DEMOCRACY & JUSTICE

COLLECTED WRITINGS

BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law Celebrating Twenty Years

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 2015

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 2015. The volume was compiled and edited by Michael Waldman, Jeanine Plant-Chirlin, Naren Daniel, Jim Lyons, Erik Opsal, Rebecca Autrey, Marissa Marzano, Ava Mehta, and Eric Petry. For a full version of any material printed herein, complete with footnotes, please email naren.daniel@nyu.edu.

Introduction from the President

The Brennan Center for Justice at NYU School of Law was founded 20 years ago as a living memorial to the life and legacy of Supreme Court Justice William J. Brennan, Jr. We were charged with carrying forward his core precept that the law must have, at its heart, the concept of "human dignity."

As we proudly mark our 20th anniversary, we continue to hold core public institutions to account in the light of fundamental American values. Today those systems urgently need reform and revitalization. At a time of government dysfunction and wide discontent, our mission is more vital than ever.

This volume offers a taste of our work over the past year. Even amid the clamor, this has been a time of real, often unexpected progress.

Our plan for automatic voter registration became law in Oregon and California, likely adding millions to the rolls. Courts upheld our challenge to Texas's discriminatory voter ID law. We brought together leading presidential candidates from both parties to explore solutions to ending mass incarceration. We convened 160 leading police chiefs and prosecutors as a strong new voice to argue that we can reduce crime and incarceration. And the U.S. Supreme Court cited our research and arguments six times as the justices upheld citizen-created redistricting commissions and Florida's judicial campaign finance law.

In all this, we remain committed to rigorous research and fresh thinking. We challenge assumptions, even our own, as with our report urging stronger political parties as a solution to the campaign finance mess.

Plainly, 2016 will be a critical year for America. The very integrity of our democracy will be on the ballot. Our issues will move to the forefront.

Now and for the next 20 years, let's recommit to the values of democracy and justice, of freedom and fairness and tolerance, that make our country truly exceptional.

Michael Waldman
President

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MONEY IN POLITICS

Can Stronger Parties Create a Stronger Democracy?

Daniel I. Weiner and Ian Vandewalker

For decades, political reformers might have pointed to parties as part of the problem. But in the wake of Citizens United, *freespending outside groups have swamped the system. The Center broke with longstanding orthodoxy to rethink reform in a report for the series "New Ideas for a New Democracy," which seeks to harness new approaches at a time when fresh thinking is needed more than ever. It argued that part of the solution is to strengthen parties through loosening some fundraising rules, adopting public financing, and other steps.*

Political parties are a core ingredient of representative democracy. A robust debate has recently developed, however, concerning whether organized parties can still provide the sorts of democratic benefits they traditionally supplied to our political system and, if not, what to do about it. This paper examines these questions from the perspective of campaign finance law. We ask whether there are changes that can be made to the rules governing party fundraising and spending that will enhance parties' democratic strengths without expanding the risks associated with unfettered money in politics.

Elections today are far more focused on individual candidates than on the parties.

Over the last century, parties have been changed, and some would say undermined, by significant legal and societal forces. These include the expansion of party nominating primaries, institutional shifts in Congress and state legislatures, and the emergence of television advertising as the key medium for political persuasion. Today, elections are far more focused on individual candidates than on the parties. And in recent years, even the parties' important supporting role has been increasingly eclipsed, as financial resources have flowed outside formal party institutions to new, purportedly independent entities like super PACs.

Campaign finance law, many argue, has played an important role in these changes. In particular, the balance of power is said to have shifted more quickly away from parties in the last decade thanks to both the heightened fundraising restrictions in the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold law, and the Supreme Court's elimination of restrictions on purportedly independent non-party groups, most notably in *Citizens United v. Federal Election Commission*. The resulting accelerated waning of organized parties is blamed for a host of problems, ranging from greater polarization and gridlock, to instability caused by the

Excerpted from *Stronger Parties, Stronger Democracy: Rethinking Reform*, September 16, 2015.

weakness of party leaders, to vanishing transparency in political spending, to declining participation by ordinary voters. One often-proposed solution is to allow parties to accept bigger checks: to deregulate party fundraising by repealing or significantly altering not only much of BCRA, but also the older framework of federal contribution limits and restrictions in place since passage of the original Federal Election Campaign Act (FECA) in 1974.

Others dispute that the parties have been significantly weakened. They note that party committee fundraising has been relatively steady since BCRA, and contend that party leaders in Congress exert a historically high amount of control over their caucuses. This camp sees polarization and gridlock as the products of broader political forces, such as Americans' residential sorting by political views, to say nothing of strategic choices by party leaders. They question whether changes to campaign finance regulation can fix these problems, and are especially skeptical of many calls for deregulation.

This is an important debate, but it tends to obscure two threshold questions: First, what is a party? When practitioners in the field speak of parties, they are usually referring to the institutions run by the traditional party establishments — e.g., the Democratic and Republican National Committees and the two major parties' respective congressional committees, as well as the many state and local party committees. But a growing number of scholars argue for a broader conception of the parties as diffuse networks connected to a common brand, encompassing both established party organizations and a variety of other individuals and entities affiliated with them, including ostensibly independent but party-aligned super PACs and 501(c) nonprofit groups. Clarity on this point is important, because the broader one's conception of the parties, the less it makes sense to think of them as competing with other political actors so much as themselves encompassing an array of competing interests. Since the various factions within parties differ in their democratic character — some include party activists and organizers while others are controlled by elite donors — the result of this intraparty competition has potentially significant effects on the parties' contribution to the health of the republic.

Second, what is the ultimate goal of efforts to "strengthen" parties? For example, many argue that strengthening traditional party leaders will promote the stability and compromise necessary for divided government to function. Others advance different goals, like empowering the so-called party faithful (i.e. the party's rank-and-file activists and volunteers) to make wider party networks more accountable to ordinary voters. While there is significant tension between such objectives, a common thread running through the arguments of many party-boosters is the need for parties to raise more money. Yet, as a consequence of the Supreme Court's *McCutcheon v. FEC* ruling and the recent roll-back of national party contribution limits by Congress, party committees can already accept vastly larger contributions than they could just a few years ago. Such changes may have strengthened the parties in some sense, but they have not necessarily enhanced the attributes that make organized parties attractive as political actors.

Decisions like McCutcheon *have strengthened the parties' fundraising ability, but without enhancing the attributes that make them attractive as political actors.*

Hanging over all such discussions, moreover, are familiar concerns about corruption and political misalignment. It has long been understood that large contributions to parties, like those to candidates, pose an inherent risk of quid pro quo corruption and its appearance. There are many examples in American history of corruption scandals in which the quid took the form of contributions to a political party. The more money a small class of wealthy donors can give to the parties, the greater danger that the parties, dependent on those contributions, will sell policy outcomes in exchange. In addition, there is a growing body of evidence to suggest that the views of the donor class (which has always been small and unrepresentative of the public at large) have an outsized impact on policy decisions, creating misalignment between public opinion and policy outcomes. Too often, middle and working class voters already find themselves shut out of the policymaking process. Sweeping deregulation of party fundraising risks exacerbating such problems.

All of these concerns — especially the perennial threat of corruption — have driven decades of campaign finance regulation directed at the parties. One need not advocate wholesale abandonment of this traditional regulatory paradigm, however, to realize that the current system is not enough, especially in an era dominated by an activist Supreme Court majority hostile to many of its central components.

Ultimately, legitimate concerns about corruption and misalignment resulting from party fundraising must be balanced against the reality that party institutions do play a salutary role in our democracy, one that risks being eclipsed in the new era of unlimited fundraising by both party-affiliated and truly independent outside groups. Not only do the parties offer a number of avenues for political engagement by their core supporters, they also continue to drive voter registration and turn-out efforts on a scale that few other political actors can replicate. As presently constituted, moreover, organized parties plainly are more transparent than the shadow parties and other outside groups competing with them for resources.

Organized parties are more transparent than shadow committees and outside groups.

Whether the wholesale lifting of party contribution limits would enhance these positive attributes is an open question but, in any event, there are other ways to strengthen traditional party organizations that do not raise comparable corruption and misalignment concerns. We advocate for targeted reforms to build up the institutional parties as meaningfully transparent organizations that function as engines of broad participation in politics. This approach eschews complete deregulation of party fundraising, instead embracing other, more targeted measures to strengthen organized parties, including:

- Making public financing available to parties;
- Raising or eliminating coordinated spending limits and other limits on party contributions to candidates;
- Lessening federal regulation of state and local parties;

- Relaxing certain disclosure requirements whose burdens outweigh their benefits while strengthening others; and

- Relaxing certain restrictions on contributions to parties.

A thoughtful policy agenda combining one or more of these measures stands the best chance of producing a more inclusive, fair and transparent democracy. This is not intended as a single package of reforms, but rather as a set of discrete suggestions, and some combinations may not be desirable.

This paper is in no way intended to be the final word on party financing reform, to say nothing of the larger challenges parties face. However, our hope is that it will provide a framework to guide the discussion of policies that will make the parties better at what they do best: facilitating ordinary citizens' engagement with the political process.

A New Framework for Democratic Reform

Mark Schmitt

In this entry for "New Ideas for a New Democracy," the director of the political reform program at New America writes that expanding "political opportunity" will enhance public understanding of the problems our democracy faces — and the necessary solutions.

What should a useable framework for political reform achieve? First, it should rest on an accurate description of what's wrong with the current political process. Second, it should lead to policy responses that are achievable, if not today in the next five or 10 years, and that would also be effective. It should serve the dual purpose of creating a plausible legal and constitutional justification for policy, and conveying a clear and accessible story about solutions for the public and policymakers. Finally, it should not create further conflicts with rights to free expression, but expand and enhance every person's freedom to speak about issues and candidates.

Expanding political opportunity can provide a set of approaches more likely to be effective at breaking the cycle of cumulative inequality.

The key to such a framework is expanding political opportunity. Just as there are two ways to address purely economic inequality — by limiting gains at the top, or by expanding real economic opportunity for those who have not benefitted from growth — there are two similar approaches to the influence of radical inequality in the political process. The traditional strategy has been to put a ceiling on the electoral and political voice of the very wealthy, which, as shown above, has both practical and constitutional limits. The alternative is to create structures that ensure opportunity for people, organizations, ideas and visions that are currently shut out of the political process. The concept of political opportunity can provide not only a legal framework for a new generation of policy reforms, but a set of approaches that are more likely to be effective at balancing the voice of the well-off and breaking the cycle of cumulative inequality. "Opportunity" is an overused word in American political life, on both left and right, but political opportunity is a real, substantive concept with specific implications for effective policy. Political opportunity means:

Any candidate with a broad base of support, or who represents a viewpoint with broad support that wouldn't be represented otherwise, should have a

Mark Schmitt is the director of the program on political reform at New America. Excerpted from *Political Opportunity: A New Framework for Democratic Reform,* February 5, 2015.

chance to be heard, in elections and other contexts, even without support from big-dollar donors.

Every citizen should have a reasonable opportunity to participate meaningfully, not just as a voter, but as a donor, a volunteer, or an organizer, or expressing his or her own views.

Individuals should be free to express their own political views, protected from coercion or direction by an employer or other institution.

The system is structured in a way that encourages organizing people, not just money, especially around issues affecting low- and moderate-income voters.

Political opportunity-based reforms will not only make the system fairer, giving voice to the voiceless and helping to offset the political influence of wealth. They also hold the promise of restoring fluidity and creativity to the political process, as candidates compete on new ideas and new axes of conflict and compromise emerge, breaking the stifling duality of the current system.

A familiar metaphor in thinking about political money is that big money "drowns out" the voices of those who do not have it. That might have been the right way to think about money in a world of three broadcast networks, but in the modern world, communication is so rich, varied, and complex that it's difficult to drown out anyone. The real question is whether people and ideas can reach a threshold where they can be heard amid the noise. Somewhere after that threshold is reached, there are likely diminishing returns to additional political spending. In other words, efforts to limit spending at the top end are likely to have less of an impact on opportunity than reforms that help others be heard.

The first focus, then, should be the barriers to entry to politics, the things that make it difficult for candidates and new ideas to reach the threshold where they are fully heard in the debate. While it is true that, as shown above, elections are only one avenue by which political influence is allocated, they are nonetheless the main gateway for people and ideas.

The most obvious reform that flows from the framework of political opportunity would be an expansion of programs like New York City's small-donor public financing system, which dramatically lowers the barriers to entry: It makes it possible for candidates who start with broad public support but not a base of money to run. And it gives ordinary citizens the opportunity to participate as donors. Results can be measured by the number of races that are competitive or have more than two viable candidates, as well as by the number of contributors.

Full public financing systems, such as Arizona's or Connecticut's, have a similar effect. They enable candidates to run who don't start with money, and through their qualifying process — in Arizona, a participating candidate must raise a base of $10 contributions — enable ordinary citizens to participate in the money primary. Tax credits or vouchers for contributions, such as

New York City's public financing system dramatically lowers the barriers to entry.

proposed by Yale Law School professor Bruce Ackerman and at work in Minnesota, would similarly empower all individuals, even those who do not have $175 to donate to a campaign (the threshold for a small contribution in New York City). But vouchers alone might not create more opportunity for candidates who are not already well known. A combination of matching funds and credits or vouchers, as proposed by Rep. John Sarbanes (D-Md.) in his Government By the People legislation, might be the best approach, giving candidates a way to get started and everyone, even those who cannot spare $50, a chance to contribute.

In his pathbreaking 2011 article, "The Participation Interest," George Washington University's Spencer Overton put forward a number of other proposals that would encourage citizen participation as donors and volunteers as well as voters, all of which would also expand opportunity. Small donor PACs, for example, which could accept contributions of no more than $250 but have more flexibility than other PACs, would encourage organizing and help causes that do not have wealthy supporters to be heard. There is some evidence that the disclosure requirement on contributions of more than $200 deters donors from making those modest contributions. Raising that threshold to, say, $500 might make first-time donors more comfortable without opening a massive loophole.

Technology has changed the relationship between candidates and small donors.

Although reforms based on political opportunity rely on limits less than traditional approaches, limits on the size of individual contributions remain essential. They serve the established purpose of preventing corruption through the influence of very large donors, but also ensure that public financing systems are not overwhelmed by massive private spending by nonparticipating candidates, which would deter participation by others. But robust, modern public financing systems can also make limits more effective, by reducing the incentive to evade contribution limits through quasi-independent expenditures, super PACs, or any of the other channels that will inevitably remain open. In New York City, for example, while there was concern about outside spending in the 2013 elections, it nonetheless represented a small fraction of the total spent, and there is no indication that any of the outside groups were actually affiliated with candidates, using them to work outside the system. The same cannot be said at the federal level, where members of Congress have their own super PACs, or in most states without small-donor public financing.

Not all efforts to lower the barriers to entry into politics will involve changing the rules. Technology has already dramatically changed the relationship between candidates and small donors. On the Democratic side, for example, ActBlue has made it possible for potential donors to identify candidates all across the country who they might support (often based on recommendations from friends or bloggers), and along with older projects such as EMILY's List, these tools have given candidates a way to raise their first money even if they do not have a wealthy base of supporters.

More recently, products such as NationBuilder came onto the scene, offering candidates from any party or none — as well as small organizations of all

kinds — a basic suite of tools necessary to start a campaign, including the capacity to build and manage lists, launch a website, send mass emails, coordinate volunteers, accept credit card donations and — of real value — access a reliable voter file. NationBuilder's costs range from $19 to $999 a month, but previously most campaigns had to buy these services separately and put them together from scratch, at much higher cost. It is, in effect, a turnkey startup campaign. Similarly, Run for America, a new organization intended to encourage young people to run for Congress, is structured as a B Corporation — that is, a company that's not a non-profit but is intended to serve a public purpose — that would provide its candidates with basic campaign services at the lowest possible cost.

The declining effectiveness of broadcast television advertising, and the shift to targeted online communication, might also reduce the barriers to entry. Most candidates beyond the local level spend a large percentage of whatever money they have on television, because that's how it's always been done, and because political consultants have a vested interest in advertising commissions. But political scientist David Karpf predicts "a slow shift away from television among campaigns that is going to continue." The combination of smart public-financing systems, technology that lowers the barriers to entry, and new ways to communicate with voters at lower cost could dramatically transform the landscape of money in politics, reducing the incentives for candidates to create super PACs or enlist outside spending.

