Bopp and others who opposed the campaign finance laws. All of those and other similar drives began just like this — from considerations of doctrine to considerations of ideas to moving public opinion to making those ideas from the academy part of litigation to dissents, and hopefully, eventually, to the law of the land. Each one of these took years. Each one changed the country for worse or for better.

Building a Democracy-Friendly First Amendment

Johanna Kalb and Burt Neuborne

After the Center's jurisprudence convening, the conversation continues in an online symposium to explore and develop a new constitutional doctrine governing money in American elections. This introductory piece explains how the high court has failed to appreciate the need for regulation to ensure an open marketplace of ideas.

Last term's 5-4 decision in *McCutcheon v. FEC* represents the sixth consecutive decision of the Roberts Court invalidating a campaign finance regulation on First Amendment grounds. *McCutcheon* struck down the federal cap on the total amount ($123,200) that any single donor could contribute to candidates and parties during a federal election cycle, over and above the unlimited amounts he could expend on his own. While the immediate impact of the decision is likely to be minimal in a campaign finance system already awash in cash, *McCutcheon*'s enduring legacy may be its vision of an entirely privatized political marketplace.

Over the last decade, the conservative majority on the Roberts Court has invoked free market metaphor to turn the First Amendment into a deregulatory device.

The free market metaphor has a long lineage in the Court's First Amendment jurisprudence, dating back to Justice Holmes's iconic dissent in *Abrams v. United States*, where he argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." But just as the unregulated economic marketplace does not always lead to the most competitive trade in goods (hence the need for antitrust and securities regulation), an unregulated political marketplace does not inevitably produce a robust trade in ideas. Since *Buckley v. Valeo*, the Supreme Court has repeatedly glorified the myth of the electoral free market, while undervaluing the need for reasonable regulation to ensure a genuinely open marketplace of ideas.

Over the last decade, the conservative majority on the Roberts Court has invoked free market metaphor to turn the First Amendment into a deregulatory device. In so doing, as Ciara Torres-Spelliscy explains in her contribution to this collection, the Court has disavowed precedent that permitted government to correct distortions in the political marketplace, particularly those caused by accumulated wealth. As a result, after *McCutcheon*, the government's interest in regulating political spending is vanishingly small — limited to preventing *quid pro quo* corruption (or the transparent exchange of cash for votes) and requiring disclosure of the source of campaign funds. If the deregulatory trend continues, as Justice Thomas's concurrence suggests it will, even the few remaining limits on political spending are at risk.

This piece appeared in the Brennan Center and *New York University Law Review's* online symposium, *Money in Politics 2030: Toward a New Jurisprudence,* October 2014.

In its immediate aftermath, the *McCutcheon* Court was roundly criticized for being divorced from reality and "incoherent." More disturbing, though, is the likelihood that the Roberts Court's vision of politics is entirely coherent, with *McCutcheon* representing a new beginning, rather than an end, to its deregulatory agenda.

In a notable passage in *McCutcheon*, Chief Justice Roberts defined First Amendment rights of political participation to include running for office, voting, urging others to vote, volunteering, and contributing. As Yasmin Dawood notes, this account demotes voting to a form of political participation under the First Amendment, rather than what it was recognized in *Yick Wo v. Hopkins* to be: the "fundamental political right … preservative of all rights." Reducing the status of voting rights makes sense in the logic of the deregulated political marketplace. The *McCutcheon* Court's discussion of the aggregate contribution limits highlights its concern that through this cap on political spending, the government impermissibly privileged some forms of participation over others, and thereby distorted the electoral debate. Put more plainly, the wealthy, who would prefer to participate with cash, were the only ones whose political activity was restricted.

Viewed through such a lens, the primacy of voting rights could also be challenged as unnecessarily redistributive. Voting is a form of political participation in which each citizen's influence is formally equal. If the goal is to have a deregulated marketplace of ideas shaped through individual interactions rather than government intervention, the privilege of voting looks like a heavy finger on the scale. By choosing to represent voting as just one of many forms of influence, the *McCutcheon* Court may reduce the relative value and power of the most important egalitarian form of political activity, in favor of permitting the most "engaged" citizens to increase their control over the political process. What the *McCutcheon* Court fails to acknowledge, perhaps quite intentionally, is that this move further erodes the boundaries between economic and political power by giving increased weight to the many forms of participation that are facilitated by wealth. In the post-*McCutcheon* world, the most engaged citizens are also the richest.

Recognizing the Court's deregulatory mindset, many of the voices in this collection explore ways to build a representative democracy that works despite the First Amendment, not because of it. *McCutcheon*'s silver lining, some have posited, is that it could redirect the flow of financial contributions into the political parties. Samuel Issacharoff argues that this would be a positive development because candidates and parties represent a more responsible and accountable alternative to independent expenditure groups. The essays by Professor Michael J. Malbin and Professors Joseph Fishkin and Heather K. Gerken both extend and challenge this account. Malbin's empirical evidence undermines the assumption that the major political parties have been weakened by campaign finance regulation and leads him to question whether reinvigorating them with an influx of cash would lead to a healthier democracy. Fishkin and Gerken reach a similar conclusion but by a different path. In their view, the emergence of powerful independent organizations (like Obama for America or the Crossroads groups) represents a transfer of power *within* the parties, but one that shifts authority away from the "party faithful" and toward a handful of small donors. In their framing, the problem is not the weakening of the parties vis-à-vis other groups; it's the restructuring (or "hollowing out," as Kate Andrias puts it) of the parties in a way that diminishes their representative function. Thus, they too question whether wealthier parties would improve democratic outcomes. Andrias takes their line of analysis one step further, moving beyond the party paradigm to advocate for rebuilding other representative organizations that could provide a people-centered counterweight to big political spending.

Another set of essays looks at restructuring the rules of the game to reduce the importance of political spending in campaigns without running into the limitations imposed by the Roberts Court's interpretation of the First Amendment. Edward B. Foley encourages creative thinking about the ways that technology

We live now in "an accidental democracy built by judges," where the will of the people has little influence on the behavior of government.

could help to expand the importance of electoral spheres where the equality norm reigns, like on the ballot and in public debates. But as Lisa Marshall Manheim's response reminds us, a technological fix comes with its own new set of challenges, introducing new avenues for manipulation and distortion.

The shift in focus from doctrine to structure evidenced in these essays is a positive development in the field of election law. As Justin Levitt observes, attempts to fashion an electoral system indirectly through constitutional law often lead to results that are odd or even perverse. Moreover, thinking through institutional solutions to our electoral problems requires developing a much more serious and realistic understanding of how we would like our politics of representation to work.

Despite the participants' innovative and praiseworthy efforts, however, the notion that the Roberts Court's First Amendment is an obstacle rather than an aid in our exercise of self-government is a tragedy. As Justice Breyer noted in his *McCutcheon* dissent, deciding First Amendment cases without considering the quality of the democracy they produce is to miss the point entirely. As the exchange between Professors Justin Levitt and Richard L. Hasen over "electoral integrity" suggests, no consensus has emerged around an alternative vision that could challenge the developing hegemony of the Roberts Court's First Amendment. Thus, while the participants' thoughtful essays have started us down the path, there is more work to be done in developing a vision of a democracy-friendly First Amendment (rather than a First Amendment-friendly democracy). We live now in "an accidental democracy built by judges," where the will of the people has little influence on the behavior of government. If the Roberts Court's wholly deregulatory First Amendment triumphs, that is not only our present, it is our future.

Finding a New Balance Between Money and Speech

Robert Post

The Yale Law School dean posits a new constitutional basis for regulating campaign funding: the need to preserve "electoral integrity." In the Supreme Court's McCutcheon *case, the four dissenters, led by Justice Stephen Breyer, embraced that view, and cited Post's book.*

I have been teaching the First Amendment my whole professional career — 30 or 40 years — and I have always shied away from trying to teach the campaign finance cases. On the one hand they plainly limit speech and the most essential aspect of speech — speech about what we should do as a country, who should we elect, and their purpose. And on the other hand, if you wanted to have a system that worked, you had to have some structuring of campaign finance. How do you put these two things together? The Court, when it first confronted this issue in 1976 in *Buckley v. Valeo,* which has structured all our jurisprudence since then, basically had a compromise. It said, look, it's really important that elections work, so we'll stop corruption, we'll allow you to put limits on contributions, but it's really important that people speak freely, so you can't limit independent expenditures, which we conceptualize as pure speech. That compromise was built in from the beginning. That compromise through the present institution of super PACs has undermined the compromise to the point now where it's basically free season for money in politics. Many of us who care about the integrity of the electoral process are in despair.

I was less outraged by the Citizens United *conclusion than by the reasoning the Court engaged with to reach the conclusion.*

So the question is: How do we go back and rethink the problem in a way that both understands why it's a dilemma and allows us to transcend the dilemma, and that's what the book is an effort to do. The book starts from an insight that's both simple and extremely hard to get your mind around. When I went back to look at *Citizens United*, I was outraged by that case. But I was less outraged by the conclusion than by the reasoning the Court engaged with to reach the conclusion, which struck me as extravagant and stupid and really indifferent to any of the genuine principles of the First Amendment.

I wanted to start there and think again: How should one reason through the problem that *Citizens United* put on the table? If you look at the case afresh, one is struck by the following fact: The majority opinion for five justices by Kennedy is about democracy. It's about how we govern ourselves. It's about the value of self-governance, and it has a certain conception of self-governance. That conception is that we govern ourselves by talking to each other, by forming

Remarks excerpted from a Brennan Center talk promoting Post's book, "Citizens Divided: Campaign Finance Reform and the Constitution," June 18, 2014.

The First Amendment allows for self-government. It's our means of democracy, Kennedy says in Citizens United.

public opinion, and by having government responsive to public opinion. We have First Amendment rights and those rights exist for a purpose. As Kennedy says, it's the way in which we do democracy in this country. So the government is responsive to me insofar as I'm able to form or shape public opinion. That's the picture in the majority opinion. The dissenting four justices say self-governance is really important, but we do self-governance by electing representatives who represent us.

The theory of self-governance in the dissent is a theory of representation that works through the institution of elections. The theory of self-governance in the majority is a theory of communicative interaction in the public sphere. These are the two different theories we have on tap. Notice that they both agree that we need self-governance. That is a master virtue of the American scene since the Revolution. As Jefferson said, we engaged in a revolution in order to acquire the blessings of self-governance. The question at that level of abstraction posed by *Citizens United* is how do we balance out the idea of self-governance understood as a system of representation — elections, representatives — versus self-governance as a system of communicative interaction. How do these two things fit together?

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I'm going to suggest a way we can unify this jurisprudence, and unify it from the point of view of the First Amendment. I know the campaign finance reform community views the question of self-governance through the lens of representation. I'm going to give you an explanation that is not about representation.

The First Amendment allows for self-government — it's our means of democracy, Kennedy says in *Citizens United*. It allows for democracy because everyone can participate in the formation of public opinion and the government is responsive to it. That's the logic of the First Amendment. I've said nothing about representation. I've talked only about discursive democracy and communication. So why do we know that the government is responsive to public opinion? We have only one mechanism to make the government responsive to public opinion: elections. Therefore, from the perspective of the First Amendment — not from the perspective of representation — if elections do not produce officials whom the public believes are responsive to public opinion, First Amendment rights will fail. There's no reason to have First Amendment rights. Because First Amendment rights are there to establish self-governance for us, and if I talk but the government doesn't listen, it can't be a mechanism, it can't be a vehicle of self-governance. It requires us, moreover, to *believe* that the government officials are responsive. Why is that? Because no people can be self-governing unless they believe themselves to be self-governing. They can't be unconsciously self-governing. They have to know themselves to be self-governing. Therefore, they have to believe that public officials are responsive to public opinion. It follows from that, that it is a compelling interest under the First Amendment, not under representation, but under the First Amendment, that elections be structured.

Remember, since the beginning of this country, since 1789, every American who has thought about this problem seriously has said the relationship between elected officials and the electorate is always a matter of institutional design. It is a compelling interest that institutional design be such that the people believe that elected officials are responsive to public opinion. That has to be an essential prerequisite of First Amendment rights, that's a compelling interest. Now, put that side by side with what the Court said in *Citizens United* and more recently in *McCutcheon*, which is, the only compelling interest for campaign finance reform is the abandonment of corruption. Well, corruption is a theory of representational integrity — is the representative system doing its job? Let's just say that's a compelling interest, you still have to balance it against the First Amendment interest. I just put on the table a compelling interest that's necessary for the very First Amendment rights the government is using to trump the representational integrity that people advance for campaign finance reform. The Court has been completely oblivious to this.

"Electoral integrity" — this is the word Justice Stephen Breyer took from the book [for his *McCutcheon* dissent]. Electoral integrity describes a property of elections such that they produce representatives that people believe are responsive to public opinion. We know that electoral integrity is a historical fact. It can come, it can go, it can be lost, it can be gained. Just to give you a simple example of how oblivious, horrifyingly oblivious, the Court is to this is the Montana case. Right after they decided *Citizens United* there was a case that came up out of Montana that prevented expenditures by corporations, independent expenditures — why? Because in 1912 when the statute in Montana was enacted, the mining corporations owned the state. There were editorials saying: "Why do we even bother having a state flag, why do we even bother having a state legislature? The legislators are owned and bought for by the Anaconda Copper Company and there's no point in voting for them because they're not responsive to public opinion, they're responsive to the copper companies." No one doubts this historically. The Court takes the case and overturns the Montana statute as a matter of law, which tells us they do not understand, as a matter of law, the compelling interest in maintaining what I just defined as electoral integrity. That's the first point. That is an essential point. That's a deep, deep, deep point about the inadequacy of the Court's understanding of the very First Amendment principles that it is invoking to trump campaign finance reform. That's a big lesson right there.

A Debate on 'Electoral Integrity'

Justin Levitt and Richard L. Hasen

Two leading election law scholars use Robert Post's work as a starting point and sort through the debate.

Justin Levitt, *Professor of Law, Loyola Law School, Los Angeles*

One test of the utility of electoral integrity — as a matter of constitutional law and not democratic theory — is whether it lends analytical rigor that reveals a mistaken result in the most controversial cases. I suspect that a court recognizing electoral integrity as the prevailing government interest in campaign finance regulation would merely continue to deliver its existing policy judgment, using different words. In fact, a policy-laden weighing of the relative constitutional value of regulation and speech is exactly what the Court did in *Citizens United*.

In a way, the case for a unifying theory of electoral integrity is made easier by picking *Citizens United* as the vehicle. The decision is badly overwritten, with patches of clumsy logic and a stingy reading of precedent. The standard gloss is that the Court allowed the government to attack only the bluntest forms of *quid pro quo* bribery; independent speech that presents no possibility of prearrangement (according to the Court) may not therefore be regulated. Much language in the opinion lends itself to this literal reading. This reading, in turn, spurs a search for a regulatory principle like Robert Post's, which is focused not on preventing the rare criminal bribe, but on the public interest in preventing a disconnect from the electorate.

Yet there are hints, within the opinion and without, that though the standard gloss accurately describes what the Court *said*, the Court's conclusion was not driven merely by a failure to appreciate the right government interest. At the crux of the opinion, Justice Kennedy seemed to recognize that speakers, including corporations producing independent expenditures, "may have influence over or access to elected officials." But he asserted that "[t]he appearance of influence or access ... will not cause the electorate to lose faith in our democracy." That claim does not ignore the principle of electoral integrity. It recognizes the importance of the principle, but arrives at a different conclusion about the proper constitutional balance.

Excerpted from articles that appeared in the Brennan Center and *New York University Law Review's* online symposium, *Money in Politics 2030: Toward a New Jurisprudence,* October 2014.

Indeed, though Justice Kennedy's conclusion is written as a categorical absolute — an assertion that independent expenditures cannot undermine confidence in the responsiveness of incumbents — it is clear that Justice Kennedy does not really believe that independent expenditures pose no risk to electoral integrity. One year earlier, in *Caperton v. A.T. Massey Coal Co.*, he required the recusal of judges winning elections marked by significant independent expenditures, lest the appearance of "disproportionate influence" jeopardize faith in official decision-making. That is, he recognized that the appearance of influence or access from independent expenditures *could* cause the electorate to lose faith in its elected officials.

At face value, *Caperton* and *Citizens United* are difficult to reconcile. It is possible that the distinction inheres in the judicial role: Perhaps, in the Court's view, the public must not believe that judges heed particular contributors at the expense of their best legal judgment, but the public may believe that legislators heed particular contributors at the expense of "public opinion." If so, that would mean that the Court understands but simply does not value electoral integrity.

But I suspect that the distinction between *Caperton* and *Citizens United* is not that independent expenditures can cause the electorate to lose faith in judges but not legislators or executives. To me, the more persuasive difference is that the issue in *Caperton* involved recusal: a restriction on the behavior of elected officials. The issue in *Citizens United* involved restrictions on speech. The Court understands that some independent expenditures may well have an impact on electoral integrity. But it believes that any calculus favoring electoral integrity at all costs "'is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'" And in a more nuanced balance of competing interests, it believes that the incremental speech value of independent expenditures as a category outweighs any incremental and uncertain detriment to electoral integrity that they may cause.

I readily admit that this is not the primary frame the Court used to describe its conclusion. Post's principle of electoral integrity provides a more coherent vehicle for reconciling the real issues at stake. But if I am right about the underlying basis for the holding, a transparent evaluation of electoral integrity would simply have provided different words for what the Court was already doing.

To see the real core of the Court's work, simply tether the expansive language in *Citizens United* more closely to the issues actually at hand. *Citizens United* confronted the desire of an association unquestionably formed for expressive purposes — like the Sierra Club or the ACLU or the NRA ... or the organization Citizens United — to spend sensibly disclosed money on that expression. It is not clear why the constitutional value of that association's ability to fulfill its expressive mandate should depend on whether its organizational form affords liability protection or whether it is recognized as a member of the institutional press.

Whatever the value of speech distributed by an organization of two or more individuals formed for expressive purposes, it is also not clear why the value of that speech should be different from that of speech by a single individual. And if an individual's speech is constitutionally valuable no matter the origin of that person's wealth, then the speech of an organization formed for expressive purposes should be valuable no matter the origin of its funding.

Against this background, imagine that *Citizens United* had expressly confronted the best argument for regulating such speech to preserve electoral integrity ... and expressly laid out the limitations of such an approach. The Court would have noted the unquestionable importance of preserving electoral integrity, but it also would have recognized that it had no means to discern the degree to which the regulated organizational speech actually fostered or detracted from that integrity. It would have acknowledged the potential for skewed incentives of the regulatory body and the value of the regulated speech. It would further have mentioned that the regulation at issue seemed poorly tailored to preventing only speech that "*actually* undermine[d] faith in democratic responsiveness," in that it prevented organizations like Citizens

United from spending not only $500 million on pre-election broadcasts mentioning candidates, but also $5.

The Court might have explained that without any meaningful constitutional value on the other side of the balance, the desire to preserve electoral integrity would surely justify regulation: There is nothing wrong with promoting citizens' confidence in the fidelity of their representatives if nothing else is at stake. But given the constitutional value of the organizational speech and its uncertain incremental impact on the public perception of representative fidelity, it is not particularly surprising that the Court would — even with a refined framework — decline to engage in the confidence game.

Richard L. Hasen, *Chancellor's Professor of Law and Political Science, UC Irvine School of Law*

As Professor Justin Levitt's exceptionally polite but trenchant critique of Dean Post's "electoral integrity" argument convincingly demonstrates, this electoral integrity argument is simply a variation on a theme which has been around since at least the 1976 case of *Buckley v. Valeo*: a public confidence argument for campaign finance limitations. In *Buckley*, the Court couched this interest as an "appearance of corruption" argument: "Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent." The Court in *McCutcheon* explicitly held that the appearance of corruption interest could not justify the aggregate contribution limits challenged in the case (and in so doing it appeared to narrow the scope of the appearance of corruption argument).

Stricter campaign finance laws are not correlated with higher public confidence in government.

What's worse, as both Professor Levitt and Professor Pam Karlan (in her response to Dean Post in the "Citizens Divided" book) amply demonstrate, social science has not found a convincing link between public confidence and the state of campaign finance laws. That is, while the public likes campaign finance limits and while it has a low opinion of Congress, the two views are not necessarily causally related: Stricter campaign finance laws are not correlated with higher public confidence in government.

That is not to say that there could never be a link. Dean Post may be wrong empirically today but right in predicting the future: It might be that public confidence in government will decline further because of the explosion of outside money wrought by the Roberts Court's campaign finance cases.

Dean Post is one of the sharpest constitutional minds in the country. His book is beautifully written and tells a compelling historical tale of campaigns and speech in the United States. So why would he offer in the prestigious Tanner Lectures as his grand solution to the campaign finance problem a government interest justifying reform that the Court has already rejected and that is largely unsupported by social science evidence? And why would Justice Breyer so eagerly latch on to this interest, viewing it as important enough to cite before Dean Post's book was even available?

My sense is that Dean Post was looking to offer a different label or doctrinal hook to allow the Court (or more likely, a progressive Court, which could well come after the Roberts Court) to reverse the *Citizens United* line of cases consistent with an appearance of fidelity to First Amendment doctrine. Upholding a "new" interest in "electoral integrity" would not require the Court to outright reject the reasoning in earlier cases, making it perhaps more palatable for a Court that would not want to be criticized (as the Roberts Court sometimes is) for overruling precedent.

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When it comes down to it, there are really only three major arguments that have been advanced in the last 40 years to justify limits on money in politics against a charge that such limits violate First Amendment rights of speech and association: an anti-corruption interest, a political equality interest, and a public confidence interest. To be sure, there has been great fighting over what "corruption" means, and as Professor Levitt shows, the Supreme Court majority has simply closed off the presentation of evidence of corruption to justify campaign finance limits. Further, there are a variety of types of corruption, political equality, and public confidence arguments. But it is really just these three interests debated by the Court and commentators: nothing new under the sun.

It may well be that if and when the Supreme Court reverses *Citizens United* and the rest of its deregulatory jurisprudence, the justices will latch on to something like "electoral integrity" or "dependence corruption" to explain the latest reversal. Maybe even some justices will actually believe that these interests represent new arguments not before considered by the Court. But it would be far better from the point of view of coherent doctrine and sound policy for the Court to transparently and forthrightly relate these new arguments to the old, and to explain where the Court went wrong before and what path it should take going forward.

How the NRA Rewrote the Second Amendment

Michael Waldman

How does constitutional change happen? Gun rights advocates won a big victory when the U.S. Supreme Court ruled in 2008 that the Second Amendment recognizes an individual right to gun ownership. In this adaptation of his book, "The Second Amendment: A Biography," Waldman explains how the NRA waged a successful campaign for change.

"A fraud on the American public." That's how former Chief Justice Warren Burger described the idea that the Second Amendment gives an unfettered individual right to a gun. When he spoke these words to PBS in 1990, the rock-ribbed conservative appointed by Richard Nixon was expressing the longtime consensus of historians and judges across the political spectrum.

Twenty-five years later, Burger's view seems as quaint as a powdered wig. Not only is an individual right to a firearm widely accepted, but increasingly states are also passing laws to legalize carrying weapons on streets, in parks, in bars — even in churches.

Many are startled to learn that the U.S. Supreme Court didn't rule that the Second Amendment guarantees an individual's right to own a gun until 2008.

Many are startled to learn that the U.S. Supreme Court didn't rule that the Second Amendment guarantees an individual's right to own a gun until 2008, when *District of Columbia v. Heller* struck down the capital's law effectively banning handguns in the home. In fact, every other time the Court had ruled previously, it had ruled otherwise. Why such a head-snapping turnaround? Don't look for answers in dusty law books or the arcane reaches of theory.

So how does legal change happen in America? We've seen some remarkably successful drives in recent years — think of the push for marriage equality, or to undo campaign finance laws. Law students might be taught that the Court is moved by powerhouse legal arguments or subtle shifts in doctrine. The National Rifle Association's long crusade to bring its interpretation of the Constitution into the mainstream teaches a different lesson: Constitutional change is the product of public argument and political maneuvering. The pro-gun movement may have started with scholarship, but then it targeted public opinion and shifted the organs of government. By the time the issue reached the Supreme Court, the desired new doctrine fell like a ripe apple from a tree.

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"The Second Amendment: A Biography" was published in May by Simon & Schuster. This article appeared in *Politico,* May 19, 2014.

The Second Amendment consists of just one sentence: "A well regulated militia, being necessary for the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Today, scholars debate its bizarre comma placement, trying to make sense of the various clauses, and politicians routinely declare themselves to be its "strong supporters." But in the grand sweep of American history, this sentence has never been among the most prominent constitutional provisions. In fact, for two centuries it was largely ignored.

The amendment grew out of the political tumult surrounding the drafting of the Constitution, which was done in secret by a group of mostly young men, many of whom had served together in the Continental Army. Having seen the chaos and mob violence that followed the Revolution, these "Federalists" feared the consequences of a weak central authority. They produced a charter that shifted power — at the time in the hands of the states — to a new national government.

"Anti-Federalists" opposed this new Constitution. The foes worried, among other things, that the new government would establish a "standing army" of professional soldiers and would disarm the 13 state militias, made up of part-time citizen-soldiers and revered as bulwarks against tyranny. These militias were the product of a world of civic duty and governmental compulsion utterly alien to us today. Every white man age 16 to 60 was enrolled. He was actually required to own — and bring — a musket or other military weapon.

On June 8, 1789, James Madison — an ardent Federalist who had won election to Congress only after agreeing to push for changes to the newly ratified Constitution — proposed 17 amendments on topics ranging from the size of congressional districts to legislative pay to the right to religious freedom. One addressed the "well regulated militia" and the right "to keep and bear arms." We don't really know what he meant by it. At the time, Americans expected to be able to own guns, a legacy of English common law and rights. But the overwhelming use of the phrase "bear arms" in those days referred to military activities.

For two centuries, gun rights and gun control were seen as going hand in hand.

There is not a single word about an individual's right to a gun for self-defense or recreation in Madison's notes from the Constitutional Convention. Nor was it mentioned, with a few scattered exceptions, in the records of the ratification debates in the states. Nor did the U.S. House of Representatives discuss the topic as it marked up the Bill of Rights. In fact, the original version passed by the House included a conscientious objector provision. "A well regulated militia," it explained, "composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person."

Though state militias eventually dissolved, for two centuries we had guns (plenty!) and we had gun laws in towns and states, governing everything from where gunpowder could be stored to who could carry a weapon — and courts overwhelmingly upheld these restrictions. Gun rights and gun control were seen as going hand in hand. Four times between 1876 and 1939, the U.S. Supreme Court declined to rule that the Second Amendment protected individual gun ownership outside the context of a militia. As the Tennessee Supreme Court put it in 1840, "A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty

years, and yet it would never be said of him that he had borne arms; much less could it be said that a private citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in a cane."

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Cue the National Rifle Association. We all know of the organization's considerable power over the ballot box and legislation. Bill Clinton groused in 1994 after the Democrats lost their congressional majority, "The NRA is the reason the Republicans control the House." Just last year, it managed to foster a successful filibuster of even a modest background-check proposal in the U.S. Senate, despite 90 percent public approval of the measure.

What is less known — and perhaps more significant — is its rising sway over constitutional law.

The NRA was founded by a group of Union officers after the Civil War who, perturbed by their troops' poor marksmanship, wanted a way to sponsor shooting training and competitions. The group testified in *support* of the first federal gun law in 1934, which cracked down on the machine guns beloved by Bonnie and Clyde and other bank robbers. When a lawmaker asked whether the proposal violated the Constitution, the NRA witness responded, "I have not given it any study from that point of view." The group lobbied quietly against the most stringent regulations, but its principal focus was hunting and sportsmanship: bagging deer, not blocking laws. In the late 1950s, it opened a new headquarters to house its hundreds of employees. Metal letters on the facade spelled out its purpose: firearms safety education, marksmanship training, shooting for recreation.

The NRA testified in support of the first federal gun law in 1934, which cracked down on the machine guns beloved by Bonnie and Clyde and other bank robbers.

Cut to 1977. Gun-group veterans still call the NRA's annual meeting that year the "Revolt at Cincinnati." After the organization's leadership had decided to move its headquarters to Colorado, signaling a retreat from politics, more than a thousand angry rebels showed up at the annual convention. By four in the morning, the dissenters had voted out the organization's leadership. Activists from the Second Amendment Foundation and the Citizens Committee for the Right to Keep and Bear Arms pushed their way into power.

The NRA's new leadership was dramatic, dogmatic, and overtly ideological. For the first time, the organization formally embraced the idea that the sacred Second Amendment was at the heart of its concerns.

The gun lobby's lurch rightward was part of a larger conservative backlash that took place across the Republican coalition in the 1970s. One after another, once-sleepy traditional organizations galvanized as conservative activists wrested control.

Conservatives tossed around the language of insurrection with the ardor of a Berkeley Weatherman. The "Revolt at Cincinnati" was followed by the "tax revolt," which began in California in 1979, and the "sagebrush rebellion" against Interior Department land policies. All these groups shared a deep distrust of the federal government and spoke in the language of libertarianism. They formed a potent new partisan coalition.

Politicians adjusted in turn. The 1972 Republican platform had supported gun control, with a focus on restricting the sale of "cheap handguns." Just three years later in 1975, preparing to challenge Gerald R. Ford for the Republican nomination, Ronald Reagan wrote in *Guns & Ammo* magazine, "The Second Amendment is clear, or ought to be. It appears to leave little if any leeway for the gun control advocate." By 1980 the GOP platform proclaimed, "We believe the right of citizens to keep and bear arms must be preserved. Accordingly, we oppose federal registration of firearms." That year the NRA gave Reagan its first-ever presidential endorsement.

Today at the NRA's headquarters in Fairfax, Virginia, oversized letters on the facade no longer refer to "marksmanship" and "safety." Instead, the Second Amendment is emblazoned on a wall of the building's lobby. Visitors might not notice that the text is incomplete. It reads:

".. the right of the people to keep and bear arms, shall not be infringed."

The first half — the part about the well regulated militia — has been edited out.

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From 1888, when law review articles first were indexed, through 1959, every single one on the Second Amendment concluded it did not guarantee an individual right to a gun. The first to argue otherwise, written by a William and Mary law student named Stuart R. Hays, appeared in 1960. He began by citing an article in the NRA's *American Rifleman* magazine and argued that the amendment enforced a "right of revolution," of which the Southern states availed themselves during what the author called "The War Between the States."

At first, only a few articles echoed that view. Then, starting in the late 1970s, a squad of attorneys and professors began to churn out law review submissions, dozens of them, at a prodigious rate. Funds — much of them from the NRA — flowed freely. An essay contest, grants to write book reviews, the creation of "Academics for the Second Amendment," all followed. In 2003, the NRA Foundation provided $1 million to endow the Patrick Henry professorship in constitutional law and the Second Amendment at George Mason University Law School.

This fusillade of scholarship and pseudo-scholarship insisted that the traditional view — shared by courts and historians — was wrong. There had been a colossal constitutional mistake. Two centuries of legal consensus, they argued, must be overturned.

If one delves into the claims these scholars were making, a startling number of them crumble. Historian Jack Rakove, whose Pulitzer Prize-winning book "Original Meanings" explored the Founders' myriad views, notes: "It is one thing to ransack the sources for a set of useful quotations, another to weigh their interpretive authority.... There are, in fact, only a handful of sources from the period of constitutional formation that bear directly on the questions that lie at the heart of our current controversies about the regulation of privately owned firearms. If Americans has indeed been concerned with the impact of the Constitution on this right ... the proponents of individual right theory would not have to recycle the same handful of references ... or to rip promising snippets of quotations from the texts and speeches in which they are embedded."

And there were plenty of promising snippets to rip. There was the ringing declaration from Patrick Henry: "The great object is, that every man be armed." The eloquent patriot's declaration provided the title for the ur-text for the gun rights movement, Stephen Halbrook's 1984 book, "That Every Man Be Armed." It is cited reverentially in law review articles and scholarly texts. The Second Amendment professorship at George Mason University is named after Henry. A $10,000 gift to the NRA makes you a "Patrick Henry Member."

The quote has been plucked from Henry's speech at Virginia's ratifying convention for the Constitution in 1788. But if you look at the full text, he was complaining about the cost of both the federal government

and the state arming the militia. ("The great object is, that every man be armed," he said. "At a very great cost, we shall be doubly armed.") In other words: Sure, let every man be armed, but only once! Far from a ringing statement of individual gun-toting freedom, it was an early American example of a local politician complaining about government waste.

Thomas Jefferson offers numerous opportunities for pro-gun advocates. "Historical research demonstrates the Founders out-'NRAing' even the NRA," proclaimed one prolific scholar. "'One loves to possess arms' wrote Thomas Jefferson, the premier intellectual of his day, to George Washington on June 19, 1796." What a find! Oops: Jefferson was not talking about guns. He was writing to Washington asking for copies of some old letters, to have handy so he could issue a rebuttal in case he got attacked for a decision he made as secretary of state. The NRA website still includes the quote. You can go online to buy a T-shirt emblazoned with Jefferson's mangled words.

Some of the assumptions were simply funny. In his book on judicial philosophy, Supreme Court Justice Antonin Scalia, for example, lauded Professor Joyce Lee Malcolm's "excellent study" of English gun rights, noting sarcastically, "she is not a member of the Michigan Militia, but an Englishwoman." But a historian fact-checked the justice: "Malcolm's name may sound British, and Bentley College, where Malcolm teaches history, may sound like a college at Oxford, but in fact Malcolm was born and raised in Utica, New York, and Bentley is a business college in Massachusetts."

Still, all this focus on historical research began to have an impact. And eventually these law professors, many toiling at the fringes of respectability, were joined by a few of academia's leading lights. Sanford Levinson is a prominent liberal constitutional law professor at the University of Texas at Austin. In 1989, he published an article tweaking other progressives for ignoring "The Embarrassing Second Amendment." "For too long," he wrote, "most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members. That will no longer do." Levinson was soon joined by Akhil Reed Amar of Yale and Harvard's Laurence Tribe. These prominent progressives had differing opinions on the amendment and its scope. But what mattered was their political provenance — they were liberals! (One is reminded of Robert Frost's definition of a liberal: someone so open-minded he will not take his own side in an argument.)

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As the revisionist perspective took hold, government agencies also began to shift. In 1981, Republicans took control of the U.S. Senate for the first time in 24 years. Utah Sen. Orrin Hatch became chair of a key Judiciary Committee panel, where he commissioned a study on "The Right to Keep and Bear Arms." In a breathless tone it announced, "What the Subcommittee on the Constitution uncovered was clear — and long lost — proof that the Second Amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms." The cryptologist discovering invisible writing on the back of the Declaration of Independence in the Disney movie "National Treasure" could not have said it better.

Despite Hatch's dramatic "discovery," a constitutional right to gun ownership was still a stretch, even for the conservatives in Reagan's Justice Department, who were reluctant to undo the work not only of judges, but also of democratically elected legislators. When Ed Meese, Reagan's attorney general, commissioned a comprehensive strategy for jurisprudential change in 15 areas ranging from the "exclusionary rule" under the Fourth Amendment to public initiatives to private religious education, it did not include a plan for the Second Amendment.

But in time, the NRA's power to elect presidents began to shift executive branch policies, too. In 2000, gun activists strongly backed Governor George W. Bush of Texas. After the election, Bush's new attorney general, John Ashcroft, reversed the Justice Department's stance. The NRA's head lobbyist read the new policy aloud at its 2001 convention in Kansas City: "The text and original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms."

In the meantime, the "individual right" argument was starting to win in another forum: public opinion. In 1959, according to a Gallup poll, 60 percent of Americans favored banning handguns; that dropped to 41 percent by 1975 and 24 percent in 2012. By early 2008, according to Gallup, 73 percent of Americans believed the Second Amendment "guaranteed the rights of Americans to own guns" outside the militia.

In time, the NRA's power to elect presidents began to shift executive branch policies, too.

Over the past decade, the idea of a Second Amendment right has become synonymous with conservatism, even with support for the Republican Party. In 1993, for example, *The New York Times* mentioned "gun control" 388 times, and the Second Amendment only 16. By 2008, overall mentions of the issue dropped to 160 but the Second Amendment was mentioned 59 times.

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In the end, it was neither the NRA nor the Bush administration that pressed the Supreme Court to reverse its centuries-old approach, but a small group of libertarian lawyers who believed other gun advocates were too timid. They targeted a gun law passed by the local government in Washington, D.C., in 1976 — perhaps the nation's strictest — that barred individuals from keeping a loaded handgun at home without a trigger lock. They recruited an appealing plaintiff: Dick Heller, a security guard at the Thurgood Marshall Federal Judiciary Building, who wanted to bring his work revolver home to his high-crime neighborhood. The NRA worried it lacked the five votes necessary to win. The organization tried to sideswipe the effort, filing what Heller's lawyers called "sham litigation" to give courts an excuse to avoid a constitutional ruling. But the momentum that the NRA itself had set in motion proved unstoppable, and the big case made its way to the Supreme Court.

The argument presented in *District of Columbia v. Heller* showed just how far the gun rights crusade had come. Nearly all the questions focused on arcane matters of colonial history. Few dealt with preventing gun violence, social science findings, or the effectiveness of today's gun laws — the kinds of things judges might once have considered. On June 26, 2008, the Supreme Court ruled 5-4 that the Second Amendment guarantees a right to own a weapon "in common use" to protect "hearth and home." Scalia wrote the opinion, which he later called the "vindication" of his judicial philosophy.

After the decision was announced, Heller stood on the steps of the court for a triumphant press conference. Held aloft behind him was a poster bearing that quote from Patrick Henry, unearthed by the scholars who had proven so important for the successful drive: "Let every man be armed."

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In January 2014, liberal activists jammed a conference room at the Open Society Foundations in New York City. They were there to hear former NRA president David Keene. "Of course, we really just invited David to coax him into giving us the secret of the NRA's success," joked the moderator.

Improbably, the gun movement's triumph has become a template for progressives, many of whom are appalled by the substance of the victories. Keene was joined by Evan Wolfson, the organizer of Freedom to Marry, whose movement has begun to win startling victories for marriage equality in courts. Once, conservatives fumed about activist courts enforcing newly articulated rights — a woman's right to reproductive choice, equal protection for all races. But just as they learned from the left's legal victories in those fields, today progressives are trying to relearn from their conservative counterparts.

One lesson: patience. The fight for gun rights took decades. Another lesson, perhaps obvious: There is no substitute for political organizing. A century ago the satirical character Mr. Dooley famously said in an Irish brogue, "No matter whether th' Constitution follows th' flag or not, the Supreme Coort follows th' iliction returns." Before social movements can win at the court they must win at the ballot box. The five justices in the *Heller* majority were all nominated by presidents who themselves were NRA members.

But even more important is this: Activists turned their fight over gun control into a constitutional crusade. Modern political consultants may tell clients that constitutional law and the role of the Supreme Court is too arcane for discussion at the proverbial "kitchen table." Nonsense. Americans always have been engaged, and at times enraged, by constitutional doctrine. Deep notions of freedom and rights have retained totemic power. Today's "Second Amendment supporters" recognize that claiming the constitutional high ground goes far toward winning an argument.