Nor would all of the steps that fall under the framework of political opportunity involve raising money or lowering costs. Changes to voting structures, such as instant-runoff voting or ranked-choice voting, can give candidates who start with little chance to win an opportunity to influence politics anyway, as other candidates compete for the second-choice votes of their supporters. These systems can reward organizing over money and discourage campaigns based on pure negative attacks. Innovations such as ranked-choice voting can both reduce the influence of money and the pressure to raise it, and can be coupled to systems like small-donor matching funds to boost the effectiveness of each.

Finally, the dominance of money in shaping the debate outside of elections, such as through think-tank funding, paid research, lobbying and grassroots lobbying, can be offset by restoring some of the infrastructure of independent, trusted resources. Yale Law School professor Heather Gerken has proposed treating lobbying in much the same way that the political-opportunity approach would treat campaign finance: public funding of experts to ensure that lawmakers have access to sound and balanced information from independent sources, without trying to block anyone else's right to lobby. The elimination of independent sources of information, such as the congressional Office of Technology Assessment in the mid-1990s, is widely thought to have increased the influence of industry lobbyists. Restoring those institutions, in a newer and more adaptable form would help bring new ideas and information to the legislative process.

We should always be wary of promising more than any procedural reform, or combination of public and private reforms, can achieve. Nothing will be "the salvation" of American politics. Progressives who hope that fixing money in politics will lead to a new era of liberal consensus will be as disappointed as conservatives, or centrists. The country is deeply divided and our political structures are awkwardly designed for such deep divisions. But it's all made worse by profound economic inequality that deepens and reinforces political inequality. To disrupt this closed and stagnant system, an approach based on a vision of political opportunity can map the way to reforms that will be legally and constitutionally sound, and bring in new voices, new perspectives and new ideas.

Five Years After *Citizens United*

Lawrence Norden and Daniel I. Weiner

Many of the predictions about the impact of Citizens United *turned out to be wrong. Supporters said it would free up more voices to enrich political debate. That didn't happen. Opponents said campaigns would be awash in corporate and union cash. Five years after the decision, we know what America got is far worse. The stunning consequence is that a few wealthy individuals now dominate elections and a tidal wave of undisclosed contributions, so-called "dark money," makes it impossible for citizens to know who is backing which candidates.*

Few recent U.S. Supreme Court decisions have received as much attention — or generated as much public backlash — as *Citizens United v. Federal Election Commission.* The court and its defenders promised that the ruling — which gave corporations (and, by extension, unions) a First Amendment right to spend unlimited money on elections — would free up more voices to enrich U.S. political debates. Critics predicted a deluge of corporate cash into U.S. elections.

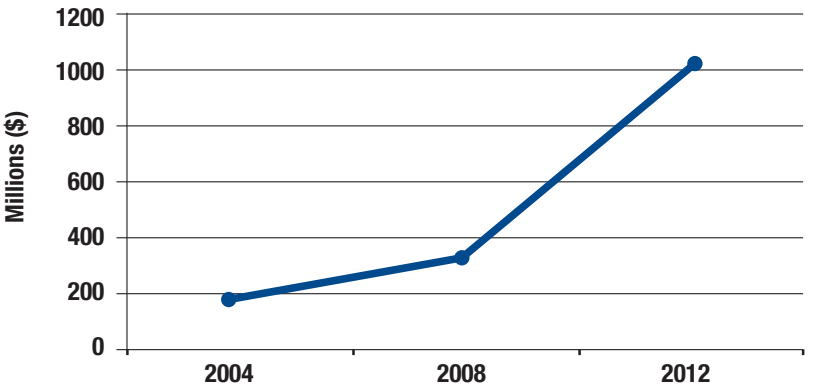
Yet neither has been the most striking result of *Citizens United*. The most stunning consequence is the influence that a few tycoons and other wealthy donors now wield in U.S. elections. Running a close second is the tidal wave of "dark money" from unknown sources making it impossible for citizens to know who is supporting candidates in pivotal races. Both these unexpected and troubling developments undermine American democracy.

An Explosion of Outside Spending

In the wake of *Citizens United*, there has been an explosion in spending by outside interests the likes of which we have never seen before. They have spent almost $2 billion in total since the ruling five years ago. It almost tripled between the 2008 and 2012 presidential elections; more than quadrupled between the 2006 and 2010 midterm elections, and then almost doubled again between the 2010 and 2014 midterm elections.

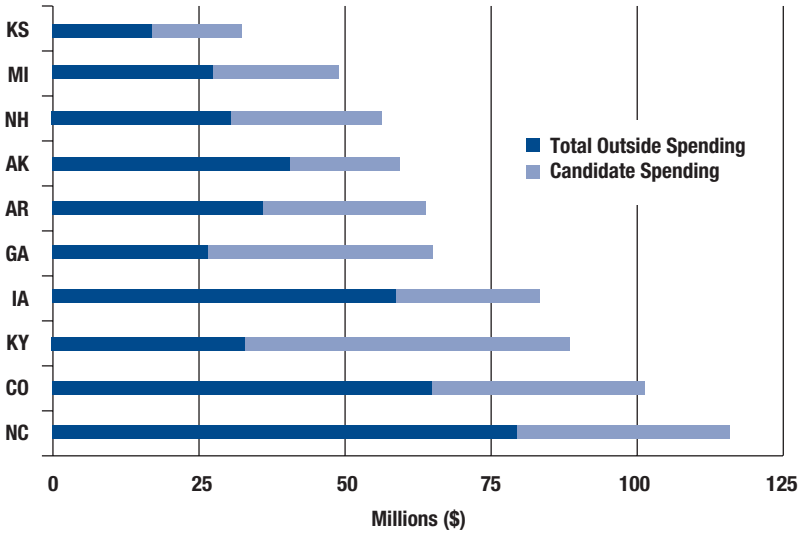
This article appeared on the *Reuters* website as part of a series on the U.S. Supreme Court's *Citizens United* decision, January 16, 2015.

Outside Spending in Presidential Elections



Below the presidential level, this spending was largely concentrated in a handful of close races in key battleground states. Outside groups now routinely outspend both candidates and parties in pivotal races. They spent more than the candidates themselves in 10 of the most hotly contested Senate races in 2014, for example.

Election Spending by State in 2014
10 Toss-Up Senate Races



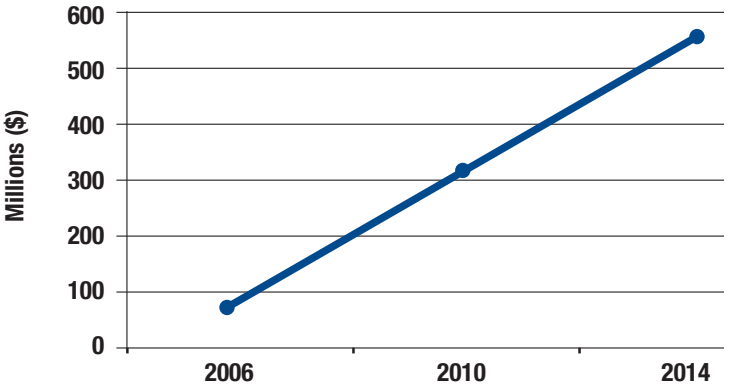
Although there is less comprehensive data on state elections, it appears that outside spending is skyrocketing there as well. Outside spending in several key governors' races was between four times and 20 times higher than at the same point in 2010, according to Brennan Center calculations in October 2014. Local races have also been affected. Recently, for example, Chevron poured roughly $3 million into municipal elections in the city of Richmond, Calif. (population: 104,000), where it owns a major refinery.

Individual Mega-Donors Rise, As Smaller Givers Disengage

Citizens United's most striking consequence has been the rise of uber-rich mega-donors — including casino magnate Sheldon Adelson and his wife Miriam, libertarian plutocrats Charles and David Koch and liberal investor Tom Steyer. Since 2010, the top 195 individual donors to super PACs and their spouses gave nearly 60 percent of the total that super PACs spent — many times the amount contributed by business corporations.

These mega-donors wield more influence than either the justices or their critics seem to have expected. Adelson, for example, seems in many respects more important than most official party leaders. In 2012, he and his wife gave about $93 million. Their backing literally kept Newt Gingrich's presidential campaign afloat. That fact was not lost on top Republican hopefuls for 2016, who gathered last March in Las Vegas for a series of closed-door events dubbed "the Sheldon Primary."

Outside Spending in Midterm Elections



All this is happening as ordinary Americans are giving less to political campaigns. In 2014, the number of reported federal contributors (those giving $200 or more) dropped for the first time in decades. Small donations are also down. In fact, the top 100 super PAC donors of 2014 gave almost as much as all 4.75 million small donors combined.

During this time of historic wealth inequality, individual mega-donors have more clout than at any point since Watergate. While these few voices are now much louder, many others are increasingly muffled.

The Rising Dark Money Tide

Citizens United's second unexpected legacy has been a sharp drop in electoral transparency as dark money flooded in.

Justice Anthony Kennedy, who wrote the majority ruling, seemed to expect "effective disclosure" so the public would know where the money came from. This system would also help corporate shareholders hold business executives accountable for corporate political spending.

"A campaign-finance system that pairs corporate independent expenditures with effective disclosure has not existed before today," Kennedy wrote — apparently assuming that his decision was creating such a system.

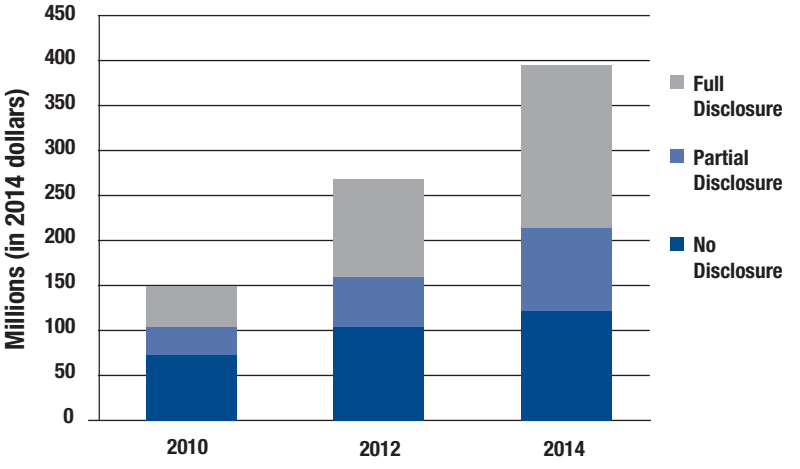
It did not. While federal candidates and political parties are required to disclose all their donors above $200, outside groups need only do so if they qualify as political action committees (PACs). Since the *Citizens United* ruling, 501(c)(4) "social welfare" organizations and other groups have emerged to spend money in elections. They do not register as PACs, and they can keep all their donors secret. This is the dark money that has influenced many races. Donors who want to spend six or seven figures in elections without being identified funnel their money through these groups.

Many of those in power, notably Senate Majority Leader Mitch McConnell (R-Ky.), are implacably opposed to closing these dark-money loopholes. He successfully filibustered federal legislation that would have done so, dubbing it "an all-out attack on the First Amendment."

Groups that depend on corporate contributions like the U.S. Chamber of Commerce, meanwhile, have fought hard against even voluntary disclosure of corporate political spending.

Thanks in part to such efforts, more than $618 million in dark money has been spent on federal elections since 2010. That is more than a third of all outside spending at the federal level, mostly targeting a handful of pivotal contests. In the 11 most competitive Senate elections of 2014, for example, almost 60 percent of all outside spending was dark.

Non-Party Outside Spending by Election Cycle, Senate Races



It played a critical role in Republicans winning the Senate in November. Consider, dark money accounted for fully 89 percent of all outside spending to support Cory Gardner, the winner in Colorado, 86 percent to support David Perdue, the winner in Georgia, and 81 percent for Thom Tillis, the winner in North Carolina.

The Next Five Years?

So where are we headed? Clearly, predicting how changes to campaign-finance law will have an impact on the actual political landscape is a tricky business.

A remarkable feature of the debate over campaign-finance laws is how much the public actually agrees. After *Citizens United* was decided, 80 percent of respondents in a *The Washington Post* poll said they disapproved of the decision. An astonishing 88 percent, according to another recent survey, said they favored reasonable limits on money in politics.

The real challenge has never been changing the public's mind. It has been getting elected leaders to believe the public cares. Too often politicians assume that campaign finance is not enough of a priority, that they can ignore or pay lip service to the issue, leaving needed reforms in limbo.

After *Citizens United*, however, politicians may no longer have that option. Judges helped reshape our political landscape, but they alone do not get to determine the future of American democracy. That power lies with the American people.

They only need to use it. The burning question for the next five years is whether they will.

Politics is Expensive. But Must It Be Corrupt?

Walter Shapiro

The biggest problem with politics today is not how much money is spent, but where the money comes from and how it is raised. If every voter gave $20 to a presidential candidate, the total would exceed the money spent in 2012. Instead, the ultimate concern is the narrow slice of the economic elite who are funding the candidates.

By the time the 2016 campaign grinds to a halt in just 18 short months, we probably will have a new page in Bartlett's of quotations devoted to political chutzpah. The unifying theme for all these quotations will be candidates whose financial prowess puts Daddy Warbucks to shame decrying the oversized role that money plays in presidential politics.

A constitutional amendment to overturn Citizens United *is about as likely as a successful crusade to repeal the Second Amendment.*

Hillary Clinton, fortified by her recent burrito bowl at Chipotle, paused in her listening tour of Iowa to announce without prompting, "We need to fix our dysfunctional political system and get unaccountable money out of it once and for all — even if it takes a constitutional amendment."

A laudable sentiment, even if Bill Clinton pioneered the use of unregulated "soft money" to help finance his 1996 reelection campaign. Then there is the central role that a Democratic super PAC, Priorities USA, is poised to play in Hillary's 2016 campaign. And don't forget the Clintonian parsing of language: She is on record as only opposing "unaccountable money" so that presumably she has no problem with billionaires who disclose their political largesse.

Despite the dreams of true believers, a constitutional amendment to overturn *Citizens United* is about as likely as...well...a successful crusade to repeal the Second Amendment. All it takes is a two-thirds vote of a Republican-majority Congress and approval by 38 states. Putting that in perspective, such a constitutional amendment would require the approval of at least 9 of the 21 states that voted Republican in every presidential election in this century.

Talking about a constitutional amendment is a practiced way of sounding sincere about campaign reform — without actually having to do anything. It is the equivalent of vowing to raise the minimum wage to $15 an hour just as soon as leprechauns dance on the White House lawn.

When it comes to whoppers about campaign spending, it is hard to top the recent comments by Jeb Bush. "I don't think you need to spend a billion dollars to be elected president of the United States in 2016," Bush told reporters before he rushed to a Miami Beach fundraiser.

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, May 4, 2015.

"I don't think it's necessary if you run the right kind of campaign. You don't need to have these massive amounts of money spent."

The third Bush to seek the White House has figured out a novel way to be parsimonious — let his super PAC (Right to Rise) do all the real work. Bush has apparently delayed launching his formal campaign in order to continue to legally fundraise for Right to Rise, which is rumored to have already raked in a staggering $100 million this year. In fact, there are hints that Right to Rise may end up as the deep-pocketed real campaign while Jeb Bush for President may serve as a Potemkin village version of running for president. Bush sounds like a campaign reformer when he decries the high cost of running for president. But is $1 billion or even $2 billion really too much to spend on electing a president when Whole Foods grosses nearly $13 billion per year peddling organic kale?

Imagine if every American voter gave $20 to the presidential candidate of their choice.

The problem is not how much money is spent on politics but where the money comes from and how it is raised.

Imagine if every American voter gave $20 to the presidential candidate of his or her choice. That's about the cost of date night at the movies if you skip the concession stand. Under this scenario, presidential candidates would have $2.5 billion to spend (more than the cost of the 2012 campaigns) without a whiff of corruption or quid pro quos.

Of course, American politics doesn't work that way, especially in the super PAC era. But the goal should be to keep candidates from catering to the policy whims of super PAC patriarchs like Sheldon Adelson rather than trying to impose arbitrary limits on their total spending.

This confusion has bedeviled campaign reformers from the beginning. The post-Watergate reforms — which cleaned up presidential politics for a quarter century — reflected a self-defeating Puritanism about money in politics.

The federal matching funds program for the primaries (which helped credible contenders augment their small contributions) required candidates to abide by rigid state-by-state spending limits. The result was silly gamesmanship as campaigns rented cars in Omaha for use in Iowa and booked motel rooms in Massachusetts after a long day of campaigning in New Hampshire. This spending rigidity helped doom partial public financing for the primaries, which serious candidates abandoned after 2004.