Liberal lawyers might once have rushed to court at the slightest provocation. Now, they are starting to realize that a long, full jurisprudential campaign is needed to achieve major goals. Since 2011, activists have waged a widespread public education campaign to persuade citizens that new state laws were illegitimate attempts to curb voting rights, all as a precursor to winning court victories. Now many democracy activists, mortified by recent Supreme Court rulings in campaign finance cases (all with *Heller*'s same 5-4 split), have begun to map out a path to overturn *Citizens United* and other recent cases. Years of scholarship, theorizing, amicus briefs, test cases, and minority dissents await before a new majority can refashion recent constitutional doctrine.

Molding public opinion is the most important factor. Abraham Lincoln, debating slavery, said in 1858: "Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed." The triumph of gun rights reminds us today: If you want to win in the court of law, first win in the court of public opinion.

LIBERTY & NATIONAL SECURITY

How the Torture Could Start Again

Frederick A. O. Schwarz, Jr.

A Senate Intelligence Committee report revealed horrifying details about the CIA's post-9/11 torture programs, finding detainee abuse was far more brutal and widespread than previously known and the program itself was ineffective in producing intelligence. But by narrowing its focus to the CIA instead of exploring the role the White House played, the Senate Intelligence Committee may have left the door open for future, "more effective" torture techniques.

The executive summary of the Senate Intelligence Committee's torture report is full of detail the American public deserved to see, and we learned a lot from Sen. Dianne Feinstein and her colleagues. The problem is that the report cuts off most responsibility with the CIA. As we learned nearly four decades ago, when I served as chief counsel for the U.S. Senate's Church Committee's massive investigation of U.S. intelligence agencies under six presidents — Franklin Roosevelt through Richard Nixon — it is extremely dangerous to let off senior officials in this way. Indeed it only risks *increasing* the likelihood of future use of torture if there is a new calamity like 9/11.

No doubt the Committee had reasons for narrowing its focus to the CIA, and for emphasizing the CIA's lack of effectiveness and misleading statements to overseers about the program and its value, as opposed to also exploring the role of the White House and equally emphasizing the illegality and immorality of torture.

There is greater risk a future administration faced with peril will say: "Well, we can do it better."

But by stopping there, by making the story narrowly about how torture didn't work in these instances rather than that torture doesn't work at all and, more fundamentally, that it should never be used by any White House because it is immoral and illegal — as well as harmful to America's reputation and the safety of American captives — there is greater risk a future administration faced with peril will say: "Well, we can do it better." And along with increasing the chance of a future White House sliding back to torture, placing blame almost exclusively on the CIA is neither accurate nor fair.

The Church Committee initially risked going down the same path in its investigation of CIA assassination plots. Sen. Frank Church speculated to the press that the CIA may have acted like a "rogue elephant on a rampage." Other senators, also speculating, opined the CIA "took orders from the top." But, after extensive investigation and when the committee released its Interim Report on Assassinations, it declined to adopt either theory. Instead, the Church Committee presented substantial evidence for both views, saying the conflicting evidence made it impossible to be certain whether or not Presidents Dwight Eisenhower and John F. Kennedy authorized the assassination plots. Then, in its final reports issued six months later, based on facts from six administrations and review of many more programs and many more agencies, the Church Committee was ready to fix responsibility at the top. Yes, some agency programs were concealed from higher authority, but more frequently it was senior officials themselves who through pressure for results created a climate for abuse, failed to assure compliance with the law, and demanded action without carefully providing for future oversight.

Schwarz was chief counsel for the Church Committee's far-reaching investigation of U.S. intelligence agencies in the 1970s. This op-ed appeared in *Politico,* December 15, 2014.

In the case of torture, the Bush-Cheney White House was clearly involved. It pushed for and approved the program; it was complicit in obtaining the deeply flawed legal opinions that redefined the ban on torture to meaningless nothings. White House officials forgot that both George Washington and Abraham Lincoln barred torture in perilous times when Americans were hard pressed in their fight to create the nation or to save it. They also forgot that after World War II the United States led the way in drafting the Geneva Conventions, which prohibit torture and other forms of inhumane treatment. They locked out voices of experience from the State Department and the military who would have warned of harm to America's reputation and risks to American captives. They failed to listen to FBI experts on interrogation who could have explained we were getting important intelligence through interrogation techniques other than torture. And they forgot, or nobody told them, that after World War II we had prosecuted Japanese officials as war criminals for using on American soldiers the same torture techniques the White House authorized and the CIA implemented after 9/11.

The danger of addressing only part of the problem is this. In his Gettysburg Address, Lincoln called for a "new birth of freedom" so that "government of the people, by the people and for the people, shall not perish from this earth." But if government is to be by the people, necessary information cannot be hidden from the people. The Church Committee disclosed many embarrassing or illegal government actions that had previously been secret, believing that "the story is sad, but this country has the strength to hear the story and to learn from it."

If government is to be by the people, necessary information cannot be hidden from the people.

In the current case, the public is already aware that the CIA was slow to react to the draft summary and that the CIA and the White House delayed the classification-clearance process for far too long. Even with longer reports covering many more subjects, the Church Committee was able to resolve all classification issues more rapidly. A difference was that the Gerald Ford administration was cooperative and, at least on domestic matters relating to the FBI and CIA, new agency heads agreed there had been wrongdoing. At the start of his administration, President Obama acted promptly and properly in banning torture and releasing the flawed legal opinions that sprinkled blessings upon it. Sadly, with this Senate report, Obama did not force the clearance process to speed up, and the 500-page summary was delayed for far too long by the president's passive resistance. Secretary of State John Kerry's last-minute warning of possible dangers from releasing the report surely must have reflected the president's view as well. (Of course danger from the inevitable discovery of our torture techniques should have been one of the many reasons not to start down the torture path in the first place.)

Obama is not the first president to change his tune on openness and secrecy after he came into office.

Obama is not the first president to change his tune on openness and secrecy after he came into office. The reasons for this are several. Once in office, a president is subject to new and powerful pressures. These include reliance on the hard, and generally good, work of the intelligence community in helping a president live up to the awesome responsibility of keeping the nation safe. A president, therefore, has positive pressures to support the intelligence community as well as negative pressures to avoid confronting it on issues such as secrecy that are traditionally seen as going to its core. It is harder to take a longer view of secrecy once in the Oval Office.

But when you do take a longer view of secrecy, most of the documents quoted in the Senate report should no longer be classified. The full documents should be released, except for certain details like the identity of agents and informers. Similarly, the full 6,000-page report should also be promptly cleared and released. After the earlier disclosure of the Justice Department opinions specifying allowable torture techniques and ample discussion of them, as well as the additional lurid details in the Senate summary, there is no reason to argue that what was done should be kept secret. Moreover, the CIA

had leaked affirmative assessments of its program to the press, making unfair its efforts to hide its negative assessments. All the documents are part of the history which the American public and future leaders are entitled to, and need to, learn. Nothing is new about this point. The government's failed argument to keep secret the Pentagon Papers, for example, raised a fundamental question: Why should so much history be secret? But the CIA is particularly greedy (and defensive) in its secrecy claims, still suppressing documents, for example, about the Cuban Missile Crisis — more than a half century ago.

This episode is just the latest example of how during America's Secrecy Era, starting some six decades ago, government has far too often moved from keeping secrets in order to protect America to keeping secrets from Americans.

The defense put forward by the fathers of and supporters of the torture program is loud with conclusions but squishy on substance. Their credibility is undercut by their failure to describe what was done by its rightful name: torture. Much of the defense is just to say "yes it was" to the detailed findings that the program was not effective. It is revealing that the defenders all fail to address the statements in CIA documents that the post-9/11 program was not effective. They also ignore the CIA's own conclusions in earlier years that torture was not effective. They also ignore the proof that many of their claimed accomplishments were obtained by standard interrogation techniques, not "enhanced" ones.

The defense put forward by the fathers of and supporters of the torture program is loud with conclusions but squishy on substance.

One argument made by most defenders is that the committee did not interview witnesses. This ignores two points. First, Justice Department investigations made many witnesses unavailable. Second, the committee did have access to the transcripts of witness interviews referenced in the CIA inspector general's report and in CIA oral histories. Moreover, once the CIA obtained the draft of the Committee's report, it could have easily interviewed its own employees and contractors.

Of course, in an ideal world, an investigation uses both documents and testimony. However, investigators know the truth is far more likely to lie in contemporaneous photos and documents than in later testimony. As for photos, the CIA itself destroyed the videos of interrogations. As for documents, investigation targets are well aware they are vital. A piece of paper or a recording will say the same thing on Tuesday that it said on Monday. Wording in documents is not "reviewed or extended" or recollections "refreshed." This is one reason the executive branch commonly resists or stalls document production, often relying on secrecy.

The CIA torture tactics were derived from the military's SERE (Survival, Evasion, Resistance, and Escape) handbook. SERE was used to prepare American soldiers to resist torture that might be used if they were captured by enemy forces. SERE's techniques were based on torture used in the Korean and Vietnam wars to obtain false confessions from American detainees (and may partly also have been based on CIA techniques used in earlier eras and then condemned by the CIA itself). It is not yet known whether the White House was told of the obnoxious ancestry of the torture techniques it authorized.

This is not the first time America has been tempted to copy our enemies. But, as the Church Committee said almost four decades ago:

> "The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make [us] free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes us free, is lessened."

The language resonates today. It also clearly resonated with the majority members of the Feinstein Committee. And yet too much is yet left unsaid.

'We Need a Path That Allows Both Technology to Advance and Timeless Values to Endure'

Brad Smith

At the Brennan Legacy Awards Dinner, Microsoft General Counsel Brad Smith discusses the need for every generation to stand up for the principles in our Constitution.

We at Microsoft are huge believers in the importance of the advancement of technology. But we also believe that as technology advances, timeless values need to endure. So we're very focused on this intersection between the advance of technology and the values that we all hold dear. Technology has grown by leaps and bounds since the day in the fall of 1985 when I graduated from Columbia Law School, and was among the first to carry a personal computer into the courthouse at Foley Square as a new clerk. In the amicus brief that the Brennan Center filed earlier this year before the U.S. Supreme Court in *Riley v California*, it cited research that showed that today 65 percent of Americans sleep with their smartphone, 20 percent of Americans have used their phone in church, and 12 percent have used their phone in the shower. Now, I just want to be clear, at Microsoft we do not recommend that you use your phone in the shower!

Every generation needs to stand up for the principles in our constitutional documents if they are going to retain the vitality that is so important to our country.

But, more than the advance of technology, tonight is about the principles that we hold dear. I think in many respects, not surprisingly, Justice Brennan put these principles as well as anyone on the planet and in our country ever has. In 1961, he gave the second Madison Lecture at New York University and he talked about the Bill of Rights, and what he said was this: The principles in the Bill of Rights were put there for a purpose by people who knew what words meant. And yet every generation, people need to stand up for the principles in our constitutional documents if they are going to continue to retain the vitality that is so important to our country.

It was one of those unanticipated coincidences that brought us at Microsoft front-and-center into these issues. Over the last 18 months, we've done something that I never thought we would do: We brought three lawsuits, quite thoughtfully and after much deliberation, against our own government to stand up for those principles. Now, I will admit, as a general counsel of a large company, I've actually experienced what it's like to walk into the Department of Justice as a defendant — this plaintiff's work, I tell you, it's pretty interesting!

Smith received a Brennan Legacy Award for his leadership to expand legal services and his advocacy to enhance constitutional protections. These remarks are excerpted from a speech he delivered at the Center's annual dinner, November 18, 2014.

We brought the first case to stand up for the right to speak, to be able to share with the public more information about the national security letters and orders that were being served upon us and with which we were complying. Because of that case, we were able to work things out with the Department of Justice in February and we won the right to speak more freely.

We brought a second case to stand up for the rights of our customers — government customers and business customers — to be able to defend themselves so that when a subpoena was served on us seeking the email that belongs to a customer in one of our data centers, we could tell the customer and the customer could make its own decision about whether to comply, or whether to negotiate, or whether to go to court to defend its rights.

Since then we've brought the third case, which puts to the test our continued ability in a new technology era to continue to enjoy the right of protection against unreasonable searches and seizures. It is a case that involves data that's not in the United States at all but, instead, is in Ireland. It's a case that gives us the opportunity to stand up for a principle that we happen to believe is fundamental to the future: The notion that information that is stored in "the cloud" deserves the same level of protection under the Constitution and under the law as information that is stored on paper. It gives us the opportunity to stand up and defend the principle that whether you're a company or a consumer, your email, your photos, your text messages, and all the content that you create belongs to you and to you alone. When you store your content in our data center, it does not cease to belong to you, you continue to enjoy the full constitutional protections and legal rights that you've had in the past.

And there's one last principle, as well. It's the principle that in the world today, governments need to continue to respect other countries' borders and the laws that apply inside them. This is a principle that we believe is not only important for the United States when we, as a country, act abroad. It is a principle that applies to Americans as well, because we live in a world where, increasingly, companies from other countries are offering new technology services. They're having IPOs in the United States, they will build data centers in our own country, and when the day comes when a foreign government wants to access information — content from American citizens — we have every confidence that the American people will want their content to be protected by our *own* laws and our *own* Constitution, not the laws of another place.

Ultimately, we recognize that these issues involve not just important principles; they involve significant practical problems as well. We appreciate we do live in a dangerous world. Law enforcement needs to be effective when it does its job. We need to find new solutions to the practical hurdles that arise when law enforcement needs information that exists in another country, and we believe that there are alternatives we can pursue. We recognize that there are challenges, but more than that we recognize this: All problems are insurmountable if you don't try to solve them. And, hence, what we need to do is this: We need to find new ways to come together. We need to bring together people from government, and from the technology sector, and from civil liberties organizations, and groups like the Brennan Center to help us show and find the way. We need people to come together and be creative. We need people to act with good will. And if we do all that, we believe we can find new steps for a better future. We can find a path that not only will be true to the legacy established by Justice Brennan, we will find a path that will ensure that technology can advance and that timeless values will endure in a new century and a new age.

Privacy and Liberty at Risk Even if NSA Reform Passes

Elizabeth Goitein

Even if a Senate bill to reform NSA bulk collection becomes law, Americans' private information will still remain vulnerable to other foreign and domestic surveillance programs.

After a brief hiatus, legislative reform of the NSA's bulk collection program appears to be back on track. Thanks to skillful negotiations on the part of Sen. Patrick Leahy, Democrat of Vermont, and other co-sponsors, the version of the USA Freedom Act that was unveiled in the Senate last week restores many of the protections that House leadership and administration officials stripped out of the House version in secret, last-minute talks. Most notably, the Senate bill clearly would prohibit the bulk collection of Americans' telephone records and other types of information.

Much more remains to be done to protect the privacy and civil liberties of law-abiding Americans.

And yet, even if the Senate version becomes law, Americans' private information will remain vulnerable — under both the domestic programs addressed by the bill and other, much larger, programs nominally targeted at foreigners. As Leahy acknowledged when introducing the bill, much more remains to be done to protect the privacy and civil liberties of law-abiding Americans.

The good news first: The Senate bill would require any collection of business records to be based on a "specific selection term," such as a name or account, that narrowly limits the scope of collection "to the greatest extent practicable." The bill includes a non-exhaustive list of selection terms that are deemed too broad, including area codes, zip codes, and names of telecommunications companies. The Foreign Intelligence Surveillance Court (FISA court) would have to approve the selection terms in advance and assess whether the records would be relevant to an authorized investigation. These provisions would not only end the NSA's bulk collection of telephone records; they would preclude any analogous program for Internet, financial, or credit records.

The bill also leans on the executive branch to be more transparent about surveillance activities. It would require the director of national intelligence to make public either a redacted version or a summary of any significant opinion by the FISA court. It also would require far more detailed statistical reporting on the use of surveillance authorities. For the first time, the government would publicly report the number of individuals affected by various surveillance programs — including, for most programs, a separate estimate of the number of affected Americans. And the bill would establish a panel of paid privacy advocates who could appear in FISA court proceedings, which currently take place with only government officials present.

In these and many other respects, the bill should lead to a marked improvement over the status quo. But the operative word here is "should." The bill's definition of "specific selection term" is necessarily imprecise. Congress would not limit the executive

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branch to obtaining the records of named suspects, because in some cases the very reason for seeking the records will be to identify the suspect — for instance, where the FBI has a tip about a plot to bomb a particular airliner and seeks to obtain the passenger manifest. Rather than impose an exact but too-strict definition, the bill attempts to focus collection through phrases like "narrowly limit" and a list of terms that would not be narrow enough.

Although the legislative intent behind this approach is clear, the executive branch could exploit the absence of a bright-line restriction to engage in collection that is far broader than necessary, even if it falls short of "bulk" collection. It would not be the first time the executive branch twisted Congress's words with the FISA court's blessing.

Under the bill's requirement to disclose significant FISA court interpretations, the public should know if such a perversion of congressional intent has taken place. But here, too, there is the potential for the executive branch to disregard the spirit of the legislation. The bill allows the executive branch to decide which court opinions meet the bill's definition of "significant" and how much information may be disclosed consistent with national security. In theory, nothing would prevent the director of national intelligence from releasing an opinion with every sentence but one redacted.

Even assuming faithful implementation, the bill leaves some holes. It specifies no time limits for when intelligence agencies must discard information about Americans that has not been deemed to have any foreign intelligence value. It implicitly accepts the administration's specious claim that it cannot even estimate the number of Americans whose communications are swept up under a program that targets foreigners' calls and emails. And it allows the FISA court to determine when, if ever, it wishes to hear from the panel of privacy advocates.

The bill also creates a new telephone records collection program. While the executive branch would not be allowed to collect phone metadata in bulk, it would be entitled to obtain records, not only of suspected terrorists, but of anyone in contact with them — an automatic second "hop." Phone companies would produce all such records to the government on an ongoing basis, and the resulting database could be kept indefinitely and queried for any purpose. Given that two independent, presidentially-appointed committees concluded the telephone metadata program had little value, it is unclear, at best, why even a scaled-down version of it is needed.

Of course, the perfect should never be the enemy of the good — and on Capitol Hill, where the perfect is generally off the table, the good should not be the enemy of the better. But the opposite is true as well. A bill that makes improvements to the status quo, even significant ones, can backfire if it dissipates the incentive for additional reform.

If bulk collection is the tip of the surveillance iceberg, these other programs are the looming underside.

That risk deserves particular attention here, where so many of the government's most intrusive surveillance practices have been left to another day. The bill's architects deliberately deferred substantive reform of Section 702 of the FISA Amendments Act, a 2008 law that allows the NSA to collect the content of Americans' international communications without a warrant. Nor does the bill tackle the overseas collection of communications under Executive Order 12333, which operates with no involvement of the FISA court and little oversight by Congress. If bulk collection is the tip of the surveillance iceberg, alarming because of its visibility, these other programs are the looming underside.

Reaching consensus on how to reform these massive, poorly understood programs will be challenging, to say the least. Leahy and his co-sponsors were right not to hold other reforms hostage. But if the bill becomes law, lawmakers and the public must not betray its promise by assuming that the balance between our liberties and our security has been restored.

I'm Terrified of My New TV

Michael Price

Buyer beware: You don't watch new "smart" TV's. They watch you. New smart technology may be recording and sharing personal, constitutionally protected information that should not be for sale to advertisers and should require a warrant for law enforcement to access.

I just bought a new TV. The old one had a good run, but after the volume got stuck on 63, I decided it was time to replace it. I am now the owner of a new "smart" TV, which promises to deliver streaming multimedia content, games, apps, social media, and Internet browsing. Oh, and TV, too.

The only problem is that I'm now afraid to use it. You would be too — if you read through the 46-page privacy policy.

The amount of data this thing collects is staggering. It logs where, when, how, and for how long you use the TV. It sets tracking cookies and beacons designed to detect "when you have viewed particular content or a particular email message." It records "the apps you use, the websites you visit, and how you interact with content." It ignores "do-not-track" requests as a considered matter of policy.

I'm afraid to use my new TV. You would be too — if you read through the 46-page privacy policy.

It also has a built-in camera — with facial recognition. The purpose is to provide "gesture control" for the TV and enable you to log in to a personalized account using your face. On the upside, the images are saved on the TV instead of uploaded to a corporate server. On the downside, the Internet connection makes the whole TV vulnerable to hackers who have demonstrated the ability to take complete control of the machine.

More troubling is the microphone. The TV boasts a "voice recognition" feature that allows viewers to control the screen with voice commands. But the service comes with a rather ominous warning: "Please be aware that if your spoken words include personal or other sensitive information, that information will be among the data captured and transmitted to a third party." Got that? Don't say personal or sensitive stuff in front of the TV.

You may not be watching, but the telescreen is listening.

I do not doubt that this data is important to providing customized content and convenience, but it is also incredibly personal, constitutionally -protected information that should not be for sale to advertisers and should require a warrant for law enforcement to access.

Unfortunately, current law affords little privacy protection to so-called "third party records," including email, telephone records, and data stored in "the cloud." Much of the data captured and transmitted by my new TV would likely fall into this category. Although one federal court of appeals has found this rule unconstitutional with respect to email, the principle remains a bedrock of modern electronic surveillance.

This op-ed appeared at Salon, October 30, 2014.

You may not be watching, but the telescreen is listening.

According to retired General David Petraeus, former head of the CIA, Internet-enabled "smart" devices can be exploited to reveal a wealth of personal data. "Items of interest will be located, identified, monitored, and remotely controlled through technologies such as radio-frequency identification, sensor networks, tiny embedded servers, and energy harvester," he reportedly told a venture capital firm in 2012. "We'll spy on you through your dishwasher" read one headline. Indeed, as the "Internet of Things" matures, household appliances and physical objects will become more networked. Your ceiling lights, thermostat, and washing machine — even your socks — may be wired to interact online. The FBI will not have to bug your living room; you will do it yourself.

Of course, there is always the "dumb" option. Users may have the ability to disable data collection, but it comes at a cost. The device will not function properly or allow the use of its high-tech features. This leaves consumers with an unacceptable choice between keeping up with technology and retaining their personal privacy.

We should not have to channel surf worried that the TV is recording our behavior for the benefit of advertisers and police. Companies need to become more mindful of consumer privacy when deciding whether to collect personal data. And law enforcement should most certainly be required to get a warrant before accessing it.

In the meantime, I'll be in the market for a new tinfoil hat and cone of silence.

The Clear Anti-Muslim Bias Behind Anti-Shariah Laws

Faiza Patel and Amos Toh

The motives of those pushing foreign law bans become clearer with each limitation. As supporters continue to make exceptions to the law for businesses and families, the real intent becomes apparent — to stir up misconceptions and fear about Muslims.

Foreign law bans are back.

For the fourth year running, Florida is trying to outlaw the use of foreign and international law in state courts. Missouri has mounted another attempt to pass an anti-foreign law measure after last year's effort was vetoed by Gov. Jay Nixon. The bans also have crept farther north, making a debut in Vermont.

These laws, which have passed in seven states, are the brainchild of anti-Muslim activists bent on spreading the illusory fear that Islamic laws and customs (also known as Shariah) are taking over American courts. This fringe movement shifted its focus to all foreign laws after a federal court struck down an Oklahoma ban explicitly targeting Shariah as discriminatory toward Muslims.

But by banning all foreign law, the laws create new problems, particularly for American businesses with commercial relationships overseas. To avoid ensnaring routine international commerce, supporters of foreign law bans have added a confusing array of restrictions and exemptions to ensure that only those who are disfavored are targeted.

And as these restrictions pile up, the bans come full circle and reveal their true purpose: to demonize the Islamic faith.

For decades, American courts have applied foreign law as long as it does not violate U.S. public policy. This approach has worked well: Supporters of the bans have yet to point to a single case where foreign law has been used to violate the rights of Americans. U.S. companies are increasingly involved in cross-border transactions, and sometimes prefer to rely on foreign law because it protects their interests. When disputes arise, they count on the courts to respect their choice and apply the appropriate foreign legal principles.

Responding to concerns that these laws would be bad for business, legislators in several states exempted corporations, which were never the intended targets anyway. But this exemption led to even more questions: What about unincorporated businesses? Sole proprietors? When employees take corporations to court, how will the bans affect the proceedings?

To avoid this new set of problems, many foreign law bans — such as the ban in North Carolina and the bill recently introduced in Florida — are expressly limited to family matters. America is a country of immigrants, and this focus on family disputes affects all of us who have relatives overseas, regardless of their faith. For example, Jewish-American couples who marry in Israel, where such marriages and divorces are governed by rabbinic law, could be in trouble in Florida. The bill pending in Tallahassee may prevent courts from recognizing any marriage license, divorce decree, or child custody order issued in Israel.

This op-ed appeared in *The Washington Post* and Religious News Service, February 20, 2014. Patel and Toh are co-authors, with Matthew Duss, of *Foreign Law Bans: Legal Uncertainties and Practical Problems,* published by the Brennan Center and Center for American Progress (2013).

In Missouri, groups that help childless couples adopt from overseas successfully lobbied Nixon to veto the ban last year. But the response has been characteristically insular. Rather than abandon an unnecessary and potentially hazardous measure, Missouri legislators are pressing on with a ban that targets all family matters — except adoptions.

The motives of those pushing for bans on foreign law become clearer with each limitation. It beggars belief that supporters of these bans are genuinely concerned about the purported ills of foreign law when they are so ready to make concessions. Instead, "foreign law" provides a convenient — and increasingly transparent — fig leaf for supporters to stir up misconceptions and fear about Muslims. Although the legislators leading the charge for foreign law bans have not been shy about their agenda, the state legislators who vote for them for other reasons can no longer pretend they don't understand what these bans are about.

"Foreign law" provides a convenient — and increasingly transparent — fig leaf for supporters to stir up misconceptions and fear about Muslims.

Nor can the federal government. President Obama has recognized the importance of the role played by all faiths in our democracy and has chastised foreign governments for their treatment of minority religious communities. But he has done little to stem this tide of anti-Muslim propaganda disguised as law. It's time he took a public stance and condemned these moves as divisive to our democracy.

The Department of Justice, too, should drop its passive approach and start examining whether there are federal law grounds for challenging these laws. America's religious communities should not have to wage this battle alone.

CIA and Senate Oversight Battle

Elizabeth Goitein

The executive branch should not be resisting legislative oversight at a time when it has never been more necessary.

On the surface, the battle between the Senate Intelligence Committee and the CIA looks to be a classic he said/she said story. Did the CIA improperly monitor computers used by committee staffers as they investigated the agency's earlier torture program, as Sen. Dianne Feinstein (D-Calif.) alleges? Or did the staffers help themselves to CIA documents they were not authorized to possess, as agency officials counter?

The problem with this narrative is that it implies a false equivalence between the two claims. Even if the CIA's version of events is accurate, it is the agency's conduct that should concern us.

If true, this account suggests executive misconduct of historic proportions.

The documents at the heart of the dispute are draft versions of the so-called Panetta review, an internal analysis of the CIA's torture program conducted for then-CIA chief Leon Panetta. The review's conclusions reportedly validate the findings of the Senate committee's own study — namely, that the brutality of the "enhanced interrogation techniques" was unjustified by any national security benefit.

This is particularly notable because the CIA's official written response to the committee's work contested the very findings that the Panetta review purportedly supports. (All of these documents remain classified, but insiders have disclosed their general content to reporters.)

According to a speech Feinstein gave on the Senate floor, the Panetta review was part of millions of documents made available to the committee by the CIA. The agency refused to release the full cache of documents to the committee, instead requiring staff to view the documents using a walled-off network of CIA computers at a secure CIA location. The agency agreed to access the network for technical purposes only. In fact, however, CIA Director John Brennan informed Feinstein that the CIA had conducted a search of the dedicated network — including, she claims, the staff's own work product — after learning that staff might have accessed the Panetta documents.

If true, this account suggests executive misconduct of historic proportions. The Constitution vests Congress with the authority to oversee the activities of the executive branch. Covertly spying on the committee's investigative activities constitutes gross interference with a core congressional function. The situation is compounded by the fact that the CIA's acting general counsel, who was closely involved with the torture program and is named 1,600 times in the committee's study, filed a report with the Justice Department alleging that committee staff committed a possible crime by accessing the Panetta review.

This op-ed was published in the *Los Angeles Times,* March 23, 2014.

As Feinstein noted, the foreseeable effect of this action, and its likely purpose, is to intimidate committee staff and dissuade rigorous investigation — an apparent violation of the Constitution's separation of powers.

The CIA's version of events appears in a letter Brennan wrote to Feinstein in January, leaked by a government official after Feinstein's speech. Brennan asserts in the letter that the Panetta review is subject to executive privilege because it reflects sensitive internal deliberations. Accordingly, he contends, committee staff was not authorized to access the documents and the CIA did not make them available. Speaking off the record, officials have posited other means by which committee staff obtained them — by hacking into the CIA's network or through a CIA whistle-blower.

Suppose it is true that the CIA did not give committee staff permission to view the documents. Why not? Executive privilege is not a satisfactory answer. The Supreme Court has made clear that even the strongest form of executive privilege, which protects communications between a president and his advisors, is qualified rather than absolute. In other words, it must yield if a co-equal branch of government needs the information to perform its own constitutionally assigned functions. Even if that were not the case, claims of privilege for presidential advice or agencies' deliberations may be waived.

The committee's investigation represents a legitimate exercise of constitutionally conferred authority. There is little doubt the Panetta review was important to the investigation: It contradicted the official statement that the agency had provided and reinforced the validity of the committee's findings. Committee staff therefore had every right to the document, regardless of its privilege status. The CIA's attempt to withhold it was improper. (Of course, the CIA's improper withholding would not give committee staff license to hack into the CIA's computers, but that insinuation is frankly implausible — if only because security-cleared staffers generally are issue experts, not skilled technologists.)

The Supreme Court has made clear that even the strongest form of executive privilege is qualified rather than absolute

More fundamentally, the essence of Feinstein's complaint is that the CIA interfered with the committee's oversight, while the essence of the CIA's complaint is that the committee engaged in a little too much of it. Given all that has been revealed since 9/11 about the executive branch's secret, unprecedented, and sometimes even unlawful exercises of power, the notion that other branches of government should tread more lightly in their oversight rings hollow.

Whichever version of events holds true, the story is the same: The executive branch is resisting legislative oversight at a time when it has never been more necessary.

How to Fix the FBI: It Shouldn't Be an Intelligence Agency

Michael German

The FBI is the most powerful agency in the federal government, armed with the tools and authorities necessary to investigate allegations of criminal activity. But by transforming itself into a domestic intelligence agency, the FBI slips certain constitutional restraints. It is time for Congress to examine the FBI's intelligence authority and end programs that are ineffective and prone to abuse.

Less than a year after taking charge at the Federal Bureau of Investigation, Director James Comey has turned to the pages of *The New York Times* to stoke public anxiety about a "metastasized" Al Qaeda threat. Clearly, terrorism has been a good issue for the FBI, helping it obtain vastly expanding authorities and resources since the 9/11 attacks, and a thicker wall of secrecy to prevent the public from seeing how it uses them. Comey's new fear-mongering is part of his continuing effort to transform the FBI into a full-fledged domestic intelligence agency. For anyone concerned about unchecked government power, this is a bad idea. And for anyone only concerned with effective security, it is even worse.

The FBI has a long history of abusing its claimed intelligence authorities to impede Americans' First Amendment rights.

The FBI is the most powerful agency in the federal government, as it has the legitimate tools and authorities necessary to investigate allegations of criminal activity. As the nation's predominant law enforcement agency it can probe federal, state, and local government officials, members of Congress, and even the president (not to mention the rest of us). An FBI agent merely asking questions about a political candidate, a religious leader, or a community activist can start rumors that destroy reputations and alter destinies, without ever leveling charges that could be defended. The Founders recognized this threat to individual liberty and democratic governance, which is why fully half of the amendments in the Bill of Rights are designed to restrict the government's police powers and force public accountability over their use.

By transforming itself into a domestic intelligence agency, however, the FBI slips these constitutional restraints. Intelligence agencies by their nature operate in near-impenetrable secrecy, mask their sources and methods, and collect information against people not even suspected of wrongdoing. They use deception as a primary tool and seek to disrupt the activities of those they perceive as enemies of the state, rather than prosecute them. Often their victims never know how their fortunes changed and, even if they suspect government interference, don't have a legal means to challenge it.

This article appeared in the National Review Online, May 23, 2014.

The FBI has a long history of abusing its claimed intelligence authorities to impede Americans' First Amendment rights. And a 2010 inspector general audit revealed this inclination to view political activism as a potential threat has recently resurfaced in today's FBI. Indeed, FBI training materials state that "the FBI has the ability to bend or suspend the law and impinge on freedoms of others" when using its intelligence authorities.

These habits and practices bleed over to corrupt the FBI's interactions with Congress, the courts, and the public, further undermining constitutional democracy. Intelligence leaks regarding the FBI's use of its Patriot Act authorities reveal it misled Congress during reauthorization hearings in 2005, 2009, and 2011. The FBI and other law enforcement agencies are also using parallel construction to hide from courts how evidence is collected through legally suspect intelligence programs like Hemispheres, violating defendants' rights to challenge government methods. Citing secret threat intelligence to justify government actions stifles the public debate necessary for effective policy making by rendering those outside the intelligence community unqualified.

Intelligence should be designed to focus government's resources on protecting the nation from the next threat, not the last one.

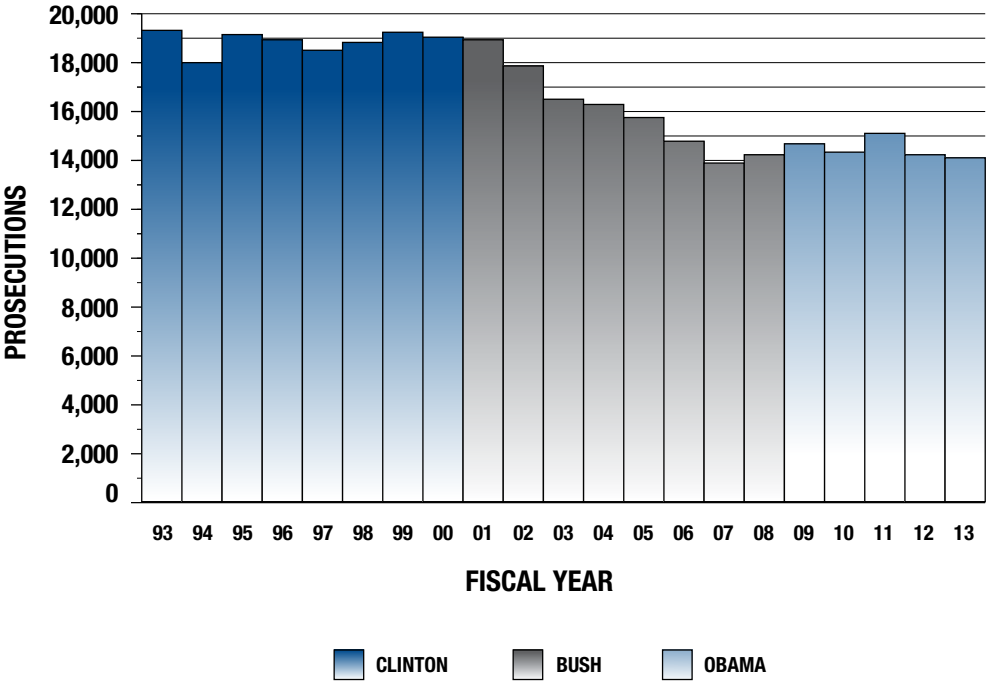
The timing of Comey's statement tells the story. Threat inflation is an old Cold War trick intelligence agencies use to quell criticism over poor performance, which the FBI recently received in two government reports documenting its lackadaisical response to Russian warnings about future Boston Marathon bomber Tamerlan Tsarnaev. A populace worried about a lurking menace isn't likely to demand accountability for the policeman's previous failures.

And Comey uses the traditional tactics, claiming access to secret evidence that contradicts that available in the public sphere. "I didn't have anywhere near the appreciation I got after I came into this job just how virulent those affiliates had become," Comey told the *Times*. "There are both many more than I appreciated, and they are stronger than I appreciated."

To put the terrorism threat into perspective, Jim Harper of the Cato Institute pointed out that Americans are actually eight times more likely to be killed by a police officer than a terrorist. Stacie Borrello compared the four U.S. deaths attributable to Al Qaeda-inspired terrorism in 2013 to 11 deaths caused by toddlers with guns the same year. And Brian Michael Jennings reminds us that during the 1970s the U.S. experienced 50 to 60 terrorist bombings a year, so there's actually far less terrorism today.

The point is not to argue there isn't a terrorist threat. As a former FBI agent, I know better. But there are numerous threats to public safety and the FBI's focus on terrorism intelligence collection is undermining its performance in other important areas.

Though the FBI has added thousands more agents and analysts since 9/11, its criminal prosecutions have dropped significantly, according to Justice Department data provided to the Transactional Records Access Clearinghouse:



The financial crisis provides a case in point. In 2004, the head of the FBI's white-collar crime program warned about a mortgage-fraud epidemic, but resources for these investigations continued to be cut in favor of counterterrorism. Then by 2009, the director of national intelligence called the global economic crisis the "primary near-term security concern of the United States." Intelligence should be designed to focus government's resources on protecting the nation from the next threat, not the last one.

Finally, there's little evidence that the FBI's intelligence-first approach is effective in preventing terrorism, anyway. The FBI's most indiscriminate terrorism intelligence tool, the telephone metadata program that sweeps up information about all our calls, has never stopped a terrorist attack. And reviews of its work in failed investigations involving Tamerlan Tsarnaev, David Headley, Carlos Bledsoe, and Nidal Hasan (who all slipped through the cracks and executed deadly plots even after coming under the FBI's scrutiny) indicate that the relentless workload created by the overwhelming amount of information the FBI collects is part of the problem, not the solution. Shielding government agencies from robust public accountability has never been a recipe for effective performance.

If the FBI were truly an "intelligence-driven organization," as Comey likes to say, it would empirically evaluate all the threats we face, and utilize methods scientifically demonstrated to be effective to efficiently address them. It is time for Congress to conduct a thorough examination of the FBI's use of its post-9/11 authorities to end programs that are unnecessary, ineffective, or prone to abuse. Just calling what you're doing intelligence doesn't make it intelligent.

Warrantless Cellphone Searches Are Unconstitutional

Michael Price

In Riley v. California, *the Supreme Court unanimously decided cellphones are, in fact, protected under the Fourth Amendment during an arrest. The Court ruled that due to the vast amount of information these devices hold about our daily lives, police must have a warrant to search their digital contents. The Brennan Center, along with the National Association of Criminal Defense Lawyers, filed an amicus brief in the case, arguing that our nation's legal privacy protections must evolve to keep pace with advances in technology.*

Amici encourage this Court to prohibit the warrantless search of cellphones incident to arrest. Both the technical capacity of these devices to store great volumes of information, and the deeply private manner in which smartphones have become integrated into all aspects of daily living, create a significant privacy interest in their contents.

The Fourth Amendment is not blind to the advances of modern living.