America has always been a whatever-it-takes country when it comes to campaign spending. In 1757, George Washington bought voters a barrel of punch, 35 gallons of wine and 43 gallons of strong cider in order to win election to the Virginia House of Burgesses. (This drinking man's strategy was soon banned by the state of Virginia).

Sure, some political spending is ludicrous, such as the $100 million that both candidates and super PACs dumped on the 2014 North Carolina Senate race. But, at some point, even the most pigheaded super PAC billionaires will presumably realize that in many situations the only thing they are buying are vacation homes for their political consultants.

In other instances — such as in the 2016 Republican primaries — super PAC spending will reward donors with access, good will and maybe altered policy positions. But the ultimate concern is the narrow slice of the economic elite who are funding the candidates rather than the total amount of money being squandered.

As George Washington illustrated, American politics will always be expensive. But the challenge in a post-*Citizens United* world is to find a way to prevent it from becoming expensively corrupt.

The FEC and the Breakdown of the Rule of Law

Ciara Torres-Spelliscy

Deadlocked between three Republicans and three Democrats, the FEC is frozen. It does not clarify its rules, enforce them, or create new ones. The result is an erosion of the rule of law and a breakdown in oversight of candidates for the House, Senate, or president.

There is a serious rule of law problem in how rarely campaign finance laws are enforced at the federal level by the Federal Election Commission, the agency set up to regulate money in politics.

Philosopher Jeremy Waldron taught me about the rule of law at Columbia Law School. As a 1L student, I could see no point in this "waste" of my precious time. But the more I see how lawlessness works in the real world, the more grateful I am to Columbia for exploring this concept in such depth.

There is a serious rule of law problem in the lax enforcement by the FEC.

So what is the "rule of law" anyway? This is a matter of rich debate. But at the very least, the rule of law encompasses the idea that as President Theodore Roosevelt put it, no one is above or below the law. A U.S. President or his administration can be hauled into court for civil or criminal offenses; and any pauper still has the right to full due process.

Another key concept invoked by the phrase the rule of law is that like cases will be treated alike. This is why respect for precedent (or stare decisis) is so important to our legal system — it goes to the core of basic fairness and justice.

And finally the rule of law means there needs to be fair notice of what the law is so that the public can conform its behavior to those rules, and so that the government cannot make up a new crime retroactively or arbitrarily.

At the federal level, campaign finance laws are enforced by two executive agencies: the Federal Election Commission (FEC) and the Department of Justice (DOJ). The FEC has jurisdiction to enforce all federal campaign finance laws including leveling civil penalties. The DOJ's jurisdiction is more limited because it must prove beyond a reasonable doubt that the violation was done knowingly.

But as the present FEC has found itself deadlocked into inaction, including inaction over enforcing existing federal campaign finance laws, the DOJ has taken on a bigger role as the money in politics enforcer of last resort. This is not ideal since a functioning FEC would have a range of administrative civil options, while DOJ has the heavier hammer of criminal penalties like jail time.

Ciara Torres-Spelliscy is a Brennan Center fellow and an associate professor of law at Stetson University College of Law. This article appeared on the Brennan Center website, June 22, 2015.

As the American Constitution Society explains, the trouble at the FEC is partially structural. The FEC is a six-person commission with three Democratic appointees and three Republican appointees. The commission needs four members to agree to take action and often there is a three-three tie, which means the FEC frequently won't take action, even if that action is telling politicians running for federal office to abide by the U.S. Code. This is how the agency has earned the unfortunate nickname, the "Failure to Enforce Commission."

Why is this state of affairs at the FEC creating a lack of respect for the rule of law? First, the FEC by definition has jurisdiction over not only those who aspire to high federal offices, but also the campaigns of incumbent members of Congress and sitting Presidents who run for reelection. These are powerful people who want to keep or advance their positions. The rule of law demands that these individuals not get a pass just because they have a title of Senator, Representative or President.

Again no one is above the law when the rule of law is respected. But without strong enforcement, it is precisely elected officials (and those who desire to be elected) who get to thumb their noses at the law.

The FEC is not performing its core function of clarifying election rules.

Second, respect for precedent is also lacking at the FEC. Not so long ago, FEC actually enforced its own rules. Break these same rules today and there is unlikely to be any action from the current FEC. Arguably, the FEC is not treating like cases alike.

Finally, the FEC is not doing its core function of clarifying the rules and giving the public notice of what is or is not out of bounds. They still don't have a Citizens United disclosure rule even though that case was five years ago. And they don't have updates to rules based on other Supreme Court precedent either.

Which leaves us with the DOJ, which has the more blunt tool of ramping up criminal prosecution, but they use this tool in more narrow circumstances. This incentivizes the powerful to run the odds that the FEC won't lift a finger to enforce the rules, and the DOJ will only go after the most egregious or bone-headed violations. This is the opposite of the rule of law when the already mighty can feel free to ignore the laws on the books.

Close New York's Biggest Campaign Finance Loophole

Lawrence Norden

Financial scandals are practically annual events in the New York state legislature. One of the biggest sources of Albany corruption is what's known as the "LLC loophole," which allows limited liability companies to evade contribution limits and hide who is behind them. All it would take to end this evasion is a simple vote from the Board of Elections. But after the Board failed to act, the Center filed a lawsuit to close the loophole in July 2015.

Amid a never-ending parade of scandals, the state Legislature and governor recently agreed to the third set of ethics reforms in four years.

Yet again, this package barely touched the single biggest conflict of interest in Albany: Our loophole-ridden campaign finance system, which allows special interests to dominate political discourse through nearly unlimited and often secret contributions to officeholders and their challengers.

This isn't something the Legislature wants to give up. Albany's culture of corruption feeds on big-money donations.

But that doesn't mean nothing can be done. With one stroke of the pen, three commissioners on New York's Board of Elections can help fix the problem.

For years, good government groups and editorial boards have complained about the so-called "LLC loophole," which allows special interests to funnel millions of dollars into campaigns anonymously. Just a few weeks ago, upstate Assemblyman Bill Nojay called it "the mothership of Albany corruption."

Here's how it works: The Board of Elections currently classifies limited liability companies (LLCs) as individuals rather than "corporations" or "partnerships," as they are treated under federal law. While most corporations can give no more than $5,000 every year, each LLC can give hundreds of thousands of dollars.

While most corporations can give no more than $5,000 each year, an LLC can give hundreds of thousands of dollars.

Worse still, individuals with multiple LLCs use them to evade contribution limits entirely. And since LLCs need not disclose the identities of their members or officers, we often don't know who is behind these sums of money.

And those sums are huge. In one of the starkest examples, a prominent real-estate developer reportedly used 27 LLCs to contribute at least $4.3 million to political committees in the last election cycle. In recent years, he used these and other LLCs to give over $1 million to both the New York State Senate Republican Campaign Committee and Gov. Cuomo, as well as substantial amounts to recently indicted former Assembly Speaker Sheldon Silver.

This op-ed appeared in the New York *Daily News,* April 9, 2015.

If you think that kind of money doesn't buy results, you haven't been paying attention. "Follow the money of any of the top LLC donors," Common Cause New York noted in 2013, "and you are likely to find a trail of special favors won and bills unfavorable to the donor killed on arrival in the Legislature."

This loophole makes a mockery of New York's entire campaign finance system and allows a few special interests to side-step contribution limits and disclosure rules that were supposed to limit corruption.

How did the Legislature get away with creating this kind of loophole? It didn't. The Board of Elections did — and it got it terribly wrong.

In a 1996 opinion, the Board reasoned that because the statute creating LLCs called them "unincorporated organization[s]," they were not corporations or partnerships and not bound by the corporate contribution or partnership limits. This ignored the rest of the statute and past precedent.

The loophole makes a mockery of New York's campaign finance system.

Worse, in making its decision, the Board relied on a Federal Election Commission rule that was changed just three years later. But New York's law remains in place. It's time to change it.

Cuomo and the Legislature failed to bring the most needed ethics and campaign finance reform to Albany. With one simple vote, the Board of Elections can close the LLC loophole, curb unlimited campaign giving and bring more disclosure to New York politics.

For the state agency charged with administering and enforcing of our campaign finance laws, this should be an easy call.

Obama Can Answer Dark Money Problem

Wade Henderson and Michael Waldman

Since the Supreme Court's misguided Citizens United *decision six years ago, spending by "dark money" groups has soared, and will grow even higher in 2016. President Obama could bolster transparency in politics by ordering major companies who receive federal contracts to disclose their political spending. As of late January 2016, the president has declined to take this step.*

Our broken campaign finance system has many harmful effects on our democracy beyond elections themselves. Among the worst, it exacerbates our nation's enduring racial and economic disparities by permitting the most powerful to spend billions to elect their preferred candidates and dictate policy while sidelining those who can't afford jumbo contributions. And because wealthy special interests can hide behind "dark money" groups that don't disclose their donors, the public increasingly does not even know who they are.

Since the Supreme Court's misguided *Citizens United* decision in 2010, dark money groups who disclose none of their donors have spent well over $600 million (according to the Brennan Center for Justice) on federal elections and are poised to set new records in 2016. Anecdotal evidence suggests that a lot of this money comes from major firms seeking to curry favor with the government. Dark money is a perfect way for these interests to avoid the scrutiny of voters and their own shareholders.

Dark money also takes a particularly toxic toll on poor and minority communities. We know these communities do not share the policy priorities of the political donor class. On issue after issue — from the minimum wage, to paid sick leave, to the regulation of predatory lenders — it is the donor class whose views and priorities win out in the end.

President Obama has spoken eloquently against dark money. But with a hostile Congress, many assume words are all he can offer to stem the tide of secret election spending. They're not.

Since the Citizens United *ruling in 2010, dark money groups have spent more than $600 million.*

With a stroke of the pen, the president can strike a blow against unaccountable money by issuing an Executive Order requiring major companies who are awarded federal contracts — including many of the nation's biggest economic players — to disclose all of their political spending.

Is transparency a magic bullet to fix our nation's racial and economic disparities? Of course not.

Wade Henderson is the president and CEO of the Leadership Conference on Civil and Human Rights. This op-ed appeared in *USA Today,* July 31, 2015.

But it does provide at least a measure of accountability.

Lack of accountability is especially troubling in the context of government contracting. In Fiscal Year 2014, the federal government spent approximately $236 billion on private-sector contracts, with roughly 69 percent of it going to just 25 major companies. Between 2000 and 2013, the top 10 federal contractors made approximately $1.5 trillion from the government. These are taxpayer dollars at stake — and the public has a major interest in knowing that money is going to companies best equipped to do the job well, not simply the highest political bidders.

It should come as no surprise that most of these companies spend big to court those in power. In the 2014 election cycle, the top 25 federal contractors all made disclosed contributions through their political action committees, giving a total of more than $30 million. And nothing stops those same companies from contributing unlimited amounts to dark money groups. Since those groups increasingly back single candidates, dark money donors can now target a particular race exactly as they would do with disclosed contributions — but in secret and with no limits.

A system that rewards big contractors for how well they play this political money game hurts poor people and communities of color in at least two ways. First, it helps perpetuate unjust policies that further grind down these communities. For example, private prison companies have pushed hard for tougher incarceration policies — for both low-level criminals and undocumented immigrants — that increase demand for their product. Their activities have contributed to a culture of mass incarceration whose true costs politicians across the political spectrum are only now starting to acknowledge.

Second, hidden contractor spending can foster a pay-to-play culture in which contracts are used to reward political supporters rather than to obtain the best product or service. Vulnerable citizens who depend heavily on government programs bear the cost of such practices. So do our active-duty military personnel and veterans, among them many middle- and working-class people of color, for whom military service offers the best opportunity to obtain an education and start a career.

Because pay-to-play culture is so dangerous, several states simply ban contractors and the individuals associated with them from making political contributions. Others opt for disclosure, which at least permits the public to judge for itself whether officials and contractors have behaved acceptably. Thanks to weak, easy-to-evade restrictions and dark money loopholes, the federal government is a laggard in both regards.

President Obama has the chance to help fix this problem. Of course, a lot more is needed to restore the promise of our democracy. But politics, as they say, is the art of the possible. This is the president's last, best opportunity to make an actual difference on something about which he has waxed eloquent but otherwise neglected. He should take it now, before his time runs out.

Bringing Campaign Spending Out of the Shadows

Ann M. Ravel

Recent American elections have been marked by two disturbing trends: a flood of outside spending and low voter turnout. How do we restore voters' faith in democracy and get them back to the polls? At a Brennan Center conference, the Federal Election Commission Chair discussed ideas for increasing civic engagement, including reform of the FEC.

We have to get the fraud out and enforce our laws. Campaign spending has to be brought out of the shadows. We should require disclosure of campaign spending by all the groups that engage in it. Disclosure isn't the only solution to campaign finance, but disclosure is really important in engendering trust.

Government needs to boost transparency. With regard to the FEC, data should be available immediately. We should require electronic filing by all spenders, and we should make the data easy and accessible to use. We're working on that, but we should be going faster.

We need a cop on the beat to enforce campaign laws.

But to do these things we really do need a cop on the beat. There are other proposals about reforming the FEC out there, but certainly Congress or the president could establish a blue ribbon commission to propose reforms at the FEC, including replacing holdover commissioners.

Importantly, we also need to look at ways to get people more civically engaged. This should be a priority of foundations, nonprofits, and government. All levels of government must be more open to more individual citizen participation. Not just to come and speak — I remember this from my county days — three minutes for public comment. Government has to be more accessible to all people, and there should be more inclusive governance. I know some cities are moving forward in this direction, but it should be broader.

A really good example of this is Brazil, surprisingly, who is far ahead of the United States in having inclusive governance. In fact, in their constitution they require deepening democracy through participation. For example, they have national public policy conferences — sometimes 1,000 of them are run simultaneously in cities all over the country — to have deliberations, and then ultimately out of the deliberations come policy reports on issues affecting the country. Representatives go to the state level and talk to the state officials about them. They come out with refinements of those original reports, which are then taken to the nationally

Excerpted from a Brennan Center conference co-sponsored by the New York City Campaign Finance Board and the Committee for Economic Development held at NYU School of Law, July 22, 2015.

elected officials with priorities to amend, and also formulate new policies in the country. This is sort of earth shattering for the United States, and I know at my own agency nobody wants anything to be open, they want everything to be totally closed. I've made some efforts but haven't been able to get this done.

We need incentives for citizen involvement in political life.

But we clearly have to incentivize involvement in political life. We have to look carefully at tax credits or small donor matches to level the playing field, and encourage politicians to campaign to and work for all voters, not just the ones who are making large contributions. And we have to expand the arena, encourage ways to allow women, minorities, and others who don't have access to money to run for office. Parties have a big role in this, and encouragement of parties would be a good thing.

There's a group that I love called Brigade that uses games and BuzzFeed-like questionnaires to let people know, based on their answers and how they play the game, who would be the candidates that you might support, and would you be interested in supporting them. Not with money but just to indicate your support of them. Publicly. Which would, they're hoping, have millions of people — because millions of people respond to those silly BuzzFeed questionnaires — sign on to support candidates and help to not only get people engaged, but also to go around the system of campaign finance.

Research has shown that young people are disengaged from traditional forms of civic and political life, but they're really engaged with new media. And if you look at the city of New York, as I have the last couple of days, they're constantly on their cell phones. So I do think that the Internet can serve as a gateway to online and offline civic and political engagement, including volunteerism, community problem solving, and political activity. And this is a statistic I just heard, and it's amazing, so you can see why online activity might be the way to go in some ways. This month, July 2015, there were 1.31 billion active Facebook users every month. And of course people know there's more than 1 billion smartphones in use worldwide. So the potential for using this mechanism is great, and we should encourage and support tech innovation in the democracy arena.

But I don't think tech is the sole answer. We have to do the hard work of engaging people. We have to talk to people to get them to understand the influence of government and governmental policies on their lives. Whether it be about the drought in California, and the short showers everyone has to take, or the fact that dying crops are going to impact the entire country. The safety of our roads, bridges, and dams, and the fact that there hasn't been a bill yet about those problems. Or ensuring that pharmaceuticals are safe or supplements are safe and that they're not covered by the FDA.

People have to realize that campaign finance and policies influenced by only a small number of people has a profound relationship to things that touch them every day. And they need to care about it, and become active in communicating with their elected officials, contributing even small amounts of money to campaigns, and voting. We need to help people understand that participation does matter. And if we all do our part, it'll make a difference.

VOTING RIGHTS & REDISTRICTING

The Case for Automatic, Permanent Voter Registration

The Brennan Center first advocated automatic, permanent voter registration nearly a decade ago. The reform would sign up every eligible citizen to vote. It would add up to 50 million voters to the rolls, save money, and increase accuracy — while curbing the potential for fraud and protecting the integrity of elections. In 2015, California and Oregon enacted breakthrough laws to automatically register voters when they interact with the DMV.

The Problem: A Voter Registration System Plagued With Errors

Our voter registration system has not kept pace with modern America. Still based largely on paper, the system is plagued with errors, which create needless barriers to voting, frustration, and long lines at the polls. According to the Pew Center on the States:

- One in four eligible citizens is not registered to vote.
- One in eight voter registrations in the United States is invalid or significantly inaccurate.
- One in four voters wrongly believes their voter registration is automatically updated when they change their address with the Postal Service.

About 3 million people were blocked from voting in 2008 because of registration problems.

While some choose not to register to vote, many try and fail or drop off the rolls. A Caltech/MIT study found that in 2008, approximately 3 million tried to vote but could not because of registration problems, and millions were also thwarted by other issues. A study only of in-person voters from the 2012 election similarly found that millions of voters experienced registration problems at the polls.

The current system fails to reflect our modern mobile society. One in nine Americans moves every year, according to the U.S. Census. Because their voter registrations do not move with them, they risk falling off the rolls after a change of address, even within state lines. In 2002, a Harvard political scientist found a full one-third of unregistered voters were those "who had moved and hadn't re-registered." Yet, even if every one of those voters changed their address with another government agency, that information never filters through to the registration file.

Excerpted from *The Case for Automatic, Permanent Voter Registration*, September 22, 2015.

Election experts and observers of all political stripes note that inaccurate voter rolls lead to confusion, delays at the polls, and wrongful exclusion of eligible citizens on Election Day. Others worry that bloated, outdated lists create the potential for fraud and manipulation, compromising the integrity of our election system. For example, more than 2.75 million people have registrations in more than one state.

And the costs of maintaining this antiquated system are substantial. According to a Pew study, Oregon's old paper-based voter registration system cost the state $7.67 per registration transaction or $4.11 per registered voter in 2008. By contrast, the same study reported that Canada, which uses modern methods to register voters, spent only 35 cents per active voter on maintaining and creating its lists.

For too many citizens in 21st century America, voter registration is a 19th century relic. At a time when we deposit checks on our smartphones and push a button to start our cars, paper-based registration just does not make sense for voters, and creates headaches for election officials. Fortunately, there is a better way.

The Solution: A Modern System for All Americans

The ultimate goal is to establish nationwide, universal registration of voters once they turn 18. This system would automatically register every American to vote when they become eligible, and would make sure that people stay on the voter rolls when they move. To get there, we must put in place the key components of a modern voter registration system.

A fully modern system is seamless and paperless for voters. Instead of registration acting as an obstacle, the government would ensure that citizens are registered when they interact with agencies, unless they choose not to be registered. The end game is achieving full participation in our democracy — and an accurate system that is easier to administer.

A. Automatic Registration

The first step to a modern voter registration system is automatic, electronic registration.

Here's how it works: When an eligible citizen gives information to the government — for example, to get a driver's license, receive Social Security benefits, apply for public services, register for classes at a public university, or become a naturalized citizen — she will be automatically registered to vote unless she chooses to opt out. No separate process or paper form is required. Once the voter completes her interaction with the agency, if she doesn't decline, her information is electronically and securely sent to election officials to be added to the rolls. Once registered, election officials would send each eligible voter a confirmation that their registration has been accepted, providing a receipt and confirmation for any electronic voter transaction.

Moving to a paperless system for receiving and transmitting registrations is a step in the right direction. An increasing number of states have already moved toward electronic, paperless, and seamless registration at agencies and have reaped substantial benefits. These systems serve voters and election officials well and are an important foundation for automatic registration.

Automatic, electronic registration systems will be better than paper-based systems at ensuring that only eligible citizens are registered to vote. The most appropriate agencies for automatic registration already collect citizenship information and the other information needed for voter registration. It is this already-vetted information that will form the basis for voter registration records and updates. A modern system will reduce errors of all types throughout the registration process, including improper registrations. And election officials will continue to review applications for eligibility and errors.

Importantly, automatic registration systems can and should be built to enhance security. Since they are more accurate, electronic systems are less vulnerable to fraud and abuse than their paper-based counterparts. When it comes to the threat of hacking, states can take steps to increase security, like limiting authorized users, monitoring for anomalies, and designing systems to withstand potential breaches. And using a paper backup would eliminate the harm that hacking could render to a registration database. With or without these measures in place, unlike with online voting, no one attempting to hack a voter registration system can change an election's outcome.

B. Portable Registration

Automatic, electronic registration systems help ensure only eligible citizens can vote.

Once a voter is on the rolls, she should be permanently registered within a state. Every time she moves, her voter registration would move with her. Just as with automatic registration, any time a consenting citizen changes her address with a broad set of government agencies, such as state DMVs, the Social Security Administration, or the Post Office, that information would be updated in her voter file. As with any new registration, the voter can choose not to be registered, and the system would generate a notice to the voter of any change.

C. Online Voter Registration

People should be able to sign up and correct their records online. Federal law should require each state to create a secure and accessible online portal that every eligible voter can access. Once registered, voters would also be able use the portal to view their registration records and polling locations, making it a full-service, one-stop shop for everything a voter needs to cast a ballot that counts. The ideal online registration system would be accessible for every eligible citizen, including those without driver's licenses or other IDs from motor vehicle offices.

D. Election Day Safety Net

Even under the best and most up-to-date list-building system, some errors are bound to happen and some voters will fall through the cracks. Any modern registration system must include fail-safe procedures to ensure that eligible citizens can correct mistakes on their voter records at the polls. One highly successful option is same-day registration, which would allow every eligible voter to register and vote on Election Day and during early voting. This protection ensures that voters do not bear the brunt of government mistakes, and it has significantly boosted turnout in every state that has adopted it. At a minimum, it is critical that every state has procedures during the voting period that permit voters to correct any error or omission on the rolls and be able to cast a ballot that counts. And in a fully modern system, this fail-safe would rarely be used because the rolls would be far more complete and accurate.

The Way Forward

The elements of a modern registration system already work in the many places that have implemented those components. But there is more work to do. A fully modern system brings these reforms together in pursuit of one clear goal: universal registration of all eligible voters.

California and Oregon took the biggest steps yet toward that goal in 2015 when their legislatures passed breakthrough laws to automatically register any eligible voter 18 and over who obtains a driver's license or other DMV ID (unless that person chooses to opt out). In California, automatic registration will reduce the ranks of its estimated 6.6 million citizens who are eligible but unregistered to vote. In Oregon, the move could bring up to 400,000 new voters on the rolls (out of a total citizen voting-age population of 3.8 million) when it is implemented and end up giving the state the highest registration rate in the country. A total of 18 states and the District of Columbia introduced automatic registration legislation in 2015.

States should continue to press ahead with these reforms and move beyond the DMV to other public agencies. But our election system demands a single national standard — a mandate to ensure that all eligible voters are registered no matter where they live. Congress should pass legislation to make that mandate a reality. In 2002, the Help America Vote Act required states to adopt computerized voter rolls and upgrade their voting machines and provided federal funds to help them do it. Today, we need a similar upgrade for our registration system.

In 2014, the bipartisan Presidential Commission on Election Administration, co-chaired by President Barack Obama and Gov. Mitt Romney's campaign attorneys, endorsed key registration reforms. As of 2015, a majority of states have implemented some modernizing reform, setting them on the pathway to universal voter registration.

The biggest reason for opposition to a proposal like this, if unstated, is the notion that maybe we don't really want everyone to be able to vote. But that idea runs afoul of our most fundamental precepts. Thomas Jefferson, in the Declaration of Independence, wrote that government is legitimate only if it rests on the "consent of the governed." That consent relies on robust voter participation but is greatly hindered when voters are thwarted by hurdles, errors, and long lines. In 2014, turnout fell to its lowest level in seven decades.

Automatic, permanent voter registration offers a common sense, nonpartisan opportunity to increase participation and protect election integrity. It satisfies the concerns of liberals by enfranchising more people and those of conservatives by protecting better against fraud. And everyone can agree on the benefits of saving money and reducing error.

Let's take advantage of the growing momentum for reform and get our elections to work for the 21st century. Fifty million new voters in a more reliable, cost-effective, and secure voting system are worth the effort.

Independent Redistricting Commissions Are Constitutional

Wendy Weiser, Michael Li, Tomas Lopez, Brent Ferguson, and Conor Colasurdo

Tired of gerrymandering, Arizona voters in 2000 passed an initiative putting redistricting in the hands of an independent bipartisan commission. The legislature sued the commission, claiming it had the sole power under the U.S. Constitution's Election Clause to draw lines. In an amicus brief, the Brennan Center argued that citizens could use a ballot initiative to protect against partisan gerrymandering. In a 5-4 ruling, the Supreme Court agreed, noting that the initiative process "was in full harmony with the Constitution's conception of the people as the font of governmental power."

Summary of Argument

The Supreme Court found citizens have the ability to protect against gerrymandering.

At stake in this case is the ability of citizens of the states to guard against the pernicious effects of partisan gerrymandering and to pass other election reforms via ballot initiative. Under the Arizona Legislature's novel interpretation, the Elections Clause — designed in part to give Congress the power to combat manipulation of the electoral rules by state legislators — would prohibit the people of Arizona from accomplishing the very same goal by establishing a redistricting commission with the power to draw congressional districts. The Legislature's position finds no support in the text or purpose of the Elections Clause, and it runs contrary to more than two centuries of interpretation and practice.

This Court recently made clear that the Constitution should be interpreted "in light of its text, purposes, and 'our whole experience' as a Nation," and that "the actual practice of Government" should inform that interpretation. Under each of those factors, Arizona's redistricting process is consistent with and permissible under the Elections Clause.

The Arizona Legislature's case depends on narrowly reading the term "legislature" in the Elections Clause to include only institutional legislative assemblies and to exclude the people acting via ballot initiative. But the use of the term "legislature" at the time the Clause was written and debated does not support such a constrained reading. To the contrary, contemporaneous dictionaries, the constitutional debates, and the diverse state constitutions from the founding era all point to an understanding of the term "legislature" that includes all configurations of a state's legislative power.

Excerpted from an amicus brief submitted to the U.S. Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, January 29, 2015.

A broader definition of "legislature," indeed, is consistent with the purpose of the Elections Clause, which was to empower Congress to override state election rules, not to restrict the ways states enact legislation. The Framers sought a check on politicians who might manipulate the political system, and a safeguard against the states failing to provide for congressional elections. The provision was not written to direct or restrict the ways states enact their laws.

The Legislature's interpretation is also inconsistent with the whole of the nation's experience, including more than two centuries of practice under the Elections Clause. From the founding through to the present day, the people have exercised legislative power in various forms to regulate the times, places, and manner of congressional elections. Citizen initiatives have been regularly used to regulate federal elections for more than a century without complaint. Congress has approved constitutions that included citizen initiative power, including the power to regulate federal elections, and this Court has recognized the validity of election laws passed in this manner. To accept the Legislature's reading would require reversing centuries of experience.

The Framers sought a check on politicians who might manipulate the political system.

Defining "legislature" so narrowly would deprive the Elections Clause of its textual meaning, its substantive purpose, and its accepted application throughout history. In its place, the Constitution would be left with a measure far weaker than the one conceived in the founding era and implemented through to the present day. This weakened provision would leave the public with what the authors of the Constitution and the people of Arizona sought to avoid when they respectively wrote the Elections Clause and established the Independent Redistricting Commission: a political system prone to manipulation by entrenched politicians.

Argument

I. The term "legislature" in the Elections Clause refers to the legislative power, however organized by the states

This Court recently explained that "[t]he Elections Clause has two functions. Upon the States it imposes the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." The question in this case is whether, by using the term "legislature," the Clause regulates states' internal governance and restricts which state actors can fulfill the states' legislative duty to provide for congressional elections.

While the Arizona Legislature suggests that the Court read "legislature" in the Elections Clause to exclude the exercise of legislative power by the people, the text and the history of American legislatures in the founding era support a different and far broader reading.

A. Founding-era dictionaries define "legislature" as sovereign legislative power rather than a specific form of assembly

Eighteenth-century dictionaries defined "legislature" not as a legislative assembly or chamber but rather as a broader term encompassing lawmaking power. Samuel Johnson's dictionary defined the word simply as "the power that makes laws." Another prominent dictionary defined legislature as "the Authority of making laws, or Power which makes them." A third, narrower dictionary definition is still broader than that proposed by the Arizona Legislature in this case: "the persons empowered to make, abolish, alter, or amend the laws of a kingdom or people."

To the extent that this Court's understanding is guided by these sources, they indicate that the word "legislature" carried a broader meaning than simply a body that meets in a state capitol. There is no evidence to support the Arizona Legislature's argument that the term should be narrowly circumscribed to its modern colloquial meaning.

B. In the debates over the Elections Clause "legislature" often was used interchangeably with "state" and "state government"

The terminology used during the debates over the Elections Clause further supports a broad interpretation of the term "legislature." In discussing the Clause, the people of the founding era frequently used the word "legislature" interchangeably with "state" and "state government," suggesting they did not understand the term to constrain who within a state could exercise legislative power to regulate congressional elections in the first instance. Indeed, in our search of the *Documentary History of the Ratification of the Constitution Digital Edition*, the terms "state" and "state government" were used roughly half the time in reference to the first part of the Elections Clause. For instance, in the Virginia ratification debates, while Delegate Nicholas discussed how "the *State Legislature* . . . [might] not appoint a place for holding elections," later, in the same debate, he refers to the prospect of Congress "chang[ing] the time, place, and manner, established by *the States*."

In the same debates, James Madison similarly refers both to "state legislatures" and "state governments" in the context of the Elections Clause. For example, in explaining the need for the Elections Clause, Madison told the Virginia convention that a congressional override was important because were the times, places, and manner of federal elections "exclusively under the controul [sic] of the State Governments, the General Government might easily be dissolved." Yet, he also referred to the "State Legislatures."

C. Founding-era state constitutions had diverse legislative structures and early elements of direct democracy

The actual structure of state legislative power at the time of ratification of the Constitution also supports a broader interpretation of "Legislature" than that urged by the Arizona Legislature. The argument that "legislature" should be narrowly construed, indeed, is flatly inconsistent with the Framers' express rejection of the idea that there should be uniformity in the form of state governments.

During the Revolution, there had been debate both at the Continental Congress and in the states about whether the newly independent states should have uniform constitutions. Ultimately, there was no agreement on what such a constitution would look like, and the idea fell by the wayside.

Instead, state constitutions differed from one another in many ways, including how they structured legislative power. There was no monolithic model of a "legislature" or the state legislative power. Rhode Island and Connecticut, for example, used their colonial royal charters, with some modifications, well into the 19th century. In both states, legislative bodies formally included the governor and assistants.

Other states, by contrast, had begun to develop a more defined separation of powers. By 1787, New York and Massachusetts allowed governors to exercise a right to veto legislation. Further, a number of states had begun to divide their legislatures into upper and lower chambers, with each chamber elected on a different basis.

Despite differences in the ways they structured legislative processes, however, early state constitutions shared a skepticism about politicians and generally sought to use early versions of direct democracy to ensure that the people and not the political class remained in control. These mechanisms arose in the context of a robust Revolutionary-era focus on the nature of representation and a rejection of British notions of indirect "virtual" representation.

Consistent with this growing emphasis on representation, and the right of the people to govern themselves, most Revolutionary-era state constitutions contained strong statements that power rested not with politicians in legislatures, but with the people.

These early constitutions sought to assure the proximity of government to the people. In five states, citizens of a legislative district could issue binding instructions to their elected representatives, and "the practice was widespread even in states that did not expressly recognize it in their constitutions." States took other measures, as well. By 1789, all had moved to annual elections for their lower houses, and seven had adopted annual elections for their upper houses as well, to ensure greater popular control over legislative outcomes. Pennsylvania and Vermont (which joined the Union shortly after it was created) required that non-emergency legislation not take effect until there had been an intervening election.

II. The word "legislature" should be read consistently with the Elections Clause's purpose, which is to empower Congress to override electoral rules for federal elections, not to restrict the ways states enact legislation

The purpose of the Elections Clause is to give Congress the power to override state electoral rules. All the founding era debates around the provision centered on this issue.