The search incident to arrest doctrine is governed by the rationale set forth in *California v. Chimel*. *Chimel's* twin exigencies, the need to protect officer safety, and the need to secure perishable evidence, are not present in the context of phone data. Cellphone data poses no threat to officer safety, and once the phone has been reduced to police control, any risk of data loss is negligible.

Moreover, unlike in the context of vehicle searches, limiting a search to evidence related to the crime of arrest is unworkable with respect to cellphones. The nature and quantity of data on cellphones will mean that law enforcement will always be able to draw a connection between the offense of arrest and the phone, rendering a *Gant* limit a nullity. And practically, it is impossible for an officer in the field to conduct an appropriately limited search of digital data.

I. Mobile Computing Devices Like The Modern Smartphone Are Unique

The Fourth Amendment is not blind to the advances of modern living. What is a reasonable search under the Fourth Amendment is a function of the privacy that society attaches to the place or object searched. Reasonableness is not fixed to a particular technology level, unable to move beyond footlockers and cigarette packs, leaving the citizenry at the "mercy of advancing technology." Rather, as technology advances, and society's use of that technology creates new privacy expectations, what is reasonable is viewed anew.

Excerpted from an amicus brief submitted to the U.S. Supreme Court in *Riley v. California,* March 2014.

A. The Capacity Of Mobile Computing Devices Renders Analogies To Physical Containers Inapplicable

Any smartphone is capable of storing digital information locally, meaning that the physical device is the repository of the information. It is when we are discussing localized storage that analogizing these devices to containers is even possible. However, the volume of information stored strains that analogy. Current models of smartphones, such as the Apple iPhone and Samsung Galaxy S4 have 64GB (gigabytes) of localized storage. And storage capacity of models continues to expand with each new iteration....

B. Mobile Devices Have Been Incorporated Into Modern Living In A Fundamentally Private And Personal Way

The mobile computing revolution has shifted societal concepts of identity and privacy in ways unimaginable just two decades ago. This Court has viewed the home as the epicenter of Fourth Amendment privacy. Yet the Amendment on its face offers no distinction between "persons, houses, papers and effects."

At the time of the Fourth Amendment's enactment, the home was a locus of one's private life. Money might be held in a strongbox. Documents, deeds, wills, and investments would likely be stored in one's study. A diary detailing health problems and sickness might be tucked away in a drawer while personal letters and a family portrait would sit upon one's desk. In essence, the home was where the documentary evidence of one's self identity could be found. But the digital revolution has distributed those private pieces of one's life across cyberspace.

No longer is one's money tangible, and located in a strongbox, now it is accessible through a banking app. According to the Pew Research Center at least one-third of all mobile phone users regularly use the phone to manage their finances....

C. The Smartphone Is The New Instrument Of First Amendment Expression

Lower courts have noted that, by their range of capabilities, ease of access, and societal saturation, smartphones are the quintessential free speech instruments of our age:

> The trial court aptly described a personal computer as "the modern day repository of a man's records, reflections, and conversations." Thus, the search of that computer has first amendment implications that may collide with fourth amendment concerns.

Even major news media such as the *Chicago Sun-Times* have eschewed staff photographers, and now issue their reporters smartphones....

II. The Warrantless Search Of A Smartphone Incident To Arrest Is Not Justified Under The Search Incident To Arrest Doctrine

As this Court has consistently held, "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.'"

Exceptions to the warrant requirement are to be jealously and carefully drawn. Such exceptions cannot be based upon mere governmental desire, or even need. Rather, warrant exceptions stake a claim to the Fourth Amendment's bedrock requirement of reasonableness only by "a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."...

A. Neither Of The *Chimel* Rationales Is Present With Respect To The Warrantless Search Of A Cellphone

Neither of the *Chimel* rationales supports the warrantless search of a cellphone incident to arrest.

First, there is no officer safety concern posed by the data. Digital data is not a razor blade, or a firearm. It cannot harm, or in any way endanger, the arresting officers.

And once the phone is reduced to police custody, there is no reasonable likelihood of the destruction of evidence. Once the phone is in police control, the data is secure, just as the footlocker was secure in *United States v. Chadwick*, where this Court struck down a search occurring 90 minutes after arrest. This Court reasoned that a search is not "incident to th[e] arrest either if the search is remote in time or place from the arrest or no exigency exists" and that authorities had removed the footlocker to "their exclusive control" before searching it, so "there [was] no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence."...

III. Permitting A Warrantless Search Of A Smartphone, But Limiting It To Evidence Relating To The Crime Of Arrest Is Unworkable

In *Gant*, this Court permitted the search incident to arrest of a vehicle when "it is reasonable to believe the vehicle contains evidence of the offense of arrest." Echoing the solicitor general's argument in *United States v. Wurie*, respondent may ask this Court to graft that vehicle-specific rule onto the context of cellphones. This Court should decline the invitation.

First, although the government may offer *Gant* as a practical limitation, in fact it is no limit at all in this context. Because of the quantity and scope of private information available on modern cellphones, and the myriad of ways we use those phones throughout our lives, an officer justifying a search after the fact in a suppression hearing will virtually always be able to draw a plausible connection between the crime and the data.

Take for example the routine DUI stop — a crime typically not requiring evidence beyond the observation of driving and a breath or blood test. Law enforcement could theorize that a phone could contain pictures of the suspect drinking at the bar, text messages containing admissions of intoxication, digital receipts for the drinks ordered, and health records showing that the subject was on medication that interacted with alcohol....

IV. Cellphone Data Necessitates The Protections Of The Warrant Requirement

The touchstone of the Fourth Amendment has always been reasonableness:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

• • •

A. Technology Has Removed Impediments To Securing A Warrant

As this Court has noted recently, advances in technology have significantly improved the ease and speed with which law enforcement can secure a warrant. Applications for warrants via telephone or email are permitted under the Federal Rules of Criminal Procedure, as well as the vast majority of states. While the time to obtain a warrant is situation-specific, courts routinely report telephonic or email warrants being secured within minutes, or the length of a typical traffic stop.

B. Warrant Is The Only Effective Mechanism For Managing Governmental Collection Of Cellphone Data

This case is but one example of a widespread phenomenon. Law enforcement nationwide is systematically capturing, copying, and keeping vast amounts of data from arrestees all without a warrant.

In this case, the San Diego Police Department "downloaded" videos "along with a bunch of photos" from Riley's cellphone "through RCFL." "RCFL" appears to refer to San Diego's Regional Computer Forensics Laboratory, established by the FBI in partnership with local law enforcement agencies in 1999. The FBI now operates similar partnerships with law enforcement in 19 states, providing local officers with assistance duplicating, storing, and preserving digital evidence. The FBI provides local police with access to "Cell Phone Investigative Kiosks," which allow officers to "extract data from a cellphone, put it into a report, and burn the report to a CD or DVD in as little as 30 minutes." In 2012 alone, the San Diego Police Department and other law enforcement agencies in the area used the kiosks 1,575 times to extract, copy, and retain cellphone evidence. The kiosks are becoming increasingly popular with law enforcement nationwide. In 2012, law enforcement used the kiosks 8,795 times, a 48 percent increase from 2011.

A predictable consequence of warrantless cellphone searches is that at least some of the information will eventually wind up stored in a government database. If police officers do not need a warrant to search a cellphone incident to arrest — if a personal electronic device is a mere "closed container" subject to full inspection — then police will surely claim the authority to conduct an unlimited search and use the information in any way they see fit. Absent a warrant requirement, police may consider themselves free to create a "mirror" copy of the data, retain it on a law enforcement database for detailed analysis, and share it with other law enforcement agencies as a matter of routine.

This is not idle speculation. Although the San Diego Police Department does not publish its procedures for handling digital evidence, the FBI's rules provide a glimpse into how law enforcement retains and shares electronic data belonging to thousands of Americans. At present, all telephone data collected during FBI investigations — including data extracted from cellphones seized incident to arrest — is stored in the FBI's Telephone Applications Database. That information feeds into the Investigative Data Warehouse (IDW), a central repository completed

Law enforcement nationwide is systematically capturing, copying, and keeping vast amounts of data from arrestees all without a warrant.

in 2005 for criminal and counterterrorism purposes. At least 12,000 federal, state, and local law enforcement and government officials have access to the IDW database. There are few limits on how long the FBI can keep data in the IDW. Bureau policy states that the data is deleted or destroyed only "when superseded by updated information or when no longer needed for analytical purposes."...

Such open-ended policies raise troubling questions about the constitutionality of copying, retaining, and sharing cellphone data without limit. Can police seize every bit of data on a phone, or only the relevant data? Will the plain view doctrine apply? How long can law enforcement keep the data it copies? Should there be a requirement to purge irrelevant information? Who else can see the data and for what purpose? Can the Internal Revenue Service take a look? The lack of appropriate safeguards creates a temptation to use the data for improper reasons. For example, the FBI's Office of Professional Responsibility recently reported that FBI employees had conducted more than 1,500 unauthorized searches on FBI and government databases to look up friends working as exotic dancers and celebrities they "thought were hot." A warrant requirement will not make these questions disappear, but it will ensure that troves of highly personal data do not wind up on a government computer network without adequate justification. Courts can craft reasonable parameters for the search that are consistent with the particularity requirement of the Fourth Amendment, minimize the invasion of privacy, and prevent personal data from being copied needlessly, kept indefinitely, or used improperly.

A bright line warrant requirement will also alleviate uncertainty for police officers in the field, placing questions regarding the scope of the search under *ex ante* judicial supervision. There may be a temptation to craft a graduated approach to cellphone searches; to require a warrant for copying the contents, but not to browse through a few screens, for example. But such an approach would force law enforcement officers with "only limited time and expertise" and in the heat of an investigation to "reflect on and balance the social and individual interests in the specific circumstances they confront."

Absent a warrant requirement, there is simply no clear way to regulate the scope of the intrusion. Even the most cursory search — for example, a search for a particular name or number — can transform into an extensive forensic search that yields large volumes of private and sensitive information. Moreover, there would be no mechanism to regulate how long police can keep cellphone data or control who has access to it. This Court has recognized that even an initially permissible seizure can become unreasonable "if it is prolonged beyond the time reasonably required to complete th[e] mission." But if there is no "mission" — if the only justification for seizing and searching cellphone data is that it occurs incident to arrest — then the scope of the intrusion is limited only by the officers' time and imagination. Every police department in the country could have a different rule about what data to keep and share.

A neutral and detached magistrate is well placed to weigh the Fourth Amendment considerations in the balance and ensure meaningful limits on the scope of cellphone searches. In some instances, there may be good reason to copy phone data or to conduct a forensic analysis, but that reason should be presented to a court before the government can "seize the haystack to look for the needle."

THE GOVERNING CRISIS

‘Dysfunction Concedes Nothing Without a Demand’

Michael Waldman

Shutdowns and showdowns. Polarization and hyperpartisanship. A dystopian campaign finance system. Plunging public trust. How do we fix broken government? The Brennan Center and the Hewlett Foundation convened scholars, advocates, journalists, and funders to share solutions and chart a research agenda.

Our political system, our government, in fundamental ways, are broken. The question for us all is: What can we do about it? Not just to bemoan it, but what solutions can we advance so our government and our politics become meaningful and powerful instruments of common purpose again for us all?

The topic and the timing couldn’t be more urgent. You could probably say that at almost any point in American history. The pressures on American democracy have been building for years and years. But in a tangible way in the past year or two, those longstanding trends toward dysfunction have tipped toward a kind of crisis.

Given the looming challenges we face, if we don’t fix the systems, we won’t solve the problems.

Of course American governance never, ever has been tidy. It has never been linear. There’s always been polarization. There’s always been partisanship. There’s always been intense fighting and occasional irrationality. I just spent much of the last year researching some early history of American constitutionalism, and I was struck by how many of the things we worry about today have been present from the beginning. Even the Founding Fathers had to pander to the Tea Party. (It was the actual Tea Party!) People were irrationally afraid of overreach from Washington since it was George Washington. And especially relevant to today, the very first partisan gerrymander took place in the very first congressional election, when Patrick Henry drew a district to try to keep James Madison from getting elected to Congress. So many of these things didn’t start last week or last year. They’re baked into the DNA of American government. Most of the country’s history has been long stretches of paralysis punctuated by occasional periods of progress, often sudden progress. That’s just the way it is.

But in recent years things have begun to happen that go deeper, that go in a more troubling direction than the norm in American politics and governance. We all know the litany: The shutdowns and the showdowns. The tribalism on Capitol Hill that supplants normal partisanship. The paralysis. More filibusters than in the previous century put together. A dystopian campaign finance system dominated by dark money, where billionaires proudly sponsor

Waldman delivered a version of these introductory remarks at a two-day Brennan Center conference on government dysfunction, February 12, 2014.

presidential candidates as if they were racehorses. Those are among the reasons why trust in government has plunged to the lowest level in decades, respect for Congress is unmeasurable, and why the Gallup poll for the first time in years identified governmental dysfunction as the number one issue concerning people last fall.

Those are the immediate symptoms. More fundamentally, there is a mismatch between the institutions of American democracy and the forces of American politics. Grappling with that current mismatch is what this conference is all about. We believe that if we don't address these issues, things are only going to get worse for American governance. There's no magical automatic equilibrium that's going to reassert itself. And given the looming challenges we face — climate change, economic growth, economic inequality, taxes, tax reform, whatever it might be — if we don't fix the systems, we won't solve the problems. Leadership isn't going to be enough, better sentiment among elected officials isn't going to be enough. That there are potential changes in the way we run our government, the way we run our institutions that need to be encouraged and addressed. All that is the bad news.

There is good news, too. There are green shoots of reform. People are starting to really focus. Look at just the last few months: We had the first steps toward filibuster reform in the Senate. We had small donor public financing come within one vote of enactment in Albany. The House of Representatives passed a clean debt ceiling extension because of the recognition there would be massive political blowback if it was going to do anything else. People in power know that people are watching and are concerned. We will hear from Bob Bauer and Ben Ginsberg, co-chairs of the bipartisan Presidential Commission on Election Administration. They're like figures from an alternate universe where people from both parties can get together and solve divisive issues. They will talk to us about how they got that done, and what lessons we can learn. So there are positive trends and positive stirrings.

And your presence here is evidence of a further positive trend: Outside the government and outside the political system, people are starting to really work on this. Now we all care about these democracy issues, we've all grown increasingly alarmed by the crisis and dysfunction — but in many ways we've worked in our various communities. We've had conversations among ourselves, whether it's funders or scholars or activists or journalists. So one goal is to bring those different communities together. The collision of those views can be useful, and there can be mutual education and mutual agreement, too.

We want to encourage you to think about proceeding with a few thoughts in mind.

First, we want to focus on solutions. It's too easy to slip into an analysis of the problems, of root causes. And we do have to ask some of those questions. We will talk about redistricting. Does gerrymandering deserve the bum rap it gets as a driver of polarization in Congress? Analysis is something we're good at — but it is emphatically not enough. I believe passionately that there is a craving for the next generation of policy reforms in the area of democracy and governance, for people to engage with and rally around. It's hard, but there's a hunger for it — and there will be a movement in the political world if we can come up with some of those ideas. And we must recognize that they can't be stale. We can't ride into battle under a tattered flag, with ideas that were last new in the 1970s. We need to look seriously at the new positive trends such as the digital world, small donors in campaign finance, a whole bunch of other things — all to ask what about the next wave — not the last two or three — of reform ideas might be.

Second, toward that end, we must ask ourselves tough and possibly disconcerting questions. We all have our preconceptions, we all have the ideas we've been wedded to for a long time. After all, if we were going to have a conference on political reform at any other point over the past century here in Greenwich Village, a lot of the theme and a lot of the agitation would have been: "How can we break the power of party bosses?" Well now we see some of the downsides, the weaknesses of parties that have come out of some of the

reforms that people like me and many of us here advanced. We need to be honest about that. How do we have strong parties without bringing back Tammany Hall? How do we have a robust campaign finance system? How do we make government work not just so that it's clear and hygienic, but that it actually can do the job?

And finally I hope we'll recognize that change of this kind requires a political strategy. "Dysfunction concedes nothing without a demand" as Frederick Douglass never said — but if he had said it, he would have been right. You've never had political reform, you've never had substantial change in the way government works without deep public engagement. And so what that means is that as we talk about ideas, we have to think simultaneously about the strategies to enact those ideas. This is not a matter for the left alone, or the right alone, or the center. We've got folks here representing all those political approaches. We think that there is potential common ground ... but even more that there is *uncharted* ground with the vast territory of the American public who are mad at government and mad at politics and don't view themselves in any distinct ideological camp.

I am always reminded of a signal moment in American politics around these issues. Twenty-two years ago Ross Perot got 19 percent of the vote as a third-party candidate talking about the dysfunction of American government and the brokenness of American politics, even after it was clear to everybody he was erratic at best. Normally when that happens, one of the two major political parties co-opts that new force. That's what FDR did with the Progressives, and what Nixon did with the George Wallace vote. But after 1992, that didn't happen. That Perot vote and the millions beyond it are the jump ball of American politics. They choose who wins the elections. They've taken on new forms, some good, some bad. But there is a public that can and must be engaged, and not necessarily in traditional ways.

What do we at the Brennan Center hope to get out of this conversation? We hope for new ideas, yes. New energy, a sense of common urgency, maybe a little common panic about what's happening and a common determination to work together. Not necessarily *consensus* about what ideas make sense, though that would be great. We want a research agenda going forward that we and other groups can focus on. What do we know? What don't we know? What will we need to know to be able to make change?

Gridlock's Effects Span Ideological Spectrum

Larry Kramer

In opening remarks at the Brennan Center's government dysfunction conference, Hewlett Foundation President Larry Kramer explained how gridlock prevents progress no matter one's ideology or goal.

The problem we are discussing today is shared across the ideological spectrum: whether you want government to do more, less, nothing, or something different, you can't get anything done. Even the libertarian, for example, can't get the government to do less than it does. Thus, the idea that we want a functional government that we can then work through to determine if it should do less, more, nothing, or something different, is what we're really after here. Today we are hoping to begin to see solutions and ways to move that idea forward.

Whether you want government to do more, less, nothing, or something different, you can't get anything done.

There has been, and continues to be, a lot of analysis as to what the problems are. Even with all this research, however, there are important knowledge gaps that remain. But really, new thinking about ways in which we can get things moving in the right direction is the most important thing now, because we can't wait that much longer. So the key things that we're looking for, and I just want to underscore what we hope will come out of today is, first and foremost, fresh thinking. There is a lot of conventional wisdom out there, much of which we think is bad, and much of which is contrary to a lot of research. Getting beyond that, and beginning to get an understanding of both what is not right and what is possible, is a really important thing that we need to talk about and to share. This is one of the reasons that we are so happy to see academics and activists together in the same room, sharing ideas, as opposed to having separate conversations.

When I moved from the academy into the foundation world, one of the most striking things to see was just how much research we were funding but not using ourselves. A lot of foundations fund a lot of research, but don't necessarily talk to the people whose research is being funded. This realization was paramount when it came to thinking through how we wanted to approach problems ourselves. This is also true for a lot of the activist organizations, so conversation is a good way to begin to develop fresh ideas and fresh thinking about how to solve some of these problems.

Kramer delivered a version of these remarks at the Brennan Center and Hewlett Foundation's dysfunction conference, February 12, 2014.

The second goal of today's meeting is to begin to develop long-term thinking about the problems. We need to worry about the system as a whole and not whatever short-term or medium-term partisan gains we can get out of it. This is, of course, a major problem when you begin to push any idea forward because everything that we might do has a short-term consequence that favors either the left or the right. Getting both sides to understand that, regardless of the short-term consequences, in the long run these proposals are all going to be ideologically neutral is a very difficult feat. Additionally, it is imperative to convince both sides that the best way to compete for support and promote ideas is not to try and exclude portions of the populace, but rather to make the system accessible and workable as a whole. That's a long-term proposition and not a short one.