The Framers wanted to empower Congress for two reasons. First, the Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." Equally important, the Clause acted as a safeguard against the possibility that politicians and factions in the states would manipulate electoral rules to preserve their advantages – and, in doing so, prevent the House of Representatives from being the "mirror of the people in miniature" famously envisioned by John Adams.

This second concern was even more central to the purpose of the Elections Clause because it was rooted in a Revolutionary-era belief in the need for representative governments and the corollary that government works best when it is closest to the people. Having just emerged from a Revolution fought in large part because of the unrepresentative nature of the British electoral system, the Framers wanted to make sure that government would actually be representative of the people at large. They feared that state legislators might manipulate electoral rules to entrench themselves or place their interests over those of the general public just as British political elites had done. The Elections Clause was designed as a check against these potential abuses, and as a way to keep government close to the people it represented. At the Constitutional Convention, Madison was explicit in arguing this rationale. He worried that state legislatures might impose rules to skew the outcomes of federal elections. Without the Elections Clause, he suggested that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." Madison spoke in

response to a motion by South Carolina's delegates to strike out the federal power. They did so because that state's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so.

These arguments were carried into the public debate over ratification. Theophilius Parsons, a delegate at the Massachusetts ratifying convention, argued that the Clause was needed to combat what today might be characterized as partisan gerrymandering, when he warned that, "when faction and party spirit run high," a legislature might take actions like "mak[ing] an unequal and partial division of the state into districts for the election of representatives." Timothy Pickering of Massachusetts similarly posited that the Clause was necessary because "the State governments may abuse their power, and regulate elections in such manner as would be highly inconvenient to the people, [and] injurious to the common interests of the States."

Fears of such abuses flowed from the Framers' clear eyed understanding of politicians. They were skeptical of many elected officials, especially at the state level, and debaters denounced them as self-interested, self-dealing, and as "Men of indigence, ignorance, & baseness." In the Constitutional Convention debate over direct election of congressional representatives, James Wilson of Pennsylvania stated, for example, that he did not want to "increase the weight of the State Legislatures by making them the electors of the national Legislature." Madison, likewise, feared that if state legislatures controlled the appointment of the House of Representatives, "the people would be lost sight of altogether." Hamilton observed that "State administrations" would be attractive to those "capable of preferring their own emolument and advancement to the public weal."

The common thread in these concerns over political abuses and the men who perpetrated them is that they all would make government more remote from the people and less representative than the Framers believed it should be. The Elections Clause was written to protect that very principle. With the Elections Clause, state politicians would be circumspect. Rufus King and Nathaniel Gorham wrote that because the Clause acted as a check, "the States . . . will do all that is necessary to keep up a Representation of the People; because they know that in the case of omission the Congress will make the necessary provision." Pickering further supported the Clause as a way to "[e]nsure to the *people* their rights of election."

If the Elections Clause were read in the manner proposed by the Arizona Legislature, it would undermine and pervert the very goal of the clause by giving free rein to elected politicians to do the very thing that people of the founding generation loathed. The driving force behind the Clause was a desire to ensure truly representative government. These were leaders who sought to prevent politicians from manipulating the political system, not grant them the express power to do so.

III. Since the nation's founding, states, this Court, and Congress have understood that states have authority to give the people the ability to regulate the times, places, and manner of congressional elections

In the more than two centuries since 1787, legislative power has been embodied in colonial-era charters, citizen votes on legislation, and the initiative power used to create Arizona's Independent Redistricting Commission. This legislative power often has been used to shape election laws, and Congress and this Court have long acknowledged that power as legitimate.

A. This Court's precedents confirm a sufficiently broad interpretation of "legislature" to encompass the legislation at issue here

Only twice before has this Court construed the first part of the Elections Clause, and in both cases the Court recognized states' flexibility to structure their legislative power in different ways. In both *Hildebrant*

and *Smiley*, this Court upheld state legislation under the Elections Clause pursuant to mechanisms that the Framers may not have recognized and that are inconsistent with the definition of "legislature" urged by the Arizona Legislature.

The Supreme Court upheld a 1912 Ohio referendum, finding that it was contained within the power of the legislature.

Hildebrant concerned whether the Elections Clause allowed Ohio's constitution to authorize voters to call a referendum to override the state legislature's redistricting plan. In 1912, Ohio wrote this referendum power into its constitution as part of a package of reforms introduced at a constitutional convention. Three years later, the state's legislature passed a set of new congressional districts. Pursuant to the state's new referendum power, the districting plan was submitted to the electorate, which rejected it. The petitioner brought suit to force Ohio to implement the districts, arguing that "the referendum vote was not and could not be a part of the legislative authority of the state, and therefore could have no influence" on congressional redistricting.

The Court upheld Ohio's system, holding that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power." The decision further noted that to hold the referendum as invalid under the Elections Clause would "rest upon the assumption that to include the referendum in the scope of the legislative power" would "in effect annihilate representative government." The Court was not concerned about whether the legislative mechanism at issue empowered particular state actors, but rather whether that mechanism preserved the representative government that was at the heart of the Framers' concerns.

Similarly, in *Smiley*, the Court addressed the question of whether the Minnesota governor's ability to veto a legislatively approved redistricting plan meant that it had been enacted inconsistently with the Elections Clause. As with the referendum in *Hildebrant*, the Court upheld the governor's veto power as consistent with the Elections Clause. The decision found "no suggestion in [the Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." In so holding, the *Smiley* Court acknowledged the long history of states adopting different legislative forms and the principle that "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning."

As the Arizona Legislature appears to acknowledge, under these decisions, Arizona's redistricting process is plainly constitutional. This Court should decline Appellant's invitation to overrule *Hildebrant* both because the case was correctly decided and because overruling it would upend more than a century of established practice under the Elections Clause.

B. Use of initiative to pass electoral laws

As the Court made clear in both *Hildebrant* and *Smiley*, as well as in *Noel Canning* last Term, history does not stop after 1787. Rather, "the longstanding 'practice of the government' . . . can inform our determination of 'what the law

is.'" It is also "an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."

Here, the flow of history is clear: states have increasingly allocated ever greater legislative power to the people. That power encompassed the regulation of elections. The initiative that created Arizona's Independent Redistricting Commission stands firmly in that tradition.

As states began to amend their constitutions after 1787, popular sovereignty became increasingly prominent in the state constitutional tradition. The Progressive Era marked the apex of the populism of the state constitutional tradition by institutionalizing the initiative and referendum. In 1898, South Dakota became the first state to adopt these direct democracy devices, with Utah and Oregon following suit in 1900 and 1902, respectively. By the end of the 20th century, roughly half of the states had adopted the statutory initiative and/or referendum.

Notably, since the advent of ballot initiatives over a century ago, Americans have regularly and repeatedly used this process to regulate the "times, places, and manner" of congressional elections without formal involvement of institutional legislatures, and without drawing constitutional objections.

For example, in 1904, the people of Oregon passed a ballot initiative establishing a primary system for *all* elections (federal and state). This occurred two years after Oregon established the ballot initiative and six years after the first state adopted the ballot initiative (South Dakota). Oregon is not alone; other states including Arkansas and Washington have altered the way candidates — including congressional candidates — are nominated through ballot initiative. The frequent use of ballot initiatives to affect the "times, places, and manner" of congressional elections underscores the fact that the power initially vested in the states by the Elections Clause has always been understood to encompass direct legislative action by the electorate.

While Arizona was the first state to pass a ballot initiative affecting congressional redistricting, others have since joined it. For decades before Arizona's initiative, voters in other states, likewise, tried and failed to address congressional redistricting through ballot initiative. In each instance, it was understood that the voters — in their capacity as legislators — had the power to enact these measures.

C. Congress did not limit the scope of initiative powers when it approved state constitutions

Likewise, Congress did not stand idly by as broad initiative powers were established to give the people a say in the rules for federal elections. Indeed, Congress actively encouraged or acquiesced in these developments. Between 1791 and 1959, Congress carefully considered and actively debated the addition of 37 states. Likewise, after the Civil War, Congress weighed the readmission of the 11 former Confederate states. Congress did not assent lightly. Rather, it frequently imposed restrictions on new states.

But Congress never required state constitutions to avoid direct democracy. In fact, Congress approved constitutions that incorporated far-reaching aspects of popular sovereignty. In the early 20th century, as states began to amend their Constitutions to grant legislative power to the people through initiatives, referenda, or both, territories seeking admission to the Union did the same. Indeed, Oklahoma, Arizona, and New Mexico all enshrined the people's legislative power in the new state constitutions approved by Congress.

Oklahoma was the first state to include initiative and referendum provisions in its Constitution at the time it was admitted to the Union Article V, Section 1 created a legislature comprised of a Senate and House of Representatives, but the same section reserved for the people "the power to propose laws and amendments

to the Constitution and to enact or reject the same at the polls independent of the Legislature, and [the] power at their own option to approve or reject at the polls any act of the Legislature."

Arizona's Constitution spoke as plainly as Oklahoma's in preserving legislative power for the people, setting forth the principle that:

> [Legislative power] shall be vested in the legislature . . . but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

New Mexico's original Constitution vested power in the Senate and House of Representatives, but reserved for the people "the power to disapprove, suspend and annul any law enacted by the legislature," with certain exceptions.

Half a century after Congress and the President approved the Constitutions of Oklahoma, New Mexico, and Arizona, Alaska's Constitution also reserved legislative power to its citizens. In Article XI, the Alaska Constitution provides that "[t]he people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum."

Notably, the congressional debates of 1911, concerning potential statehood for Arizona and New Mexico, focused heavily on direct democracy provisions included in the territories' proposed constitutions. Much of the controversy centered around Arizona's inclusion of a provision that would allow popular recall of judges, but the initiative and referendum provisions were also hotly debated.

Despite the fact that the proposed initiative power clearly would allow the people of the new states to enact electoral rules by initiative, there was no objection on that basis from Congress.

On the heels of each debate, Congress determined each territory should be admitted to the Union with the direct democracy provisions in place. Over 100 years ago, this included Arizona. The state later used its initiative power — accepted as lawful during the state's admission to the Union — to create its Independent Redistricting Commission.

Congress' repeated acquiescence in these direct democracy provisions at the very least demonstrates a widely shared constitutional understanding over two centuries. Moreover, each instance can be seen as a meaningful decision not to preempt state practices under the Elections Clause.

Conclusion

For the foregoing reasons, *amicus curiae* respectfully requests that the Court affirm the decision below.

Governor Jerry Brown Should Sign Historic Voting Bill

Myrna Pérez

In September, the California legislature passed a groundbreaking measure that would automatically register voters when they interact with the DMV. With approximately 6.6 million eligible but unregistered voters, the provision could dramatically boost California's registration rate, which was ranked 38th in the country in 2012. The Brennan Center joined many other groups in successfully persuading Gov. Brown to sign the measure.

With the presidential campaign in full swing, political jockeying dominates the airwaves. But while pundits focus on Iowa and New Hampshire, the biggest voting reform in a quarter century is unfolding out west: California's legislature passed a bill enacting automatic voter registration. Gov. Jerry Brown (D) should sign it and bring 21st century registration to the Golden State.

There are nearly 7 million eligible Californians who are not registered to vote. Automatically signing up voters could make a huge dent in that problem. Here's how it works: First, eligible citizens are registered to vote when they are at a DMV office, unless they decide they do not want to be signed up. That is a subtle, but impactful change. The current method keeps eligible citizens off the voting rolls unless they take an action to get themselves registered. Second, the DMV will electronically transfer voter registration information instead of making election officials hand-enter data from paper forms.

These two changes may sound small, but it would transform the state's system by putting the burden of registration where it should be — on the government. This could add millions to the rolls, save money, and boost election security by reducing typos and mistakes.

California is the latest state — and by far the largest — to pass this groundbreaking reform. In March, Oregon passed an automatic registration law that may add hundreds of thousands of new voters to its rolls. Soon after, the New Jersey legislature passed a similar bill (unfortunately, as of now, Gov. Chris Christie (R) has indicated he would veto it). In 2015 alone, 17 states plus the District of Columbia have introduced legislation proposing automatic registration. It has also reached the national level, with presidential candidates Hillary Clinton and Bernie Sanders endorsing the reform. California could advance automatic registration on a grand scale. In fact, if Oregon, New Jersey, and California enact this policy, 16 percent of the nation's population will live in states with automatic registration.

California is the latest state — and by far the largest — to pass this groundbreaking registration reform.

The country needs it. Our election system is broken in many ways — a common lament in election years — but voter registration is one of its greatest flaws. Fifty million eligible Americans are not registered to vote, and 1 in 8 registrations nationwide have serious errors. Much of the

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problem stems from our old-fashioned, ink-and-paper system, which leads to incomplete and error-ridden rolls.

Making matters worse, states pushed through a wave of restrictive voting laws in recent years, and the Supreme Court enfeebled a key protection under the Voting Rights Act. The result: Too many Americans experience registration difficulties while also facing greater obstacles to the ballot.

California can take important steps forward with this voting reform bill. To be sure, automatic registration needs safeguards to ensure that only eligible citizens are added, that those who do not wish to participate have that option, and that people registered because of government error are not punished for it. But California, like Oregon before it, can put these checks in place.

50 million eligible Americans are not registered to vote.

In 1992, Governor Brown voiced some prophetic words: "Every citizen in America should have not only the right but the real opportunity to vote. And it's the responsibility of government to ensure that by registering every American. And that's why we have to fight to see that government does the job with all its bureaucracy and its computers."

Today, we have the modern tools and the political will to make that a reality. But first, it will take one more old-fashioned, ink-and-paper transaction: a stroke of Governor Brown's pen.

Hillary Clinton's Game-Changing Voting Reform

Michael Waldman

For the first time in years, political reform is a prominent topic of debate among candidates for national office. This is one of the biggest and best ideas out there for strengthening the participatory aspects of our democracy.

Last week, in Houston, Texas, Hillary Rodham Clinton denounced the wave of restrictive new voting laws enacted by Republican legislatures around the country. Those of us who aren't wild about disenfranchising eligible citizens welcomed Clinton's passionate defense. It's been years since a major candidate made democracy reform a central issue. But the most important thing about the speech was her embrace of a transformative policy innovation: automatic, universal registration of voters once they turn 18. It's an idea that's already begun to gain ground across the country, building on reforms with bipartisan support. Now we have a chance to take it even further.

In a campaign season criticized for a dearth of big new ideas, this one's a doozy.

Why is it so important? Between a third and a quarter of all eligible Americans remain unregistered and therefore cannot cast a ballot. Automatic, permanent registration as Clinton proposes would add up to 50 million to the rolls. It would cost less than today's paper-clogged system. And it would curb the potential for fraud. Amid rising political inequality and declining voter interest, this could give the ailing political system a much-needed jolt of citizen energy.

Our ramshackle voter registration system disenfranchises more people by accident than even the harshest new laws do on purpose. To be sure, some people just don't want to register and never will. Call them the "Don't vote — it will only encourage them" caucus. But many others fall off the rolls, or become tangled in the mess of the current system. According to a 2012 Pew Center on the States study, 24 million entries are either invalid or inaccurate. Many eligible voters are under the impression that when they file a change of address form with the U.S. Postal Service, their voter registration information automatically updates. And, yes, plenty of dead people have stayed registered. All these flaws risk undermining election integrity.

In a campaign season criticized for a dearth of big new ideas, this one's a doozy.

While we deposit checks on our iPhones and push a button to start our cars, many states and localities still rely on piles of paper records to maintain their voting lists. Civil servants who perform data entry from paper-based applications must interpret citizens' chicken scratch handwriting. Typos are common. And today's system poorly reflects today's hypermobile society. More than 26 million voting-age Americans move each year, and because of residency requirements, many of

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them fall off the rolls, even if they move within the same state.

These glitches are a chief cause of polling place confusion and delay — which lead to long lines on Election Day. In all, according to the definitive study by Cal Tech and MIT, some 3 million eligible citizens were unable to vote in 2008 because of registration problems. Many took time from their families or jobs, only to learn they were nowhere to be found in the voter rolls. The problems aren't going away: The 2012 election saw a 40 percent jump in the number of in-person voters who experienced registration problems.

Other democracies do it better than we do. In 2009, the Brennan Center studied voting systems in 16 democratic countries. The United States was one of only four that put the responsibility for registering solely on the voter. Great Britain, Canada, Germany, and France all boast registration rates above 90 percent. Ours were as much as 30 percent lower. That's one kind of American exceptionalism we don't want to boast about.

Tinkering won't suffice. It's time to modernize the way we run elections, and bring them into the 21st century. That's where a system of universal, automatic registration would come in.

So how would Clinton's proposal work? From now on, the *government* rather than the voter would be responsible for making sure all eligible citizens are registered to vote and that rolls are accurate and complete. Citizens would register at 18 and stay on the rolls for their entire lives. All would be given the chance to opt out; nobody would be registered against their will.

Clinton has not released details of her plan, so we don't know for sure what she'd enact, but there are several innovative reforms that could achieve complete and accurate voting logs through collaboration between various government agencies. Universities, for example, could automatically register 18-year-olds, Medicare could do the same for seniors. And the U.S. Postal Service could let the voter registration agency know when someone has moved.

Some states are ahead of the curve. Ever since the Brennan Center published its proposal for Voter Registration Modernization in 2007, a package that included permanent and portable registration, at least two dozen states have implemented voter registration reforms — moving to online registration, for example. High school "pre-registration" programs, in which young people register as future voters and are automatically signed up when they turn 18, are already in place in at least 10 states.

It's time to modernize the way we run elections and bring them into the 21st century.

The biggest breakthrough on this front — and one that Clinton mentioned in her speech — came in March in Oregon, when Gov. Kate Brown (D-Ore.) signed a law that automatically registered to vote anyone 18 and up who obtained a driver's license (unless that person chose to opt out). The move is likely to add at least 300,000 voters to the rolls right away, and could end up giving Oregon the highest registration rate in the country. Other states could expand on the model, moving beyond the DMV. When someone receives Social Security benefits, pays state taxes, or applies for disability benefits, her information could be passed along for registration or updates to an existing record.

States should keep pressing forward with initiatives like these on their own. But, as Clinton suggested, there needs to be one national standard — a mandate to ensure that all eligible voters are registered no matter where they live. A comparable proposal from Sen. Kirsten Gillibrand (D-N.Y.) and Rep. John Lewis (D-Ga.) would set core federal standards while giving some flexibility to states. In 2002, the Help America Vote Act (HAVA) took such an approach. It required states to move to electronic voting, and provided federal funds to help them do it. This would be a similar technological upgrade — voting 2.0 — this time applied to registration.

What are the risks? Some worry non-citizens would inadvertently find themselves registered, even voting, without realizing they cannot — putting them at risk of deportation. So it's hugely important to make sure that the lists omit non-citizens. Others might worry about cost. So far, the move to digital records has proved very cost efficient in states that have tried it. Every so often, someone will grumble that this plan would — somehow — open the way to fraud. But that rationale quickly crumbles. After all, digital government lists, checked and rechecked, are likely to be more accurate than the names submitted by voter registration groups or private citizens. For those really worried about "Mickey Mouse" registering to vote, don't worry — he's not on the government list, even in Orlando (where he lives).

In fact, automatic voter registration gives both left and right what they demand. It enfranchises more people. And it protects better against fraud. The bipartisan Presidential Commission on Election Administration, co-chaired by Mitt Romney's top attorney and Obama's counsel, has endorsed key registration reforms.

The biggest reason for opposition to a proposal like Clinton's, if unstated, is the notion that maybe we don't really want everyone to be able to vote. But we all know that idea runs afoul of our most fundamental core precepts. Thomas Jefferson, in the Declaration of Independence, wrote that government is legitimate only if it rests on the "consent of the governed." That consent becomes muddied by missing data, illegible lists, and long lines of voters. Last year, turnout fell to its lowest level in seven decades.

One leading candidate has already spoken up. As 2016 approaches, let's hope that all candidates from both parties will tell us what they would do to improve our democracy.

50 Years Later, Voting Rights Act Under Unprecedented Assault

Vishal Agraharkar and Theodore M. Shaw

A half-century ago, the Voting Rights Act passed with bipartisan support. By the time it was last reauthorized in 2006, congressional support was practically unanimous. Yet the Supreme Court gutted a key provision of the Act in 2013, unleashing a wave of restrictive voting legislation in the states. It is time for Congress to act to restore the lost protection of the Voting Rights Act and modernize it for the 21st century.

Fifty years ago this week, President Lyndon Johnson signed the Voting Rights Act, one of the most successful civil rights laws in our nation's history. The Act was designed to curb discrimination in voting and bring equality to the ballot box for all Americans, regardless of the color of one's skin. It was the culmination of more than a century of battles for black voting rights.

But two years ago, the U.S. Supreme Court, in *Shelby County vs. Holder*, gutted a key provision of the law. The decision came amid a new wave of laws restricting voting, the most since the Jim Crow era. The ruling destroyed a core protection that allowed the federal government, in certain places, to block discriminatory election laws before they had a chance to hurt voters.

Now, advocates are waging battles in the courts to save what is left of the Act, and calling on Congress to restore this protection to ensure voting can remain equal for all.

Our country has a long history of keeping certain people away from the ballot box. Initially, only white male landowners could vote. Black men could vote after the Civil War. For a time, many did. But soon, the Jim Crow era took hold and Southern states passed discriminatory laws and carried out a campaign of violence and intimidation aimed at preventing them from doing so. Black voter registration and political representation plummeted, and stayed that way for nearly a century.

Our country has a long history of keeping certain people away from the ballot box.

Starting in the 1950s, the Civil Rights Movement began to make gains. Voter registration was a key goal to advance equality. One Sunday in 1965, a bloody march across the Edmund Pettus Bridge in Selma, Ala., brought dramatic attention to the cause. Americans across the country, white and black, watched as police officers beat and tear-gassed innocent people. The public outcry helped put pressure on lawmakers to pass the Voting Rights Act, which Johnson signed on Aug. 6, 1965.

The Act unleashed the potential inherent in American democracy. It was instantly effective. The gap between white and black registration rates dropped from nearly 30 percentage points in the early 1960s to just eight by the 1970s. Turnout among black voters shot up significantly. The black-white turnout gap in the South,

Theodore M. Shaw is the Julius L. Chambers Distinguished Professor of Law and the Director of the Center for Civil Rights at the University of North Carolina at Chapel Hill School of Law. This article appeared in the New York *Daily News*, August 2, 2015.

approximately 50 percentage points in the mid-1950s, was effectively eliminated.

Over the years, as demographics have shifted, the Voting Rights Act has also expanded to include protections for Hispanics and language minorities, furthering the promise of equality for all at the ballot box.

Section 5 of the Act was particularly instrumental in achieving these remarkable successes. Under this part of the law, jurisdictions with a history of discrimination against African Americans were required to seek approval, or "preclearance," from either the Department of Justice or a federal court in Washington, D.C., for any changes to their election practices before they could put them into effect.

This was critical. It blocked and deterred discriminatory election practices — such as last-minute changes to polling locations, or consolidating districts, which could dilute minority voting strength — that earlier litigation, brought after the fact, could do little to remedy. Before 1965, when one discriminatory voting practice was blocked through litigation, defendants could turn around and adopt a slightly different restriction in its place. Section 5 aimed to bring this gamesmanship to end.

The VRA was enacted with strong bipartisan support, and Congress has reauthorized it four times. During the last reauthorization, in 2006, Congress examined thousands of pages of evidence showing that discrimination still exists and the Act was still vital. The Senate voted 98-0, and the House 390-33, to continue it for another 25 years.

Despite all this, some opponents have been skeptical of the ongoing need for these protections in the current day. And in 2013, with the support of the Supreme Court, they succeeded. The Court struck down Section 4, the formula laying out which jurisdictions had to seek federal approval for election law changes, rendering Section 5 inoperable — like a computer without an operating system.

A 5-4 majority looked at improvements in black voter registration rates and the eradication of restrictions like the poll tax to find that the "conditions that originally justified [Section 5] no longer characterize voting in the covered jurisdictions."

The Voting Rights Act was instantly effective, greatly narrowing the gap between black and white registration rates.

In her dissent, Justice Ruth Bader Ginsburg decried that the majority was holding the Act's own success against it. "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes," she responded, "is like throwing away your umbrella in a rainstorm because you are not getting wet."

At its heart, the disagreement boils down to whether, as a nation, we still need federal protections against the possibility of racial discrimination in voting. Although we have come a long way since the 1960s, the past few years have shown that major racial divisions still exist. They may even have gotten worse since 2013, as large majorities of white and black Americans now view race relations as "generally bad," according to a recent poll.

The recent rash of discriminatory voting laws, unleashed by the *Shelby County* decision, does not help. States have used the court's implicit approval as justification to pass strict measures. These may not be as obviously discriminatory as literacy tests, but they similarly prevent people from voting.

For example, mere hours after the high court ruling, Texas implemented a strict photo ID law, which had previously been rejected under Section 5. That summer, the North Carolina legislature passed a sweeping law that also instituted a stringent photo ID requirement, eliminated same-day registration, and cut back on early voting.

All of these laws respond to phantom complaints of voter fraud, and all disproportionately hurt the ability of minorities to vote. In October 2014, a federal judge found 600,000 registered Texas voters do not have acceptable ID. Testimony showed African-American and Hispanic registered voters are two to four times more likely than white registered voters to lack photo ID. In North Carolina, data showed African Americans used early voting and same-day registration at much higher rates than whites.

Overall, since the 2010 election, 21 states have imposed new voting restrictions. In 2016, 15 states will have more strict rules than they did in 2012. The storm of discriminatory changes forecast by Ginsburg has apparently come to pass.

Many of these measures have been aggressively challenged under the remaining sections of the Voting Rights Act. Two major cases are pending in Texas and North Carolina, where attorneys laid out strong evidence showing how these laws prevent citizens from voting, and disproportionately discriminate against blacks and Hispanics.

Take Sammie Louise Bates, a witness in the Texas trial in September 2014. As the only one in her family who attended school, in a small town in Mississippi, Bates helped her grandmother count out her poll tax, a fee imposed with the intent to discourage black voters from voting.

Since the 2010 election, 21 states have imposed new voting restrictions.

This made her angry — and inspired her to become a lifelong voter. But in 2013, Texas's new photo ID law prevented her from casting a ballot. She had her voter registration card, containing her name and current address, and an Illinois photo ID — both of which would have been sufficient to prove her identity in prior elections. But when she tried to get a Texas ID, she kept running into the same obstacle: She needed to obtain her Mississippi birth certificate, which would cost $42.

"I had to put $42 where it was doing the most good," she stated. "It was feeding my family, because we couldn't eat the birth certificate. That's for sure. And we couldn't pay rent with the birth certificate."

Bates was one of approximately 16 witnesses who testified about the difficulties they personally faced in obtaining acceptable ID, ranging from insufficient funds to endless red tape. After hearing multiple expert analyses, Judge Nelva Gonzales Ramos struck down the law in October 2014 as discriminatory under Section 2 of the Voting Rights Act.

Yet, despite this evidence, the Supreme Court allowed it to remain in effect for the November 2014 election, pending an appeal that has still not been resolved.

This highlights the single most important loss in the Supreme Court's *Shelby County* decision. Before, voting laws could not go into effect in certain jurisdictions until the state had demonstrated they did not discriminate. After the ruling, laws must be challenged in case-by-case litigation that is costly and can take years. As a result, those measures can remain on the books to disenfranchise voters like Bates. And there's no guarantee that a victory won't simply give way to additional restrictions.

Another major lawsuit is also pending in North Carolina, where a trial just wrapped up. Its laws are also being challenged under the remaining provisions of the Voting Rights Act and the Constitution. At least one of these cases is likely to make it to the Supreme Court. What the court decides will determine not just the fate of those laws, but what is left of the Voting Rights Act.

Despite these fights, several states have advanced bipartisan reforms to modernize voter registration in recent years. They seek to streamline the process and increase access for all voters. Oregon, for example, passed a law to automatically sign up eligible citizens in the motor vehicle database.

Hillary Clinton recently embraced a form of automatic and universal registration. Rand Paul (R-Ky.) supports restoring voting rights to some people with past convictions. Other states have expanded early voting opportunities and moved registration online.

But while all leaders should work to create a voting system that works well for everyone, they must also fight for one that discriminates against no one.

Congress should move swiftly to restore the lost promise of the Voting Rights Act.

We have been painfully and repeatedly reminded in recent days and months about the continuing necessity of working for racial justice and equality in America. The Voting Rights Act, which gets at the core of democracy, is essential to the fight.

At the 50th anniversary of the March from Selma to Montgomery earlier this year, civil rights leaders convening in Alabama were united around this common purpose. This time, however, instead of seeking passage of the Voting Rights Act, they sought its restoration.

Whatever one's views of the *Shelby County* decision, and however one feels about the Court's view that "our country has changed," there is no question the Supreme Court believes Congress has the power to act. It practically invited action by acknowledging that "while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."

Today, Congress has introduced two separate bills — the Voting Rights Amendment Act and the Voting Rights Advancement Act — that would restore the lost protections of Section 5, making it operative once again, and modernize the Voting Rights Act for the 21st century. On this historic anniversary for our country, Congress should move swiftly to restore the lost promise of the Voting Rights Act.

America's Voting Technology Crisis

Lawrence Norden and Christopher Famighetti

After the 2000 Florida debacle, America moved to electronic voting machines. Problem solved? Now these devices are rapidly aging. Many will soon fail. The Center took the first empirical look at the problem, and offered a warning to election officials: start planning now.

The 2016 campaign is already underway, with nearly two dozen candidates vying to be the next president. Americans may have no idea who they will vote for next year, but they are likely confident that when they show up at the polls, their votes will count. And for the vast majority, of course, they will. But with rapidly aging voting technology, the risk of machines failing is greater than it has been in many years. In a close election, the performance of that old equipment will come under a microscope. Fifteen years after a national election trauma in Florida that was caused in significant measure by obsolete voting equipment — including hanging chads and butterfly ballots — it may be hard for many Americans to believe that the U.S. could face such a crisis again. But unless the right precautions are taken today and in the coming months and years, there is a significant risk that the story on Election Day will be less about who won or lost, and more about how voting systems failed.

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The looming crisis in America's voting technology was first brought to national attention last year by President Obama's bipartisan Presidential Commission on Election Administration (PCEA), which offered a stern warning about the "widespread wearing out of voting machines purchased a decade ago." Over the past 10 months, the Brennan Center, where we work, surveyed more than 100 specialists familiar with voting technology, including machine vendors, independent technology experts, and election officials in all 50 states, to study how widespread this looming crisis really was.

We found bad news and good. First, the bad: The problem of aging voting technology reaches nearly every corner of the United States. Unlike voting machines used in past eras, today's systems were not designed to last for decades. In part this is due to the pace of technological change. No one expects a laptop to last 10 years. And although today's machines debuted at the beginning of this century, many were designed and engineered in the 1990s.

Even worse, while many jurisdictions acknowledge that their machines need to be replaced, they haven't sorted out who should pay for it. Counties

This article appeared in *The Atlantic,* September 15, 2015.

often argue the states should pay, while many states argue this has always been a local responsibility. In many cases, both hold out hope that they can get some federal support, but that seems very unlikely. "Some jurisdictions seem to be saying we're just going to wait until another catastrophe and then maybe Congress will pay for it," Tammy Patrick, a senior adviser with the Bipartisan Policy Center, told us. "This is not a good plan."

On the other hand, the PCEA's report spurred conversations, and in many cases, spending on new equipment. Several counties and states will have new machines before the 2016 election, and some counties are even developing their own voting systems, which offer the hope of technology that is designed around the needs of voters.

Nevertheless, the crisis has not abated. In 2016, a majority of election jurisdictions will use machines that are approaching the end of their lifespans. That means that states and counties must develop contingency plans in case of machine failures — both to reduce the possibility of long lines, and ensure that all votes are counted. Looking beyond 2016, they must find money for new equipment. Today, far too many election jurisdictions don't know where the money for new machines will come from.