We need to worry about the system as a whole and not whatever short-term or medium-term partisan gains we can get out of it.

Related to that is the idea of thinking indirectly, in terms of solutions, rather than directly. Every organization and funder here has a substantive agenda and not just a procedural one. If you're thinking in terms of what we are going to do now that will advance your substantive agenda immediately, then this process of democratic reform will itself become just one more contributing factor to polarization. The only way we're going to get beyond the polarization debate is if people can put those agendas aside and say that what we're after in this work is, indirectly, to create the conditions in which we can begin to directly argue and fight for our agenda. If the agenda is strong, we'll prevail in that fight, regardless of what the agenda is. To me, that's true whether you're on the left, the right, or in the center.

The last thing that we're looking for, and one of the things we're most excited about, is to get funders aligned around this process. The audience here is comprised of academics, activists, and quite a few funders. And in that connection I want to underscore what Michael Waldman said about not holding back. We funders, we're not that thin-skinned. Feel free to criticize us and tell us what we're doing wrong, or what we're not doing or should be doing. Most importantly, feel free to just talk openly, because we have no interest in funding things that aren't going to work just because we think they might be the right thing to do at this very moment. That's an important part of the conversation, and I hope having us here really becomes part of a process of getting all of the funders aligned in terms of what we're supporting. The problem is so large that if funders approach this the way they traditionally do, which is to think in terms of a particular little program and what can we do to advance that forward, we're not going to solve the problem as a whole. This is not worth doing if we're not going solve the problem as a whole, just to be able to boast at the end that we achieved little reform X in five states, but then did not actually do much to solve the larger problem of polarization. If that is going to be the case, there are other areas where we could have more of an impact. An impact in this is going be measured, and needs to be measured, by some sort of broad solution, and that's only going to happen if we are all working together. So the last thing we would like to see come out of this meeting is to begin to get everybody, if not on quite the same page, at least within the same chapter.

The Governing Crisis: Exploring Solutions

During a two-day conference, dozens of academics, reformers, and philanthropists explored new ideas to fix government dysfunction and polarization. Below are excerpts from those discussions, which touched on a range of topics, from the need for stronger parties to redistricting reform to voting rights.

Frances E. Lee explained how America's system of separation of powers can breed irresponsible governance. Lee is a Professor at the University of Maryland, College Park.

The U.S. system of separation of powers and checks and balances is a means of fragmenting political power. Political parties strive to overcome this fragmentation, but our system remains fundamentally hostile to parties and it blocks them at every turn. A system of separated powers may have the virtue of preventing tyranny, as the framers argue. It also has the benefit of forcing compromise among important partisan and societal interests. But defusing power also incentivizes irresponsible behavior.

The incentives for Republicans to move to the extremes are stronger.

In democratic politics, power and responsibility go together. Irresponsibility is a privilege more open to those with less actual power. As one Democratic House member remarked in 1995 right after the Gingrich revolution, "Ain't opposition fun? We don't have to be responsible. All we have to do is watch them self-destruct." Parties that have the power to govern expect to be held responsible for governing failures. But in the U.S., neither parties nor presidents can govern because power is divided in such complex ways. Most of the time we have divided government. In fact, politicians who do not have the power to deliver policy outcomes can and will legitimately blame others for failures and for inaction. But this lack of accountability also gives them incentives to behave irresponsibly. Responsibility means acting with a concern for the immediate consequences for public policy regardless of whether they are liberal or conservatives. Politicians have to decide when to make serious efforts to participate in governance to achieve the doable at the present moment, to take the half of loaf if you can get it, to pursue incremental reforms, or instead to withdraw in order to preserve or generate issues for future elections. Irresponsible politicians will refuse to engage with the difficult choices that governance requires. They will refuse to grapple with trade-offs or to negotiate. Instead, they wash their hands of the enterprise and use their time in office to set up issues for the next elections.

Remarks excerpted from a Brennan Center conference, February 12-13, 2014.

Jacob S. Hacker spoke about the relative position of the political parties. Hacker is the Director of the Institution for Social and Policy Studies and Stanley B. Resor Professor of Political Science at Yale University.

I think it's important we diagnose the problem correctly. Basically, there's evidence of asymmetric polarization. What do I mean by that? It's pretty straightforward. The movement of the Republican Party to the right — both in positions and in willingness to use what were once considered extreme tactics — has been much greater than the movement of the Democratic Party to the left. I think that's important because this is not a recent development nor are our governing problems a recent development. So any argument that says that it's just because of the rise of the Tea Party and the fragmentation of the current Republican Party has to grapple with the much more longstanding asymmetry of polarization.

Polarization is a function of long-term historical transformations associated with the realization of full democracy in America.

It's not just about positions. It's pretty hard actually to measure positions of politicians. What I would focus on is what is called constitutional hardball. The rise from these are filibusters pioneered by Republicans, the debt ceiling crisis, the blocking of appointments, the effort to disenfranchise voters, mid-decade reapportionments, shutdown. I know people are resistant to this pattern as somehow indicative of a difference between the parties. They're resistant because this is seen as somehow partisan and imbalanced and not to mention bad manners to talk about the differences between the parties, to say that one party has been more anti-system than the other. But it's also against political science instincts, which tend to see the parties as symmetrical, converging around the median voter, or at least equally departing from the median voter's preferences. The incentives for Republicans to move to the extremes are stronger within the electorate, within the affiliated interest groups, due to the media environment around the conservative side of the spectrum. But also the electoral corrective for moving to the extremes is much weaker than generally thought. Some of the reasons for that have to do with the limits of voters. Others have to do with the reasonable trade-off that Republicans might be willing to make given the way in which they have been able to protect themselves against electoral backlash due to the concentration in particular of Republicans in safe districts.

Richard Pildes argued that the polarization of parties has been decades in the making and will not end anytime soon. Pildes is the Sudler Family Professor of Constitutional Law at NYU School of Law.

I want to use this occasion to penetrate some of the conventional stories you hear about polarization and government dysfunction. You're looking at a phenomenon that is some 40 years in the making that has been building and accumulating in a steady way over this period of time. In my view, the causes of the political polarization of our parties today is a function of long-term historical political transformations that are associated with the realization of full democracy in America, as I would put it, with the enactment of the Voting Rights Act in 1965. The South that existed for the entire 20th century started bringing forces that pushed Southern politics from a more liberal direction. Over the several decades it took for these forces to work themselves out led to

an ideological realignment and resorting of the political parties in such a way that the Republican Party is now not divided between liberal and conservative factions. The Democratic Party is not divided between liberal and conservative Southern Democrats, liberal northern Democrats or western Democrats and Southern Democrats. You have an ideological purification of the political parties that is a product of what I would say is a more normal and mature state of American democracy.

What it means is that polarization of the parties is something that is likely to be enduring for the foreseeable future at least. Not likely to be subject to easy change through various kinds of institutional reforms that have been proposed. Also something that is a reflection of a more normalized state of American politics in which you have genuine two party political competition throughout the country. So the way I approach these problems is not by trying to think of how to fix polarization. It's how do we try to imagine a more effective system of governance in the midst of a polarized political system that's likely to remain that way.

David Frum, Senior Editor at* The Atlantic, *spoke of some of the deeper questions behind reform.

There is no error in politics more deadly set than sticking to the carcasses of dead policies. You need to think, what are the indicators of American dysfunction, and how can each of them be overcome? And I put to you four things that in our recent time are the indications of a state system not working. The first is, can the state fight and win wars? I think fighting and winning wars is the single most important job the state has. America has fought a lot of wars since 1945, but the record of success is not so good. You can't win wars, your state is in trouble. The second is, can the state consistently balance its books over time? Balancing its books, I don't mean to be a deficit fetishist — I'm certainly not one of those who thinks the deficit right now is the country's most important problem, or even one of its top three — but what persistent deficits show is a political system that cannot bring its ends and means into harmony with each other. And that is a sign of political failure, whatever its economic effects. If you persistently can't do that, there's a lack of realism.

Dysfunctional behaviors weaken institutions, and the institutional breakdown reinforces dysfunction.

Can the state get value from money? The state spends money. One of the things that is remarkable about the American state compared to any other is that, if you look at all of its levels of spending — federal, state, and local and regional, and if you include tax expenditures as well as direct expenditures — the United States is not significantly less expensive than the states of Europe. But the results are always much worse. There is something about the American state that it's unable to get value from money. And the last is the ability to manage the economy successfully over time and respond to crisis effectively. This is a new role for governments, one they've only taken on since World War II. It's one the United States has had some success with until about 1980 and since then seems to be less and less effective at. When you look at those areas, those are the things you are trying to make better. Then you ask, does your reform project address each of those?

Robert Bauer asserted that dysfunction is partly the result of political culture. Bauer was White House Counsel for President Barack Obama and Co-Chair of the Presidential Commission on Election Administration.

I think it's less likely that institutional breakdowns contribute to these dysfunctional behaviors. I think the dysfunctional behaviors start to weaken the institutions, and the institutional breakdown and a vicious cycle begin to reinforce the dysfunction. In other words, the problem is oftentimes a problem of political culture, and then it begins to infect institutions. And people think, well, if we fix the institutions, we can fix the problem. But if the problem is in fact deeply rooted in the political culture for however long it is, the institutional reform is not going to have the desired effect.

We need to reset the debate and the parameters from which we're approaching these issues.

I do think the problem, in my judgment, in Washington, is less that we have polarization — that is to say, in the sense that there are widely divergent and very strongly held opposing points of view on issues. It is the quality of the debate, and the willingness to actually listen to the other side. So one of the things that becomes very critical is a willingness to, if you will, reset a debate. You have to reset certain debates. Take campaign finance reform, for example. If the debate begins with "I think the Supreme Court of the United States did something virtually criminal in *Citizens United*" — or you can pick a similar proposition from the other point of view — that debate is going to careen off the track immediately because what you're doing is you're locking the conversation into what you know is going to be a settled channel of deep disagreement. One in which all the cues are, "We're never going to agree about this."

Benjamin Ginsberg touched on how the voting commission achieved consensus to issue recommendations to reduce long lines and modernize voting in America. Ginsberg served as Counsel to Mitt Romney's presidential campaigns and Co-Chair of the Presidential Commission on Election Administration.

I would agree about the need to sort of reset the debate and the parameters from which we're approaching these issues. And I think that was something we were able to do. I think the subject of voting , at least as the way we defined it, or the president defined it in his executive order, particularly lends itself to that. I think it might be a bit more difficult in some of the other areas. Nonetheless it's instructive. Both the left and the right have tended to define the subject areas that you're talking about from a position that stakes out the edges. We're right, they're wrong is sort of the approach of both the left and the right on it. That was not where we came at it from, on this issue, it was an issue where I think it was easier to do that. On a number of them, I think we also, for various reasons, we were willing to relook at some of our basic assumptions. The voter registration lists for you, early voting for me, there were things that were actually acceptable to people in our base, but a little bit contrary from the stereotypical positions that a party would take.

Reihan Salam spoke about how increased diversity leads to a greater diversity of opinion. Salam is Executive Editor of* National Review *and a Senior Fellow at the R Street Institute.

I sometimes like looking at this in comparative terms. My family is from South Asia. They're South Asian Muslims, and if you look in India, you hear very similar parallel laments when people talk about contemporary Indian politics. They'll say that contemporary politics, it's so much more populist and awful in various ways, and part of that is a reflection of the arising assertion of a wide variety of social groups. For example, caste politics are a much bigger part of Indian life. I mean people who just kind of weren't really engaged in the conversation, we now hear them a lot more actively. They have independent channels through which they can reach the wider public, and they're quite comfortable asserting themselves in that way. I think that normative diversity — the fact that we have really meaningfully clashing worldviews, and we've had that before in our history — I think that you actually see this manufacture of new kinds of political sensibilities happening much more rapidly now, and I think that you're seeing it happening not just in the United States but around the world.

Thomas A. Saenz, President and General Counsel of MALDEF, remarked that any consideration of dysfunction must take into account changes in the nation's demographics.

Fear of the political consequences of demographic change are a large part of the explanation for increasing political polarization. In addition to spending time discussing and addressing issues of elected officials themselves, their ideologies, their polarization as well as their connection to voters and donors, it means we have to pay attention to the general public and address that fear of demographic change. I think there needs to be a vigorous discussion on how do you address the fear of the political consequences of demographic change across this country. But the fact that there is this predominant fear or this growing fear of demographic change that, as we all know, is exploited by some political leaders means that there has been a perpetuation of racially polarized voting across the country. I know that this is certainly the experience of the Latino community where we may have beliefs, views, dreams some decades ago, a decade ago that perhaps in states like California, racially polarized voting might actually decrease; it has not. It is still persistent and significant even in the progressive island of California. That persistence of racially polarized voting means that you have to continue to pay attention to the depressed, deterred levels of political participation in minority communities. A lot of that stems from the fact that under existing structures, they are consistently outvoted, at least in local and state legislative races, and believe therefore, there is no reason to vote. If their vote doesn't count, there's no reason to vote.

Fear of the political consequences of demographic change are a large part of the explanation for increasing political polarization.

15 Executive Actions

Michael Waldman and Inimai M. Chettiar

With Congress mired in partisan gridlock, this policy proposal outlined 15 steps the Obama administration could take to overcome a paralyzed government, strengthen democracy, secure justice, and further the rule of law.

1. Commission a Justice Department report, *The Constitution in 2025,* modeled after *The Constitution in the Year 2000.*

Over the past quarter century, constitutional interpretation has moved steadily to the right, upending long-settled law in cases involving campaign finance, gun ownership, affirmative action, and the power of Congress to protect workers and the environment. Much of this change was anticipated by the U.S. Department of Justice under the leadership of Attorney General Edwin Meese who, in 1988, directed the Office of Legal Policy (OLP) to publish a report entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*. This influential report set out 15 legal questions likely to come before the Supreme Court by the new millennium. The "Meese memo" is credited with raising awareness about the importance of judicial selection and articulating the path forward for conservative legal advocacy. In significant ways, it mapped the path the Supreme Court has taken on constitutional law since 1988.

The Obama administration can follow this precedent by providing a roadmap for the next stage of constitutional change. The president should request the attorney general to direct OLP to issue a new report, *The Constitution in 2025*, to focus attention on the importance of judicial nominations and better prepare the media, legal advocates, and the public to anticipate the great constitutional questions that will come to the federal courts over the next decade.

2. Direct federal agencies to find ways to increase voter participation nationwide.

The United States has one of the lowest voter participation rates among industrial democracies. One principal reason: our ramshackle systems of registering voters and running elections. Voting systems are first and foremost a state responsibility, but the federal government could do much more to help. Federal agencies employ and interact with millions of Americans. They have access to citizens, data, and tracking systems that

Excerpt from *15 Executive Actions,* April 2014.

would provide tremendous benefits to voters and election administrators. This vast reach could be used to help enhance American democracy. The president should convene Cabinet-level agencies and direct them to develop plans, within the spheres of their jurisdictions, to promote voter participation and help states improve the functioning of elections.

3. Direct federal agencies to accept designation as NVRA agencies.

At least 50 million eligible Americans are not registered to vote. The National Voter Registration Act of 1993 (NVRA) was designed to simplify the process by requiring certain government agencies to provide voter registration services. Already, the law has dramatically boosted registration, but it has fallen short of its full promise. The law requires *state* agencies providing public assistance to provide voter registration services. But *federal* offices, with the exception of Armed Forces recruitment services, can serve as voter registration agencies only "with the agreement of such offices." The president can remedy this failure. He should issue a presidential memorandum directing federal agencies to accept designation as voter registration agencies under the NVRA.

4. Enlist the private sector to assure free and fair elections.

In 2013, the U.S. Supreme Court significantly weakened the protections offered by the Voting Rights Act in *Shelby County v. Holder*. Since the Court's decision, a number of states and localities have pressed forward with discriminatory voting changes. At the same time, on a more optimistic note, many states have begun to implement reforms to modernize registration and streamline voting. The president should convene and enlist the full private sector to assure that every eligible American has the ability to vote. A White House Conference on Free and Fair Elections could bring together leaders of the bar, business, clergy, and education to encourage active participation in ensuring that all eligible Americans are able to vote.

5. Appoint Republicans and Democrats to the Election Assistance and Federal Election Commissions.

The agencies entrusted with protecting our national electoral process cannot act. Four of the six commissioners at the Federal Election Commission (FEC) still serve although their terms have expired. The Election Assistance Commission (EAC) has had no commissioners since 2011. Both agencies are hamstrung. The president has the power to cut this Gordian Knot. He should nominate commissioners who will enforce the law to replace the four FEC commissioners whose terms have expired. He should also nominate two Republicans to serve on the EAC.

6. Sign an executive order requiring disclosure of political spending by entities awarded government contracts.

In 2011, the Obama administration drafted an executive order requiring companies and organizations bidding for federal contracts to increase their disclosure of political contributions. The draft required disclosure of bidders' contributions to nonprofit groups that shield donors' identities but conduct explicitly political campaigning. This type of spending has come to be known as "dark money." The president should renew the push for contractor disclosure. He should issue an executive order requiring companies with government contracts to make their political spending public, including dark money spending. The order should be modeled on the 2011 draft, but limit its application to firms already awarded contracts.

7. Request that the Securities and Exchange Commission issue regulations requiring disclosure of corporate political spending.

More than $300 million was spent in the 2012 election by undisclosed donors. How much of this money came from the treasuries of publicly traded corporations? It is unknown. Firms can use intermediaries to spend without limit to influence elections, as long as they do not coordinate that spending with candidates. The president should request that the Securities and Exchange Commission issue a rulemaking requiring disclosure of corporations' political spending.

8. Request that the Federal Communications Commission require more thorough disclaimers of outside spending on political advertisements.

American voters are inundated with political advertisements from organizations that hide their identities behind vague names to avoid public scrutiny. Ads must include the sponsoring group's name, but need not disclose the sources of their funds. The Federal Communications Commission (FCC), which regulates mass communications, oversees the creation of disclaimers in both commercial and political messaging. The president should join the members of Congress who have called upon the FCC to exercise its statutory authority and require that groups airing mass political ads provide additional disclosure, such as the identity of the largest donors, in those ads.

9. Create a Presidential Commission on Mass Incarceration, modeled after the "Kerner Commission."

With only 5 percent of the world's population, the United States has 25 percent of its prisoners. The president can help make mass incarceration visible by creating a National Commission on Mass Incarceration of leading bipartisan policymakers and civic leaders. Such a panel could be modeled after the National Advisory Commission on Civil Disorders (chaired by Illinois Gov. Otto Kerner, Jr.). President Lyndon B. Johnson created the "Kerner Commission" to study the causes of urban riots. The National Commission on Mass Incarceration should similarly study the current drivers of the growth in federal and state prison and jail populations, examine the accompanying economic and societal toll, and issue concrete policy recommendations.

10. Issue an executive order directing federal agencies to recast their criminal justice grants in a Success-Oriented Funding model.

The federal government spends at least $3 billion in grant dollars each year to subsidize the country's overused criminal justice system. These grants, spread across several federal agencies, contain incentives that can encourage punishment and incarceration without public safety benefit. The president has the power to correct this problem. He should issue an executive order to implement a "Success-Oriented Funding" (SOF) model for all federal criminal justice grants administered by executive agencies. SOF strictly ties government dollars to concrete, measurable goals. The concept is simple: Fund what works. What works in criminal justice are practices that drive toward the twin goals of reducing crime and reducing unnecessary punishment.

11. Direct the Justice Department to identify federal prisoners to whom the Fair Sentencing Act would retroactively apply, and recommend commutations for all those eligible, barring exceptional circumstances.