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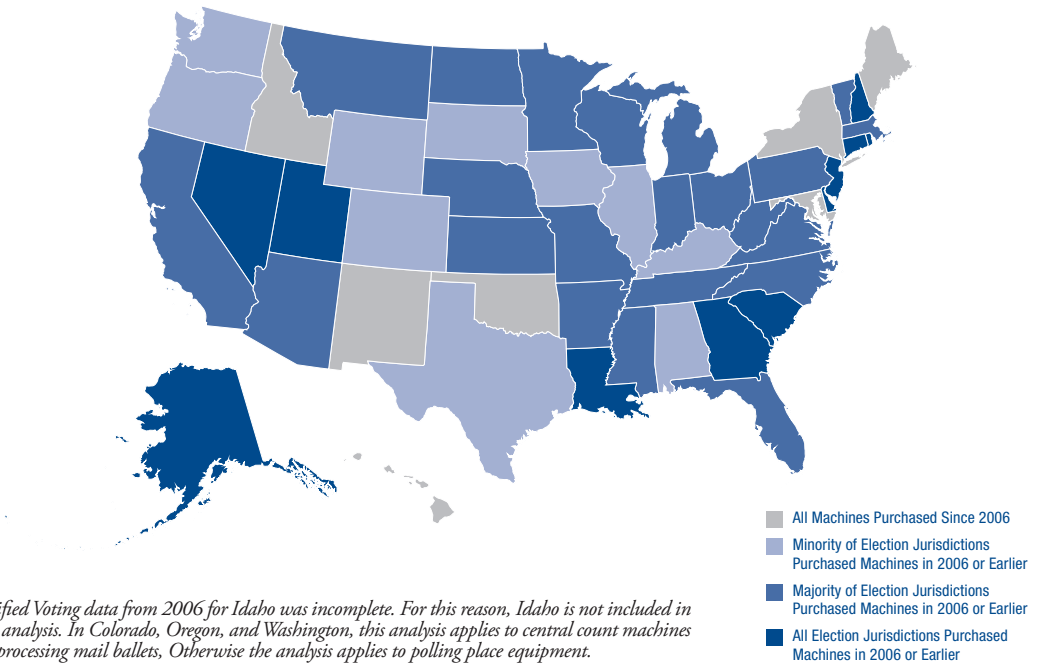
While it is impossible to say how long any particular machine will last, experts agree that for machines purchased since 2000, the expected lifespan for the core components of electronic voting machines is generally between 10 and 15 years. The majority of machines in use in the United States are perilously close to or exceed these estimates. In 43 states, the oldest machines will be at least 10 years old next November. In 14 states they will be more than 15 years old.

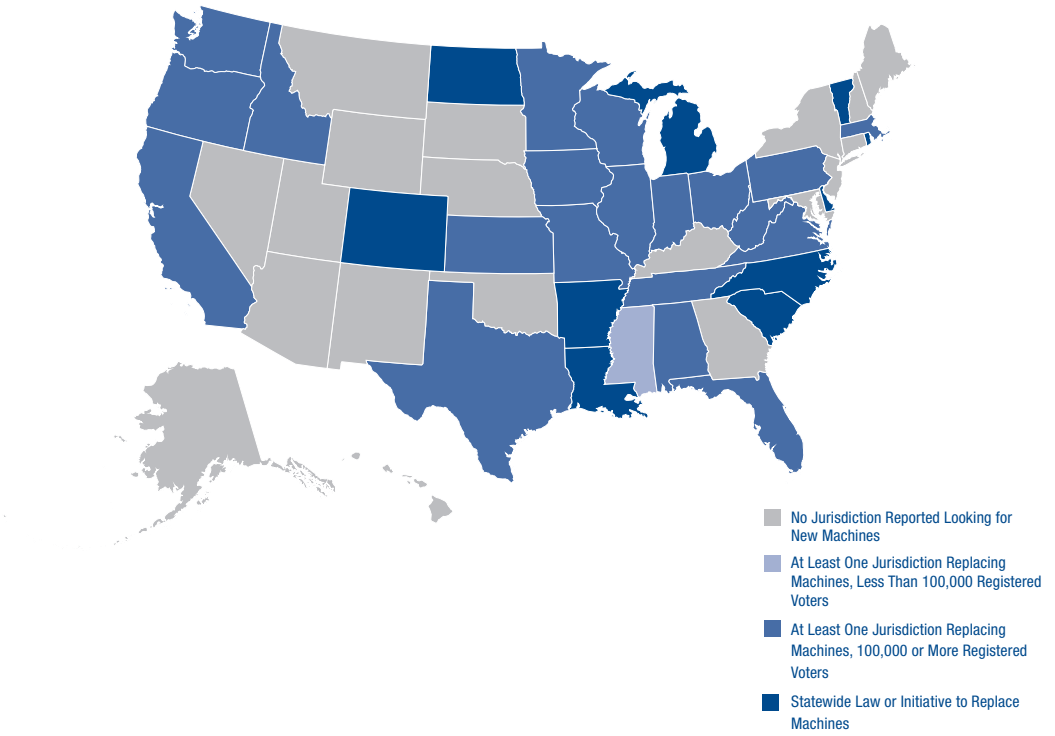
Machines 10 or More Years Old in 2016



Verified Voting data from 2006 for Idaho was incomplete. For this reason, Idaho is not included in this analysis. In Colorado, Oregon, and Washington, this analysis applies to central count machines for processing mail ballets, Otherwise the analysis applies to polling place equipment.

Election officials are increasingly vocal about the need for new equipment. But funders at the state and county level have not necessarily been responsive. Election jurisdictions in at least 31 states want to purchase and deploy new voting machines in the next five years. Officials from 22 states said they do not know where they would get the money to pay for new machines.

States with Jurisdictions Looking for New Machines



As machines age, problems will only grow worse as breakdowns become more common. "We know that a lot of machines were breaking in the 2012 election," noted Barbara Simons, an electronic voting expert and past president of the Association for Computing Machinery. "It's not that it's an impending crisis. The crisis is already here."

What can be done?

In the short term, jurisdictions with old machines (read: most of the country) that won't be replaced before November 2016 need to take measures to protect against breakdowns on Election Day.

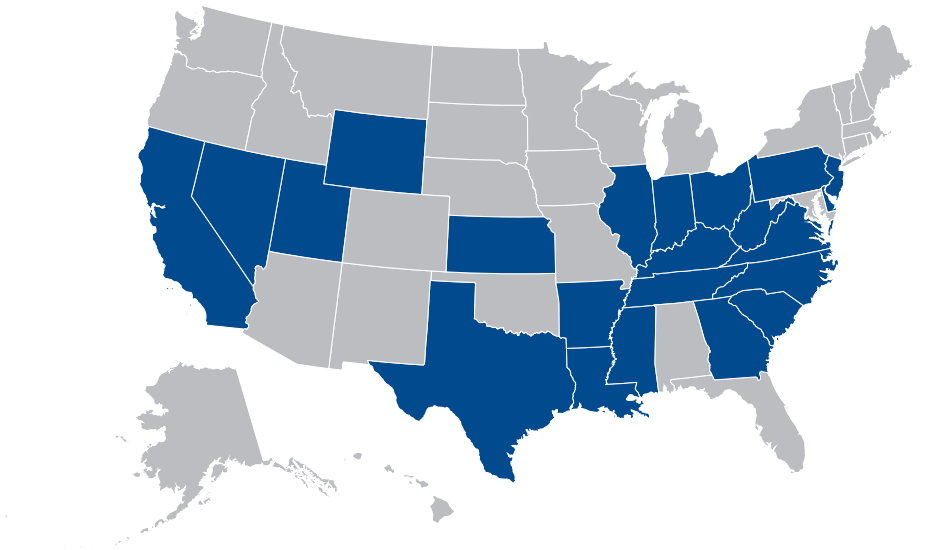
In most of the country, voters use paper ballots that are later read by machines. In such locales, machines breakdowns can be a major headache, slowing things down, and creating long lines. But they don't stop voting entirely — people can still fill out a paper ballot. If the machines malfunction and there are concerns about an accurate count, election officials can go back to the ballots themselves.

The problem of faulty machines is much more serious in jurisdictions that use what are known as Direct Recording Electronic (DRE) machines. These are machines on which voters use interfaces (pushbutton,

touchscreen, or dial) to record their votes. If a machine breaks down, voting is interrupted and voters must wait until a machine is repaired or replaced. Jurisdictions in 22 states use DRE machines.

A 2012 report by Common Cause, Verified Voting, and the Rutgers School of Law's Constitutional Litigation clinic recommended that election officials have extra machines and emergency paper ballots on hand to keep elections running in the event of a failure. The report noted that only three states — California, Indiana, and Ohio — required election officials to have contingency plans. Election officials in all jurisdictions, especially those using DREs, should develop contingency plans so voters are not waiting in line or questioning the accuracy of an election.

States where DREs Are used as Standard Polling Place Equipment



Election officials with older systems, in particular, should identify past failures and assume they may see more of them in 2016. Poll-worker training will be crucial in ensuring problems are dealt with appropriately. A recent National Science Foundation-funded report authored by the Center for Civic Design suggests creating checklists for the most important tasks, and emphasizing their importance during training, to help ensure key procedures are correctly followed.

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While there is reason to be concerned about what could happen on Election Day in 2016, there is reason for optimism in the long term. Technology has changed dramatically in the last decade, offering the possibility of machines that are more reliable, more usable, and less expensive.

For example, although every election official prefers a different kind of machine, many indicated they would like to use systems that employ commercial-off-the-shelf (COTS) hardware — such as commercial printers, Android tablets, or iPads. Commercial tablets and printers are far cheaper than current voting machine components, and can be easily and cheaply replaced. Voting on a tablet would

also make it easier to implement changes in election law at minimal cost. Tablets could provide the multiple ballot styles required by vote centers or "super precincts," giving voters more choices as to where they can vote, and could more easily accommodate early voting.

Although mainstream voting machine vendors are doing much to improve new offerings, it is election officials, working with vendors, academics, and voters, who have driven some of the most promising innovations. Their work offers the possibility of better and less expensive voting machines.

Election officials have driven some of the most promising innovations for better and less expensive voting machines.

Los Angeles County — which will need new machines in the next few years — is ground zero for some of the most interesting innovations. It is the largest jurisdiction in the country, home to roughly 5 million registered voters who speak 12 languages. Elections in Los Angeles County require a Herculean effort. Each election, the county distributes its ballots and vote casting system to more than 4,800 polling places in an area twice the size of Rhode Island.

When Dean Logan, head of elections in Los Angeles County, looked at the voting systems on the market, he did not see a product that was a good fit. Instead of buying a vendor's product, the county decided to design its own system. "We wanted to design a system around the voter's experience, not around the limitations of the market and the current regulatory environment," Logan said.

Logan and his staff spent two years asking voters what they wanted in a voting system. The proposed design combines touch-screen technology with a human-readable and auditable paper ballot of record: Voters would use a touch screen ballot marking device to fill out a ballot, print it out, and then place it in a ballot box. The county intends to own the new system, which will free it from the expensive maintenance contracts that vendors often bundle with traditional voting systems.

"To a certain extent, we are designing for a voting experience that is not fully defined in the regulatory environment or elections code," Logan said. Officials in Los Angeles are considering new services, like an interactive sample ballot that voters can scan into a machine and start the process with their choices already pre-selected to expedite the voting experience. Most importantly, county officials hope to design a system that is flexible, so it can adapt easily to changes in election laws or procedures.

Currently, Logan is working with the design consulting firm IDEO to develop the specifications for an electronic-ballot marking device and associated components of a comprehensive, modernized voting system. Next, the county will move forward with a contract to manufacture the device. On the software side, Logan envisions the system relying on open-source software, which will be maintained in-house at the registrar's office. Fortunately, Logan's office has a robust IT department that maintains the county's existing vote tabulation system, and will maintain the county's next system.

Logan believes the project has the potential to change the voting equipment marketplace for the better. "The design approach we are taking should result in lower-cost voting systems and market expansion," he said. "I think it has the ability to move the regulatory environment and the market to a more competitive landscape that could allow jurisdictions to replace systems at a lower cost than in the past."

Logan plans to begin implementing the system in 2017, and achieve a complete turnover of equipment by the 2020 election cycle. Elections officials across the country told us they are watching this project closely, and are excited to see what Logan and his team develop.

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While projects like the one in Los Angeles offer long term hope, they don't address the immediate crisis. Many jurisdictions can't wait for Los Angeles's system to be fully developed before buying new machines. And, in any event, no matter what the systems of the future, they will cost money to buy and maintain.

Unfortunately, many state and local policymakers — who never before had to provide significant funding for voting machines, and who have other competing needs to address — have not accepted the new reality.

Many state and local policymakers have not accepted the reality that they need to provide funding for new voting machines.

Virginia provides perhaps the starkest recent example of how difficult it can be to convince policymakers they need to invest in new equipment. In December 2014, Governor Terry McAuliffe (D-Va.) proposed that Virginia spend $28 million to replace aging voting machines. When McAuliffe, a Democrat, unveiled the proposal, GOP Representative Scott Rigell (R-Va.) was by his side. Despite the bipartisan announcement, Virginia lawmakers stripped the funding for new machines from the budget. The spokesperson for Speaker William J. Howell said paying for new machines was a "local prerogative."

As states adopt different policies, there will be a division between those states that fund new systems and those that continue to use aging machines. Furthermore, within the states that will not provide money for new machines, only some counties will have the funds to purchase them. "In Virginia, you can already see what will happen if the state doesn't provide money for new machines," said Virginia Elections Commissioner Edgardo Cortes. "Loudon and Fairfax counties — two of the largest and wealthiest in the state — have bought new equipment. Smaller, poorer, and more rural counties around the state are going to have a tough time."

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How much will replacing voting equipment cost? It could exceed $1 billion nationwide, according to our estimates. Many experts we spoke to doubted that Congress would supply those funds. Given how urgent the problem is, and how soon new money must be found, that probably means the burden of funding new equipment will fall in significant measure on states and counties.

In the long term, the country needs to adapt to a new reality, in which voting systems will be more flexible but less durable than in the past. There is much that can be done to reduce the costs associated with that future. Internet voting won't be ready for deployment until far-better security is developed, but there are other important steps that can be taken now. For larger jurisdictions that can handle the transition to systems that use more commercial-off-the-shelf devices — like tablet computers — there is the prospect of significantly lower purchase and maintenance costs.

Even if Congress does not supply states and localities with large amounts of money to buy new equipment in the short term, they have a very important role to play. In particular, Congress can use the Election Assistance Commission (EAC), the federal agency charged with serving as a resource of election administration to local officials around the country, to make grants to election officials and vendors to encourage more innovative voting systems. In addition to Los Angeles, such efforts are already under way in Travis County, Texas.

For a very small price, more initiatives like these could produce far better (and less expensive) machines. Similarly, adequate funding and oversight of the EAC — to ensure that it updates federal voting-system guidelines, provides guidance to smaller jurisdictions as they negotiate new contracts, and helps local election jurisdictions share and pool resources and information — can help drive down the long-term costs of using more complicated, less durable voting equipment.

Ultimately, to avoid a new technology crisis every decade, all levels of government — federal, state, and local — must develop sources of funding to support and regularly update America's voting infrastructure, just as they budget and plan to maintain (and periodically replace) other critical infrastructure, from roads and bridges to fire trucks and police cars. The good news is, unlike in 2000, there is a deep understanding of the challenge, and an infrastructure in place that should allow state and local officials to develop plans to deal with this problem in the short and long run.

Supreme Court Confronts One Person, One Vote

Wendy Weiser, Michael Li, Sidney S. Rosdeitcher, Robert A. Atkins, Pietro Signoracci, and Elizabeth M. Gary

One of the most important Supreme Court cases in 2016 concerns how state and local governments count population for redistricting. Virtually all count total population. That way all are represented. A conservative legal group contends that districts should be drawn on the basis of adult citizen population. If the challengers win, it will be nothing short of a revolution in redistricting, disenfranchising the voices of children, minorities, and perhaps citizens not registered to vote. The Brennan Center urged the court to uphold the long-standing constitutional standard.

Apportionment based on total population not only is consistent with the Equal Protection Clause, but is deeply embedded in our Constitution, our Nation's history, and the longstanding actual practice of Government. It gives life to the principles and values of equal representation that the Framers declared essential to representative democracy and that the Fourteenth Amendment commands to ensure a government of and for the people.

The Framers believed that legislatures should be a portrait of the people "in miniature."

These values are deeply rooted in our constitutional heritage. The Framers believed that legislatures should be a portrait of the people "in miniature" and chose in Article I, Section 2 to apportion congressional seats among the states by "the whole number of free persons . . ." in each state. Congress built on Article I, Section 2 and made population the basis for apportionment of all but four of the territorial legislatures it created and for almost all of the conventions it called to draft constitutions for new states.

After the Civil War, the Reconstruction Congress — after extended debate over apportionment — embraced total population when it wrote the Fourteenth Amendment, mandating that "Representatives shall be apportioned among the several states according to their respective *numbers*, counting the *whole number of persons* in each State . . ." (emphasis added).