Nearly 100,000 federal prisoners, roughly half the federal prison population, are incarcerated for drug convictions. Many were sentenced under outdated mandatory minimum penalties now considered

unnecessary for public safety and unjust. In 2010, Congress passed the Fair Sentencing Act (FSA). It significantly reduced the sentencing disparity for crack and powder crimes from 100 to 1 to 18 to 1. However, the FSA did not apply to prisoners already serving time for crack crimes. The president should direct DOJ to take a harder-hitting approach to retroactively apply the FSA. Instead of waiting for prisoners to initiate commutations themselves, DOJ should actively search out and identify all federal prisoners whose sentences would be reduced if the FSA were retroactively applied, and encourage these prisoners to file clemency petitions.

12. Issue an executive order to "ban the box" on federal agency job applications, except for law enforcement positions.

Today, 68 million Americans have criminal records. For the formerly incarcerated, the stigma of a criminal record presents a significant obstacle to gaining stable employment and re-entering society. Often, employers eliminate candidates who "check the box" on job applications stating they have a criminal record. The president should issue an executive order to "ban the box" for executive branch employment.

13. Direct the Attorney General to issue new guidance banning discriminatory law enforcement techniques.

In 2003, acting on President George W. Bush's directive, the Justice Department issued Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. The guidance banned racial and ethnic profiling in federal law enforcement. Yet it contained no enforcement mechanisms to hold agencies accountable, allowed broad exemptions for national security and border integrity investigations, and did not prohibit profiling based on religion, national origin, sexual orientation, or gender identification. As a result, unlawful profiling by federal, state, and local law enforcement remains a persistent problem. President Obama should direct Attorney General Eric Holder to promulgate updated guidance to fix these deficiencies.

14. Request that the Attorney General survey the use of "secret law" in the federal government and develop procedures to make the law public.

Since the attacks of September 11, 2001, domestic counterterrorism activities increasingly rest on "secret law" — authoritative legal interpretations and directives, issued by federal courts and agencies, that are not made available to the public. The president should openly support the principle that there must be a public version of any authoritative statement of the law on which executive action relies. He should direct the attorney general to conduct an internal, government-wide survey to identify existing categories of secret law operating within federal agencies and departments.

15. Issue an executive order applying key federal information-sharing restrictions to "suspicious activity reports" provided by state and local law enforcement.

Since September 11, 2001, the federal government has spent billions to improve information sharing between federal, state, and local law enforcement agencies through Suspicious Activity Reporting (SAR) programs. But the rush to create these programs has led to a patchwork of rules and procedures that does not adequately ensure the data's usefulness or protect our liberties. In particular, the SAR programs do not adhere to the Criminal Intelligence Systems Operating Policies. Known by their citation, 28 C.F.R. Part 23, these federal privacy rules prohibit law enforcement from collecting or retaining intelligence information when there is no reasonable suspicion of criminal activity. The president should issue an executive order directing federal agencies to apply 28 C.F.R. Part 23 to all information collected and shared through SAR programs.

How Obama Can Use Executive Actions to Improve Our Democracy

Michael Waldman

Presidents from both parties have long embarked on major policy initiatives without waiting for Congress. President Obama can act on voting and transparency to make government work better.

With Congress paralyzed, President Obama has promised to use his "pen and phone" to overcome the ongoing dysfunction and get some work done. And the White House has already acted several times to help improve America's economy. But such policies, no matter how valuable, will achieve little if we do not fix our broken democracy.

Allow me to suggest some ideas for how the president can do just that.

First, some historical context. Presidents have long acted within their authority, from Jefferson's purchase of Louisiana without consulting Congress to Lincoln's freeing the slaves by proclamation. In recent decades, at a time of divided government, presidents have found ways to act in the arena of domestic and social policy. As a young Harvard professor, Elena Kagan identified President Reagan as the pioneer of the current trend. President Clinton extended the president's role as originator of creative executive policymaking. As Clinton's chief speechwriter, I was deeply involved in his administration's executive action program, which used tools creatively to catalyze major policy change. All those announcements in the Rose Garden, from school uniforms to tobacco regulation? Those were executive action, designed to call attention to an issue, prod Congress, or achieve results. We even tried to enact campaign finance reform by executive agency action. The plan fizzled, but helped keep the issue alive — and built momentum that eventually led to the McCain-Feingold law. President Bush did the same thing.

Now comes Obama. Is his second-term strategy overreach? Hardly. Indeed, the president has issued executive orders at a slower pace than all his recent predecessors. And he is not trying to outsmart a hostile Congress. The legislative branch isn't oppositional; it's paralyzed. It can't pass good bills, bad bills, or any bills.

In the face of divided and dysfunctional government, it's little wonder that presidents have found ways to push policy and prod the bureaucracy without waiting for congressional action or approval that may never come. But Obama's executive orders have not yet focused on ways to make government work better.

In the face of divided and dysfunctional government, presidents have pushed policy and prodded the bureaucracy without waiting for congressional action.

My colleagues and I have suggested 15 steps the administration can take to overcome dysfunction, strengthen democracy, secure justice, and further the rule of law. The president should take them. And he has explicit legal authority to do so.

Start with voting. The president recently spoke out on the issue: "The first words put to paper in our American story tell us that all of us are created equal," he said. "That makes it wrong to pass laws that make it harder for any eligible citizen to vote, especially because every citizen doesn't just have the right to vote, they have a responsibility to vote."

This op-ed appeared at The Daily Beast, April 18, 2014

But his own administration could do much more to help voters exercise their franchise. The National Voter Registration Act, enacted in 1993, is known as the "motor voter" law because it uses DMV offices and other agencies to register voters. The law authorizes federal agencies to help, too. States have been asking for action for years. Remarkably, federal agencies routinely have said no. Obama could reverse that with the stroke of a pen. Hundreds of thousands could be registered by the Veterans Administration, United States Citizenship and Immigration Service, Department of Defense, and other units if they are designated as voter registration agencies. He also should convene his Cabinet heads and ask them what else they can do to boost participation.

Criminal justice reform is another area ripe for presidential action. The United States has 5 percent of the world's population, but 25 percent of its prisoners. That's a scandal. Policy on autopilot is one reason why. Washington sends billions of dollars to states for criminal justice, but the funds can have perverse consequences, inadvertently steering police and prosecutors toward unwise policies. The president should order an immediate review of the array of criminal justice grant programs. The goal: When possible, shift them toward what is known as "Success-Oriented Funding." This reliance on metrics, funding only what works — the modernizing reforms of which the administration is so proud in education and health care — would extend to criminal justice.

How about the $300 million of money from anonymous campaign spenders now hurtling toward our elections? The president could act there, too. A few years ago he floated the idea of requiring companies that bid on government contracts to disclose their campaign spending. Congress howled. At last, a cause that could rouse it to action: defending the honor of campaign contributors. It passed a provision blocking such a move. But the law allows the government to require disclosure by firms that are actually *awarded* contracts. That basic anti-corruption move would do much to shine light on "dark money."

As for fighting terrorism, controversy rages — how much, for example, it should be vacuuming up information about our phone calls. Nonetheless, the White House could take steps to disclose more of the government's activity. Since September 11, 2001, much of the government's aggressive counterterrorism moves have relied on legal opinions and directives, even by courts, that are themselves secret. That makes no sense. These documents don't reveal terrorist hideaways but legal doctrines that should be the subject of public debate. The president could order the attorney general to lead a careful government-wide review of such secret laws with an eye toward declassifying as much as possible.

Wait a minute: Didn't liberals spend a decade blasting Dick Cheney's claims that the president had "monarchical notions of prerogative"? Didn't conservatives, who now denounce the "imperial presidency," defend its right to use "enhanced interrogation techniques" without congressional approval? It's all enough to give hypocrisy a bad name. The steps we propose are all authorized by law. None would be secret. When Obama oversteps, as in his defense of the NSA spying program, he will be called to account by Congress, courts, and the public — and he should.

Like many second-term presidents, Obama is discovering that he has many powerful tools at his disposal to make progress toward his goals. He should apply them to our broken democracy.

But it should not require a defense of torture, or torturing the Constitution, to see that the president is well within his authority to act when he can. All public officials have a duty to try to advance the public good. None of these modest proposals will magically transform Washington, unfreeze Congress, or upend so many of the problems facing our political system. That still requires good old-fashioned legislation or new rulings from the Supreme Court — and perhaps a new justice or two. But like many second-term presidents, Obama is discovering that he has many powerful tools at his disposal to make progress toward his goals. He should apply them to our broken democracy. That would be the best vindication of what Alexander Hamilton, writing in the Federalist Papers, said would inevitably be a key source of strength: "energy in the executive."

Courts, Campaigns, and Corruption

The Brennan Center hosted a panel of jurists discussing recusal standards for judges who have received campaign contributions that may indicate a conflict of interest.

Hon. Jonathan Lippman, *Chief Judge, New York Court of Appeals*

Maybe recusal is not the right focus here, maybe the focus is on the assignment of the case to the judge. Maybe court administration has the responsibility to take the bull by the horns and say, this is really bad for the courts. And let's assume that everyone is totally — which is almost impossible — able to forget that Joe or Jane Schmo gave X amount of dollars to their campaign. The perception is so bad, putting aside anything else that might take place. Our judges are very sensitive: "Do you believe a contribution of $5,000 would affect a decision of mine on the bench? That is outrageous, insulting!" That was the way our judges looked at it. But I said: "I have an obligation, our court system has an obligation, to promote confidence and trust in the courts. So what we're going to do is focus on the assignment of the cases and if there's a contribution of more than a particular level, we are not going to assign that case to the judge for a period of two years after the contribution."

That's at the heart of what we decided to do, recognizing that sometimes contributors can contribute to get the judge off the case — if you're going to set limits that if there's so much money given that the judge can't hear the case: Well if I don't want Judge X to hear the case, I'm more than happy, that's a good investment to make a contribution! We combined it with a waiver approach. If a case is coming to a judge from someone who has contributed money to their campaign, we then hold that assignment. We write to the other side and say, unless you want to waive the disqualification of the judge for some reason, we will not assign this case to the judge. The other side could say, "No, no it's fine, I want to waive, I want to appear in front of that judge." But the judges themselves have no knowledge of any of this when it's happening. A case comes in and that's what we do: We don't assign it, wait to hear from the other side, and then we do not assign that case to the judge.

Remarks excerpted from a Brennan Center event co-hosted with NYU School of Law's Journal of Legislation and Public Policy and the American Bar Association's Center for Professional Responsibility, November 14, 2014.

Hon. Sue Bell Cobb, *Former Chief Justice, Alabama Supreme Court*

Alabama is one of only seven states that has *partisan* election of the justices and judges of the appellate courts, the 19 positions that we have on the appellate courts. The chief justice position is unusual in that it is a statewide race. In that race I raised $2.6 million and my Republican opponent raised, and acknowledged, and reported that he spent $5.4 million. What's not shown in the numbers was that at least $3 million was spent by other indirect groups, the state Republican Party, or other entities that were created. As a result, I was outspent about 3:1 and was still able to win that race by beating my opponent by 3.5 points....

I didn't know where I was going to be the day after the election, but two days after the election I knew I was going to be at my daughter's field trip. The phone rings and it is a reporter from *The National Law Journal* here in New York. She asked if she could speak with me a moment, and I said, "Well, I'm on a field trip with my daughter, but if you could be very brief I will speak with you." And I'm getting ready, she's fixing to say to me, "What does it feel like to be the first female chief justice in the history of the state of Alabama," or she's going to ask me, "What does it feel like to have been the justice with 25 years diverse experience, outspoken, unfettered child advocate, to be able to now be running the entire court system?" I'm ready. And she says to me, "Judge Cobb, how will you convince the people of Alabama that you will not be making your decisions based on the millions of dollars and the hundreds of thousands of contributions that you received?"... It's so sad that the system we have requires us to try to do one of the most important jobs that protects our democracy, and do it hampered by the justifiable concerns that people have. When we lose people's respect we've lost everything, because that is the only asset the courts have, our people's respect.

When we lose people's respect we've lost everything, because that is the only asset the courts have.

Hon. Maureen O'Connor, *Chief Justice, Ohio Supreme Court*

Here's what we do in Ohio when it comes to recusal or disqualification: By statute, when there is a motion (we call it an affidavit of disqualification) and it meets some procedural thresholds, then that affidavit of disqualification goes straight to the chief justice to make the decision in the event that judge who is the subject of the affidavit does not decide to voluntarily recuse from the case. Oftentimes I never found out about recusals on the trial level because an attorney involved in the case would come to the judge and say informally, "Judge, I'm going to make a motion to disqualify you in the event you don't step back, and here's the reason why," and the judge, for whatever reason, oftentimes it's just because they don't want to go through any kind of a process, will agree not to sit on the case. I don't know how often that happens. I don't suspect that it happens very often at all. Then you move to the next step where there's a formal affidavit of disqualification filed with the clerk of the court of the Supreme Court. It comes to me. The judge who is the subject of that affidavit is required, within a certain amount of days, to file a response in writing to the affidavit of disqualification. We are then mandated to review the complaint, the affidavit, and the response. The vast majority of times it is a frivolous affidavit and there is no need for disqualification. At that point there

is a preliminary decision that is communicated to the judge and the party requesting it and there is a formal decision that is then edited and released at a later time. There is a body of those decisions that is researchable and is open to the public in our archives on the Supreme Court.

Hon. Louis Butler, *Former Justice, Wisconsin Supreme Court*

Instead of trying to identify issues that relate to the giving of campaign spending in judicial races, Wisconsin has adopted rules saying we don't have a problem with it. That's the Wisconsin regime, and it has led to some interesting recusal decisions. I never know how far to go on this because A) I know all of these people, and B) it's extremely embarrassing when I'm talking about my home state. But I don't know how you can talk about recusal and not talk about what's happening in Wisconsin, because really we're the poster child for what you shouldn't be doing in judicial elections.

One of the recusal motions — in fact there were a number of recusal motions that were brought against one of the justices — had to do with campaign speech, both by the then-candidate and then by, subsequently, the candidate's lawyer with respect to attacking the defense bar in the course of an election and whether or not a person who had served to represent individuals in a criminal case should be sitting on a high court and whether or not that's a problem. That type of argument led to a number of criminal defense lawyers asking that justice to recuse himself off of their cases. The matter was heard by the court. Three of the justices came to the conclusion that there should be a full briefing, an argument, we don't have enough information to determine whether or not this justice should be removed from the court or not. The justice in question had stepped off the case off of that determination, after initially refusing to recuse himself. He denied the recusal motion, but he did not sit on the determination as to whether he should be removed from the case. The other three justices said: "We do not have the authority to remove him from this case. In Wisconsin, that deprives the voters of their elected judiciary and, therefore, we are not taking that step. We are not going to remove that justice from that case." So the court essentially split 3-3 for lack of a fourth vote. You had no real rule in Wisconsin.

Another justice was brought up on recusal issues who initially refused to step off of the case that she had been involved with. When the question came up of whether or not she should be removed from the case, the court once again split 3-3, you did not have four justices to come up with a final rule. You have to have four, otherwise you're spitting in the wind, right? You have to be able to count to four. Essentially what happened: The case came back by way of motion for reconsideration and, in the first case I'm aware of of this kind, at least in our state, all seven justices decided the question on whether or not the justice properly sat on the case. In other words, she decided her own case as to whether or not she should sit.

The Supreme Court Should Uphold Reasonable Regulations on Judicial Campaigns

Matthew Menendez

In Williams-Yulee v. The Florida Bar, *the Supreme Court will determine whether states can prohibit judicial candidates from personally soliciting campaign contributions from potential donors. The case, which concerns the balance between the right to free speech and a state's interest in preserving public confidence in the courts, could have far-reaching consequences for fair and impartial courts.*

On October 2, 2014, the Supreme Court agreed to hear a significant election law case involving fundraising in judicial elections. In *Williams-Yulee v. The Florida Bar*, the Court will consider a First Amendment challenge to a canon in the Florida Code of Judicial Conduct, which prohibits the personal solicitation of campaign contributions by a judicial candidate (under these rules, campaign donations may only be solicited and accepted indirectly through a candidate's campaign committee).

The petitioner, Lanell Williams-Yulee, was disciplined by the Florida Bar after she signed a letter seeking campaign contributions in her unsuccessful 2009 run for Hillsborough County judge. Williams-Yulee challenged Canon 7C(1) as an infringement on her right to free speech, and the Florida Supreme Court rejected that challenge.

While it may seem odd that the Court is devoting part of its very limited docket to judicial elections, advocates in the field have long expected the Court to take such a case. The outcome, however, is anything but certain.

Background

This is the first Supreme Court case to consider the interplay between the First Amendment and restrictions on judicial campaign activity since 2002, when the Court decided *Republican Party of Minnesota v. White*. In that case, a 5-4 majority applied strict scrutiny to strike down Minnesota's "announce clause," a canon of judicial conduct prohibiting judicial candidates from discussing issues that could come before their court were they elected.

Justice Sandra Day O'Connor has subsequently indicated she voted the wrong way in *White,* suggesting that the case may have contributed to increasingly partisan and polarizing judicial elections. Justice O'Connor is no longer on the Court, and it is unclear how the new justices view the tension (if they see one at all) between judicial campaign spending and the public's confidence in the judiciary.

Moreover, *Williams-Yulee* is the first case regarding judicial campaign conduct since the landmark 2009 ruling in *Caperton v. Massey*, in which a 5-4 majority recognized for the first time that significant judicial campaign spending could give rise to a due process violation of the rights of litigants. Since that time, the Court has handed down major blows to regulation of money in politics in *Citizens United* and *McCutcheon*. It remains to be seen whether this Court's majority will view *Williams-Yulee* as a case primarily about First Amendment rules on campaign speech rather than about reasonable efforts to protect judicial independence and impartiality.

This article appeared on Law360, October 9, 2014. The Brennan Center submitted an amicus brief in the *Williams-Yulee* case. Oral arguments were held on January 20, 2015.

Why is this Case Important?

There are 39 states that hold elections for at least some judges, and each of these states impose regulations on judicial conduct that do not apply to candidates in executive and legislative races. Of these, 30 have adopted some prohibition on direct solicitation of campaign contributions by judicial candidates, reasoning that judges directly requesting and receiving donations can harm the public's confidence in the courts. And 22 states employ a blanket prohibition on direct fundraising similar to Florida's.

These and additional regulations in the judicial codes of conduct are based on the important premise that judges are different. Unlike representative officeholders, judges may not favor their campaign supporters once on the bench. To the contrary, judges must faithfully apply the law to the facts before them, without consideration of whether a party or lawyer in the case supported the judge's election.

Unlike representative officeholders, judges may not favor their campaign supporters once on the bench.

And unlike other elections where some argue that the sole acceptable justification for campaign finance regulation is to prevent *quid pro quo* corruption, the Supreme Court has repeatedly emphasized that the public's confidence in the fairness and impartiality of the judiciary is itself a compelling state interest of the highest order. The high court's consideration of public confidence in judicial impartiality has thrown lower courts into confusion, and this confusion likely persuaded the Supreme Court to consider *Williams-Yulee*.

Other Challenges to Direct Judicial Solicitation Restrictions

The results of various challenges to direct solicitation prohibitions have been all over the map. At the federal level, the Third and Seventh Circuits have upheld these regulations against First Amendment challenges, as have the highest state courts of Arkansas, Florida, Maine, and Oregon. In contrast, the Sixth, Eighth, Ninth, and Eleventh Circuits have found that, at least in some circumstances, these restrictions on judicial campaign solicitation may violate candidates' First Amendment rights. Moreover, the courts have not reached consensus on the appropriate standard of scrutiny, with some applying strict scrutiny and some appearing to apply a less-searching "close fit" test between the restriction and the goal of protecting confidence in the judiciary.

The Supreme Court has repeatedly emphasized that the public's confidence in the fairness and impartiality of the judiciary is itself a compelling state interest of the highest order.

Majority of People Want an Impartial Judiciary

The ability of the states and the judiciary itself to adopt reasonable regulations on judicial campaigns has important real world impacts. As documented in reports by the Brennan Center, Justice at Stake, and the National Institute of Money in State Politics, since 2000 states have seen an explosion of campaign spending in state judicial elections. A huge percentage of all campaign spending in judicial elections is financed by frequent litigants and lawyers that have business before the judges in whose elections they spend. And in poll after poll, it has been shown that the overwhelming majority of the public (more than 87 percent in one survey) believes that judicial campaign spending can influence judicial decision-making.

If the Supreme Court applies strict scrutiny to strike down reasonable restrictions on judicial campaign activity, the increasing flood of judicial campaign spending may further damage the public's eroding confidence in the judiciary.

The Dysfunctional Decade

Walter Shapiro

As elections grow closer, dysfunction grows deeper. With the 2016 presidential race underway, can anyone govern effectively in this era of gridlock?

Those glorious 10 days will forever shimmer in memory. We will always treasure those idyllic moments that separated the final gasp of the 2014 congressional campaign (the December 6 Louisiana runoff election) and the start of the 2016 presidential race (the December 16 announcement by Jeb Bush of his almost-candidacy).

The only safe bet about 2016 is that it is certain to be a record year for media excess. The breakdown of traditional news organizations coupled with hyperactive pursuit of online clicks means that no rumor, no premature poll, no celebrity endorsement, no candidate tweet, and no campaign musical selection will ever be ignored. More media attention will be lavished on Iowa and New Hampshire than on Ukraine, Iran, and North Korea. Combined.

I will be part of the scrum as I have for the prior nine presidential campaigns. And, yes, I too am certain at times to give way to frenzied excess and mistakenly conclude that a lacerating debate moment or a scathing campaign commercial is the most important event in American political history since Richard Nixon's Checkers speech. But I hope that — despite all the temptations to become fixated on the ephemeral — I keep my eyes on the biggest challenge facing American democracy.

And that is: Can the next president govern?

For years, I assumed that winning the White House automatically gave the victor the ability to govern — and how he handled the first few years in office determined whether he would keep that mandate. So in covering campaigns over the decades, I scrutinized a presidential candidate's ideology, life experience, intelligence, and that elusive quality called character.

But the sad-eyed history of the 21st century presidency is a reminder that nothing can be assumed. George W. Bush squandered the national unity forged by 9/11 in the sands of Iraq. Since 2003, neither Bush nor Barack Obama has had a shred of bipartisan support to do anything — with the possible exception of a few attempts at immigration reform.

The result has been the Dysfunction Decade when even basic elements of governing like paying the national debt have turned into hair-raising dramas of Cold War-style brinksmanship. To merely pass legislation funding the government for 2015 required a major payoff to the banking industry and the final evisceration of the McCain-Feingold campaign reform legislation.

Other periods of paralysis in Washington have ended with a dramatic governing victory by one party or another. But American politics has been on a knife's edge since the 2000 electoral tie between Bush and Al Gore. Over the last 14 years neither party has achieved more than a momentary advantage. Every presidential election in the 21st century has been relatively close by historical standards. Despite the recent GOP off-year landslides, the Democrats seemed poised for a lasting congressional edge as recently as six years ago.

Brennan Center Fellow Walter Shapiro is an award-winning political journalist and a lecturer in political science at Yale University. This article appeared on the Brennan Center website, December 18, 2014.

Over the past century, roughly half of the presidential elections have been routs. In the 25 presidential elections going back to 1916, 13 of them were so lopsided that the winner received more than 400 electoral votes out of 538 (or 535 earlier). In 12 presidential contests, the winning candidate beat his nearest rival by 10 percentage points or more.

And then it all changed.

The last time a presidential contender received more than 400 electoral votes was in 1988. And not since Ronald Reagan in 1984 has a candidate hit 55 percent of the vote. In fact, in the last six elections, no candidate has gotten more than Obama's 53 percent of the vote in 2008 — and that number was exaggerated by the mid-September Wall Street collapse. Presidential landslides have become as outmoded as answering machines for landline telephones.

It is a daunting challenge for any president to govern in a 51-49 nation. With so much at stake in such an evenly divided country, political consultants dominate the thinking in both parties. Ideological purity and party unity are prized — and negotiations with the other party are often seen as tantamount to treason. As a result, neither party is prompted to rethink its ideology as the Democrats were after three humiliating White House losses in the 1980s. (In that decade, the Republicans carried 39 states in every single election.)

Predicting the presidential nominees this far in advance — let alone the final 2016 outcome — is a game that should be limited to fools, naïfs, and those who opine on cable TV. But what we do know is that the presidential map has been unusually stable recently (only two states shifted parties from 2008 to 2012). So, at the moment, it is reasonable to assume that the 2016 result will be close. And that puts a premium on a new president who can navigate treacherous waters — without the help of gusts from an electoral blowout.

How do you find such a candidate?

It requires more than taking them at their word: Bush in 2000 was sincere when he promised to be a "uniter not a divider" and Obama in 2008 had convinced himself that he could single-handedly transform the

It is a daunting challenge for any president to govern in a 51-49 nation.

culture of Washington. Even Richard Nixon (yes, Richard Nixon) seized upon an Ohio teenager's sign that he saw in the waning days of the 1968 campaign that read, "BRING US TOGETHER."

Maybe the first step should be to look skeptically at presidential contenders who magically promise to impose their will on Washington — regardless of Congress, a balky federal bureaucracy or a politically divided nation. Dogmatic certainty may play well on the campaign trail, but it remains a formula for disaster in the White House.

Experience matters in the governing game.

Among the most useful credentials that Hillary Clinton might bring to the Oval Office is her encyclopedic knowledge of dysfunctional White Houses: both Bill Clinton's (to which she contributed) and Barack Obama's (that she witnessed from the State Department). Current Republican governors like Ohio's John Kasich and Indiana's Mike Pence have the advantage of having also served in the House of Representatives during periods when there was still a flicker of bipartisanship. And Jeb Bush — beyond being a two-term governor of a politically divided state — hopefully picked up lessons in governing from the successes of his father and the failures of his brother.

Of course, there is no formula for governing that automatically rates the résumés of would-be presidents. Personality and persuasiveness may ultimately prove more important than authoring compromise legislation in Congress or working with the other party as governor.

In a sense, recognizing a capacity for governing is akin to Potter Stewart's definition of pornography: "I know it when I see it." But in order to glimpse that indispensable attribute along the road to the White House, you need to be looking for it. Sadly, too often campaign coverage obsesses about irrelevancies — and ignores what it takes to be a successful president in this troubled century.

Don't Mess With … Arizona?

Michael Li

At a time of polarization, gerrymandering gets much blame. Now the Supreme Court has taken a case where it may declare redistricting reform to be unconstitutional.

Days before its current term began, the U.S. Supreme Court surprised most observers by agreeing to hear a case that could drastically limit the ability of voters to determine who draws congressional boundaries — and potentially undermine a host of other longstanding election practices.

The case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, arises out of a challenge to a ballot initiative, approved by wide margins by Arizona voters in 2000, which took redistricting power out of the hands of the Arizona legislature and vested it in a five-member citizen commission.

The commission drew congressional boundaries in 2001 without controversy and was widely seen as a model for reforms around the country. However, the commission's second round of redistricting in 2011 proved to be anything but uncontroversial.

After the commission approved a map generally seen as favoring Democrats, Arizona Gov. Jan Brewer and state senate Republicans controversially attempted to remove the commission's chair. The Arizona Supreme Court blocked those efforts, but the Republican-led Arizona legislature then sued the commission in federal court, arguing that use of a commission to draw congressional maps violated the U.S. Constitution's Elections Clause.

Most observers considered the challenge novel and unlikely to succeed.

The Supreme Court's decision to revisit this issue has sent shockwaves through the election law community.

At issue is language in Article I, sec. 4 of the Constitution, which states that the "times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof" unless Congress provides otherwise. Most cases interpreting the clause to date have focused on the broad power granted Congress under the clause to override or change state election practices. Just last term, for instance, the Supreme Court ruled in another case also brought by Arizona that the clause gave Congress the power to enact the National Voter Registration Act.

The Arizona legislature argues, however, that the Elections Clause is more than just a grant of power to the federal government. Instead, the legislature contends that the clause also imposes limitations on how states can manage elections by mandating that all decisions about the "times, places, and manner" of federal elections are made by state legislatures. Under the legislature's reading, the

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Arizona commission is unconstitutional because Congress had not expressly authorized use of redistricting commissions to draw maps.

Earlier this year, a panel of three federal judges rejected the challenge in a 2-1 decision, holding that use of the term "legislature" in the Elections Clause should be read to refer to the entirety of a state's legislative process, including ballot initiatives passed by the voters. The court, in fact, regarded the issue as well settled. Its opinion noted that the Supreme Court had "at least twice rejected" Arizona's position — first in a 1916 case upholding the right of Ohio voters to use a ballot question to repeal a redistricting map passed by its legislature and then in a 1932 case affirming the constitutionality of Minnesota's practice of allowing its governor to veto redistricting bills.

The decision of the Supreme Court to revisit the issue has sent shockwaves through the election law community.

A growing number of states in recent years, including California, have given independent commissions the power to draw congressional boundaries. In fact, almost half of the states now use redistricting commissions in some form, including as a backup if the legislature is unable to pass a redistricting plan. Efforts to adopt similar sorts of reforms are currently underway in places like Ohio, Wisconsin, and Illinois — with Arizona and California frequently serving as models for proposed reforms. Because lawmakers have a natural self-interest in keeping control of the redistricting process, reforms — where they have been successful — have almost always been driven by citizen initiatives. All of those reforms, and future reforms, could be thrown in doubt if the Arizona commission is invalidated.

All of these reforms, and future reforms, could be thrown in doubt if the Arizona commission is invalidated.

The potential ramifications of a ruling in favor of the Arizona legislature go well beyond just redistricting commissions, moreover.

Florida (for now) has left redistricting power in the hands of elected officials. In 2010, however, its citizens used a ballot proposition to adopt constitutional amendments that put more explicit limits on what legislators can and cannot do in the redistricting process. Those amendments resulted in parts of Florida's congressional map being invalidated by a state court earlier this year. California voters, likewise, used that state's ballot initiative process to adopt an open primary system where the top two finishers regardless of party go to a runoff — a move regarded by many as an important step in combating increased polarization. And many states, such as Arkansas, have long used their constitutions, rather than legislation, to do things like define who is an eligible voter.

Some of these provisions are relatively new, others are of ancient lineage. But, if the Arizona legislature succeeds, all of them could be open to potential challenge on the grounds that they were adopted by voters or constitutional conventions and not by state legislatures. At the very least, the court could find itself in the position of having to make judgment calls on the wide varieties of ways that states have developed over two centuries to adopt rules governing elections.

Republicans Must Seize Filibuster Reform Opportunity

Alicia Bannon

With their Senate majority secure, Republicans are considering rolling back recent filibuster changes. Instead, GOP leaders should focus on further fixing the filibuster.

Republicans won the Senate by promising to reform a dysfunctional Congress. Yet with their new majority secure, Republicans are considering rolling back recent filibuster changes that reduced the number of votes required to invoke cloture on executive and most judicial nominees to a simple majority.

This debate asks the wrong question. Instead, Republicans should resist returning to a broken confirmation process and focus on further fixing the filibuster. The start of the next Congress is an ideal opportunity to comprehensively reform filibuster rules — for legislation and nominees — and create a process that protects minority interests without creating an effective minority veto on all Senate activities.

By most measures, today's Senate is barely functioning as a legislative body. Since 2009, the Senate has passed fewer bills during each two-year session of Congress than at any other point since 1947, the first year data is available. The Senate has also passed fewer of its own bills. From 2009 to 2010, the percentage of bills passed fell below 5 percent for the first time since 1947 — and has stayed there since.

Filibuster use — and abuse — is a major contributor to this dysfunction. The filibuster has blocked votes on everything from raising the minimum wage to reforming government surveillance. Ironically, it has often discouraged public debate and legislative accountability by preventing votes from even reaching the floor and moving negotiations behind closed doors.

By most measures, today's Senate is barely functioning as a legislative body.

It wasn't always like this. Due to a procedural change in the 1970s, a senator can filibuster a bill indefinitely without saying a single word. That change, coupled with the rise of partisan polarization and the breakdown of Senate collegiality, made filibuster use skyrocket in recent years. Prior to 1971, the number of cloture motions per Congress (a common measure of the filibuster) never exceeded single digits. In the 1970s, the average number rose to 32; by the 2000s, it was 95. In this Congress, the Senate has had 73 cloture motions filed to date on legislation alone (excluding nominations and constitutional amendments).

There is a bright spot: Last year's filibuster changes resulted in the Senate successfully considering nominees for up-or-down votes, meeting its constitutional duty to provide advice and consent on presidential nominees. The impact has been particularly striking for judicial nominees, where confirmation rates have caught up with rates under

This op-ed appeared in *Roll Call,* December 16, 2014.

The rules should require senators to stay on the floor during a filibuster and actually debate.

Presidents George W. Bush and Bill Clinton, increasing the capacity of the courts to resolve disputes and protect our rights.

Yet, even the November 2013 reforms addressed only one aspect of the filibuster — the supermajority requirement for cloture on nominations. They did not address other ways the filibuster can obstruct the consideration of nominees, such as the use of the post-cloture debate period (a misnomer, since no actual debate must occur) to use up floor time. Nor did they consider alternative mechanisms for giving voice to minority interests in the consideration of nominations, particularly for lifetime judicial appointments. And, of course, they did not alter the use of the filibuster for legislation.

The start of the next Congress in January is an opportunity to rewrite the rules. It is time to comprehensively reform the filibuster for nominees and legislation, and craft Senate procedures that facilitate both deliberation and substantive decision-making. These reforms must place costs on obstruction.

Most importantly, the rules should require senators to stay on the floor during a filibuster or post-cloture debate period and actually debate. Popular images of the filibuster involve senators speaking late into the night, reciting from the Bible or telephone book to slow consideration of a bill and publicize their opposition. Today's filibuster looks nothing like that.

Requiring senators to stand up and talk would promote accountability, foster deliberation, and give voice to minority interests — while also requiring the minority to expend time and energy to use the filibuster. Indeed, introducing a talking filibuster would make the preservation of a supermajority requirement for cloture far less concerning.

Other reforms include shifting the burden to require at least 40 votes to sustain a filibuster on legislation, rather than requiring 60 votes to break one, or reducing the number of votes required to invoke cloture. Finally, the rules should guarantee the minority party the right to offer germane amendments to legislation, thus ensuring a meaningful opportunity to participate in the legislative process.

Americans know our government is not working. Congress's approval rating currently sits at only 14 percent, while 2014 turnout rates were the lowest since 1942. The Senate must reform its rules and restore the higher chamber into a functioning body in which Americans can be confident.

Of Ceiling Tiles and Senate Committee Reform

Victoria Bassetti

Now that the GOP has control of the Senate, it's time for some common-sense changes to the committee system.

This fall, as Republicans on the campaign trail sought to recapture control of the Senate, candidates far and wide pledged to end gridlock in D.C. Productivity was their mantra. Or at least it was their consultant-burnished catchphrase.

But when Senate control switches, strange things happen. Take ceiling tiles.

In early 2001, when suddenly and unexpectedly the Senate flipped to a slim one-seat Democratic majority, for a brief period it was all ceiling tiles all the time for me.

Committees, once the workhorses of the Senate and House, the nurseries for legislative functionality, now are too often partisan bear pits.

Thrust into power, what did Democratic Senate Judiciary Committee staffers (of whom I was one) immediately turn to? If you guessed the Constitution, fighting crime, expanding civil rights, or reforming immigration, you would be wrong. In fact, we spent more than a week going down a rabbit hole in an all-out war with Republican staffers over office space allocation.

Hence the ceiling tiles. Turns out, ceiling tiles are an easy way to measure square footage in an office suite. One day, I came back to my office to find a bipartisan group of staffers counting ceiling tiles and studiously recording their findings.

As I stood in my office watching this meticulous effort to quantify and administer staff space allocation, one thought kept going through my mind. "You have got to be kidding me. Is this what any of us came to Washington work on?"

We can expect more nonsense like this in early 2015. For committees, once the workhorses of the Senate and House, the nurseries for legislative functionality, now are too often partisan bear pits.

Committee work has ground largely to a halt: neither the State nor Justice Departments have been authorized in years. Oversight of the Department of Health and Human Services or the Environmental Protection Agency is limited to ritualized hearings. Most committees are stalled processing nominees for posts in the administration, and those nominees who do pass committee are blocked on the floor.

To be sure many committees still do yeoman's work. Numerous staffers are working mightily to do the right thing. But too much of today's congressional committee activity is squirrely or has gone feral.

Bassetti is a Brennan Center contributor and author of "Electoral Dysfunction: A Survival Manual for American Voters." This article appeared on the Brennan Center website, November 5, 2014.

It is difficult to fully diagnose why the committee structure has lost its mojo. But I assert that we need it back. We need it because committees are the best way to oversee the executive branch. And when they function well, committees become fora for bipartisan consensus on critical issues.

It's true committees can fail to flourish no matter how we structure them. And well-run committees cannot solve all our dysfunction. But let's start here, maybe?

I've got some common-sense proposals for committee reform that might help. All of them are debatable, and not a one is a magic bullet. (Also, I'm limiting myself to Senate committees since the House in general is so hostile to bipartisanship that it frankly needs much, much more than committee reform).

So, with those caveats, some ideas worth debate:

- Each committee should be required to appoint a professional, nonpartisan staff plus staff director dedicated to oversight. At the beginning of each Congress, the chairman and ranking member of the committee would have to sign off on that staff before any funds are dispersed to run the committee.

- The number of majority party to minority party committee members should never differ by more than one. This has the effect of increasing minority power on the committees as the minority always has the chance to peel off one member of the majority party and thereby win a committee vote.

- No senator should be able to serve on more than two committees. No exceptions. No loopholes. This might allow senators to focus on a few issues rather than hopping around from committee to committee. (I would also limit subcommittee membership.)

- Senators' membership on committees should be term limited to 10 years. Too often senators suffer from agency or issue capture on committees. This might limit the effect.

- Staffer pay rates and overall committee funding needs to be increased. In the last 20 years, the number of committee staffers has declined. In an era of increasing legal and information complexity, this decline is a form of governance malpractice. Moreover, their pay, while certainly generous compared with average Americans, is low compared to their earning potential and skill set. We need to retain committed, educated staffers to do the job right.

And finally, I think committees need a carrot to encourage bipartisan consensus on critical legislation. The best carrot is making sure committee legislation gets passed by the full Senate. So, I propose that any piece of legislation voted out of committee with 80 percent or more of the committee members in favor, should be expedited for passage on the floor of the Senate. A cloture vote (to stop a filibuster) should be guaranteed within four hours of the legislation being called up on the floor. And post-cloture debate should be limited to 10 hours.

Too much of today's congressional committee activity is squirrely or has gone feral.

This is slightly technical stuff. And I'm happy to rattle on about it in even more detail than above. The devil is in the details after all. But the general idea is that bills that come out of committee with large, bipartisan margins should have a presumption of passage. Today, given filibuster rules, they do not since even one senator can utterly gum up the works. (This idea possibly should be applied to executive and judicial branch appointments.)

With Republicans poised to take control of the Senate in 2015, they have the opportunity to change the rules for the better. I hope they do because I am so over ceiling tiles.

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