The history of apportionment in the states is equally clear. After the Revolution, states embraced the Framers' principle of "no taxation without representation" and, with limited exception, chose to base representation in

Excerpted from an amicus brief submitted to the U.S. Supreme Court in *Evenwel v. Abbott,* in conjunction with Sidney S. Rosdeitcher, Robert A. Atkins, Pietro Signoracci, and Elizabeth M. Gary of Paul, Weiss, Rifkind, Wharton & Garrison LLP, September 25, 2015.

their legislatures on equality of inhabitants rather than equality of voters — a trend that became almost universal after the Civil War. Only 17 of 123 state constitutions between 1776 and 1920 apportioned legislatures based on voters or votes cast, and today, some form of total population is the basis for apportionment of all state legislatures.

Appellants claim this case presents a constitutional question of first impression, but history shows that the issue — who should count for purposes of apportioning representation — is neither new nor in need of rethinking. Debates over apportionment occurred throughout the Nation's history. As in this case, those debates more often than not were driven by the country's rapidly changing demographics. Whenever those debates took place, they almost always came back to the same place: representative democracy is best achieved by representation based on population.

Only 17 of 123 state constitutions between 1776 and 1920 apportioned legislatures based on voters or votes cast.

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The question of how to ensure fair representation for all people has long been central to American political life. Debates over apportionment by the Framers and by lawmakers since, at both the state and federal levels, have been vigorous and often contentious. Out of those debates, the clear consensus is that the goal of representative democracy is best served by apportionment based on "numbers" of "persons" rather than voters.

As this Court explained, the Constitution must be construed "in light of its text, purposes, and our whole experience as a Nation," and informed by "the actual practice of Government." In this analysis, the Court has said "*we put significant weight upon historical practice*." ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions.") These practices illuminate the Constitution's values and guide application of its principles, particularly on "doubtful question[s] . . . on which human reason may pause."

The text, history and purpose of the Constitution's provisions addressing apportionment and centuries of government practice all confirm that apportionment based on total population best satisfies the Constitution's vision of representative democracy and the guarantee of equal protection to all persons.

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Debates over representation were central to the drafting of the Constitution and the Fourteenth Amendment. Each time, those debates affirmed the importance of equal representation for equal numbers of people as a core constitutional value.

The Framers' views on equal representation were influenced by maladies that afflicted the British system. Many parliamentary districts had grown large and unwieldy, while others scarcely had any people. Other places, like the American colonies and Ireland, had no representation at all. This mattered little under the British belief in "virtual representation." Equality of

actual representation was of no concern because "the English people, despite great degrees of rank and property, despite even the separation of some by three thousand miles of ocean, were essentially a unitary homogeneous order with a fundamental common interest."

The founding generation rejected virtual representation, which for them meant "taxation without representation." When it came time to draft the Nation's new Constitution, ensuring effective actual representation was among the major topics debated — and resolved — by the Framers.

The debate focused on ensuring representation for all people, not just the select class of voters. For the Framers, voting was a separate topic — a privilege to be limited to those with sufficient independence to act in the best interest of the community. Such political independence could come only with financial independence. Thus, most states maintained some form of property requirements for voting, and even the most democratic and egalitarian of post-Revolution constitutions, like Pennsylvania's, contained taxpaying requirements that disenfranchised "mainly paupers and domestic servants."

Representation, however, was not so restricted. The revolutionary cry of "no taxation without representation" was not about making sure the small numbers of voters were represented, but making sure the sentiment of communities — voters and nonvoters alike — was reflected in legislative bodies.

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History teaches that total population is not only a permissible constitutional value but one that should be preferred over apportionment bases like voters or citizens, and any variation from total population should be prohibited except in rare and extraordinary circumstances.

As Congress and the states have recognized in the years since 1868, total population best fulfills the Fourteenth Amendment's promise that all "persons," not just citizens or voters, are guaranteed the equal protection of the laws. It assures that legislative officials are familiar with and can represent the interests of all inhabitants of their districts and that our governments are, in fact, of the people, by the people, and *for the people*.

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Voter-population apportionment, by excluding children and other nonvoters, ironically would recreate the very situation this Court's reapportionment jurisprudence of the 1960s was intended to remedy: less populous areas would have greater representation than more populous areas, thereby giving voters in more populous areas less political representation, and less access to state and local resources, than voters in less populous areas. This would hurt all people, voters and nonvoters alike, living in those more populous areas. Voters and nonvoters need schools for their children, police and fire protection for their neighborhoods, and the transportation, health, and other services provided by state and local governments. The need for these services is proportional to population, and history shows that populous but underrepresented areas were often underserved and underfunded.

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The Framers, the drafters of the Fourteenth Amendment, and Congress and virtually all state legislatures for more than 200 years selected population as the appropriate apportionment base. Based on that history, and on this Court's reapportionment jurisprudence, it is clear that total population ensures the equality of representation essential to the democratic structure of our national and state governments and should be the presumptive apportionment base.

Evenwel Could Make Every State Legislative Map in the Country Unconstitutional

Michael Li and Eric Petry

If the Supreme Court finds in favor of the plaintiff in Evenwel v. Abbott*, the impact could be far greater than previously realized: Nearly every state legislative district in the country would have to be redrawn.*

A big upheaval could be coming for America's state legislatures. On December 8, the Supreme Court will hear oral argument in *Evenwel v. Abbott*, a closely watched case from Texas that will decide whether states must change the way they draw legislative districts. The new analysis in this paper shows that if the *Evenwel* challengers prevail, the nationwide impact will be far greater than previously assumed.

If district lines must be drawn based on citizen voting age population instead of total population, every state legislative map in the country would be unconstitutional under Equal Protection principles.

Like other states, Texas currently draws districts so they contain a roughly equal number of people rather than voters. Indeed, over the course of American history districts have overwhelmingly been drawn this way. But the *Evenwel* challengers say Texas's legislative plans are unconstitutional because while districts may contain approximately the same number of people, many vary widely in the number of eligible voters.

So far, a lot of the attention around the case has focused on how changing the way districts are drawn would impact fast-growing Latino communities in certain states. And to be sure, some of the biggest changes would be in booming metro areas, such as Dallas, Houston, and Los Angeles, which have high numbers of both children and non-citizen immigrants. Latino majority districts, in particular, would become much harder to draw in many parts of the country.

But this new Brennan Center analysis shows the impact of a change would be far greater than expected and not confined to just a few states. In fact, if the *Evenwel* plaintiffs win and the rules are changed so lines must be drawn based on citizen voting age population instead of total population:

- Every state legislative map in the country would become presumptively unconstitutional under Equal Protection principles and would need to be redrawn.

Excerpted from *The Impact of Evenwel: How Using Voters Instead of People Would Dramatically Change Redistricting,* December 7, 2015.

- Nationwide, 21.3 percent of state house seats and 16.7 percent of state senate seats would be presumptively unconstitutional. In eight states, the percentage of house or senate districts with constitutional problems would be more than 40 percent.

- Redrawing maps to comply with constitutional requirements would require changing far more districts because of cascade effects from changes elsewhere on the map.

Measuring the Impact

To understand the extent of the impact, it is helpful to start with a few basics about the rules on the permissible size differentiation in state legislative districts.

Unlike congressional redistricting, state legislative districts do not have to have exactly the same number of people under the Constitution's Equal Protection Clause. Instead, a line of Supreme Court cases since the 1970s has allowed the size of legislative districts to vary somewhat from pure equality.

To measure whether variations go beyond constitutionally acceptable bounds, courts use two brightline benchmarks. The first of these is the 10 percent "top-to-bottom" rule, which looks at how much the largest and smallest districts in a plan differ ("deviate" in redistricting lingo) from a hypothetical district with exactly the right number of people.

If the deviations of the largest and the smallest districts add up to more than 10 percent, a plan is presumed to be unconstitutional but still can be defended by the state, up to a deviation of 16.4 percent. If the deviation of a plan is greater than 16.4 percent, (the second bright-line benchmark) a plan is — with very rare exception — deemed to be per se unconstitutional.

Unconstitutional deviations can arise from a single district that is extremely imbalanced or from a group of moderately imbalanced districts that, in aggregate, push a district plan beyond constitutional benchmarks. A district, for example, that is 20 percent larger than the ideal district would make a map unconstitutional even if all the other districts had perfectly equal populations. Likewise, a legislative plan with one district 6 percent larger than the ideal and another 7 percent smaller than the ideal would have a total deviation of 13 percent and also would be presumptively unconstitutional.

A Nationwide Upheaval

To evaluate the effect of changing to an eligible voter apportionment, we started by looking at the gap between the largest and smallest districts on the map using each district's citizen voting age population (CVAP) — one of the eligible voter metrics suggested by the plaintiffs in *Evenwel*. What we found was that every state legislative map in use today would become presumptively unconstitutional, assuming that the Supreme Court does not change any of the current legal benchmarks.

In some states, these unconstitutional deviations result from a handful of districts, but as explained below, in many states, the scale of the problem is far greater.

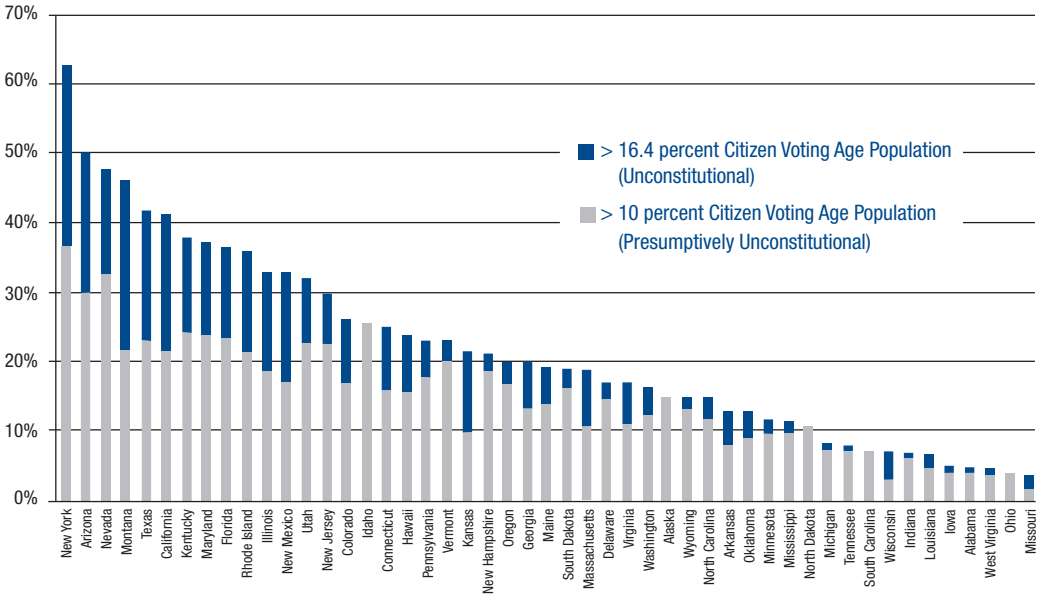
A Large Number of Impacted Districts

In many parts of the country, bringing maps into compliance will be a significant challenge because of the large number of districts affected.

High Deviation Districts

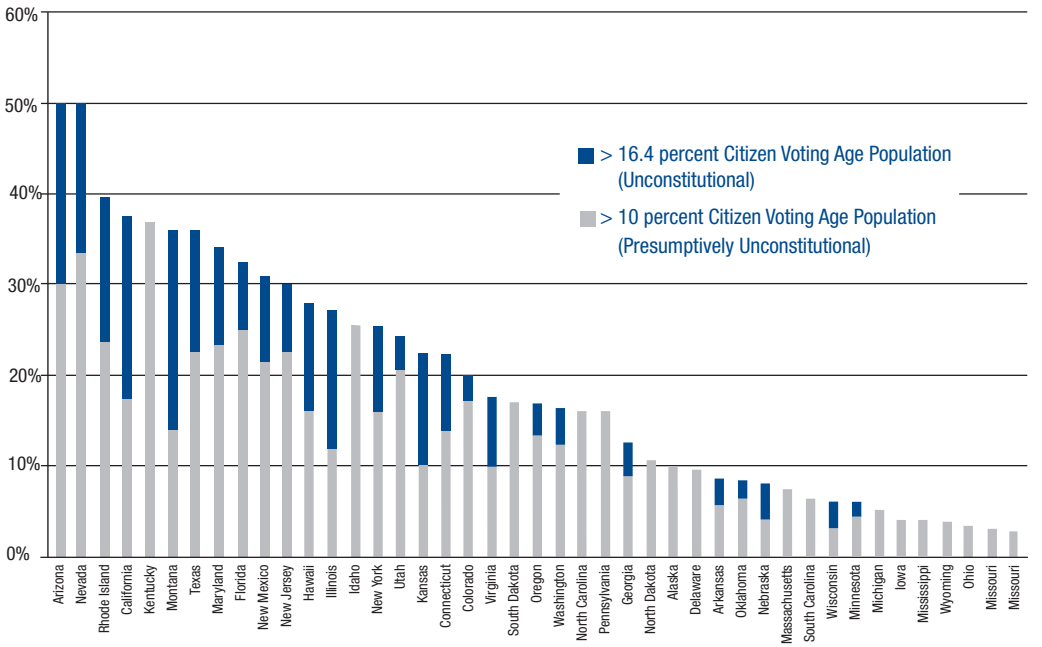
To start, 1,021 of the nation's 4,785 state house districts (21.3 percent) and 323 of 1,938 state senate districts (16.7 percent) have citizen voting age population variances greater than 10 percent and would be presumptively unconstitutional. Of these, 343 house districts (7.2 percent) and 95 (4.9 percent) senate districts have a deviation of more than 16.4 percent, indicating a severe constitutional problem. Nor are these high-deviation districts confined to just a few parts of the country. To be sure, states with large Latino populations, like Texas and California, are among the most affected, but a large number of districts outside of those states also would have to be redrawn. In Montana, for example, more than 40 percent of the house seats are significantly over or underpopulated. In Maryland and Kentucky, the figure is 37 percent and 38 percent, respectively.

Percentage of State House Districts That Would Be Presumptively Unconstitutional



The analysis shows a similar pattern in state senates.

Percentage of State Senate Districts That Would Be Presumptively Unconstitutional



Moreover, it is not just high deviation districts that will need to change.

Because it is not just individual districts, but a legislative plan as a whole that must comply with the 10 percent top-to-bottom rule, additional adjustments will have to be made in every state to make sure the variance between the largest and smallest districts does not exceed the 10 percent constitutional benchmark.

There are a significant number of districts that are over- or underpopulated on a CVAP basis by 5 to 10 percent. Many, if not all, would need to be adjusted to ensure that deviation of the largest and the smallest districts does not add up to be more than 10 percent.

In fact, the number of affected districts could be even higher. That is because it is almost invariably hard to avoid a cascade effect from changes made in one part of a map. Thus, a district with only a small deviation (or no deviation at all) might need to change to help fix problems elsewhere on the map.

In some cases, the adjustments needed to a particular district might be relatively small. However, even minor changes in the district's boundaries can have significant political impact, affecting everything from the ability of minority communities to elect their candidates of choice to the result in party primaries.

MASS INCARCERATION & JUSTICE

What Caused America's Crime Decline?

Inimai Chettiar

The Brennan Center set out to answer a simple question: What caused the crime decline? The answer is complex, and it turns out that a variety of factors, such as policing strategies, were responsible for the crime drop. But the evidence is clear that incarceration has gone well past the point of diminishing returns, contributing little to enhancing public safety for the last 13 years.

The dramatic rise of incarceration and the precipitous fall in crime have shaped the landscape of American criminal justice over the last two decades. Both have been unprecedented. Many believe that the explosion in incarceration created the crime drop. In fact, the enormous growth in imprisonment only had a limited impact. And, for the past thirteen years, it has passed the point of diminishing returns, making no effective difference. We now know that we can reduce our prison populations and simultaneously reduce crime.

Locking up millions of people is not an effective way to fight crime.

This has profound implications for criminal justice policy: We lock up millions of people in an effort to fight crime. But this is not working.

The link between rising incarceration and falling crime seems logical. Draconian penalties and a startling expansion in prison capacity were advertised as measures that would bring down crime. That's what happened, right?

Not so fast. There is wide agreement that we do not yet fully know what caused crime to drop. Theories abound, from an aging population to growing police forces to reducing lead in the air. A jumble of data and theories makes it hard to sort out this big, if happy, mystery. And it has been especially difficult to pin down the role of growing incarceration.

So incarceration skyrocketed and crime was in free fall. But conflating simple correlation with causation in this case is a costly mistake. A report from the Brennan Center for Justice at NYU School of Law, called *What Caused the Crime Decline?,* finds that increasing incarceration is not the answer. As Nobel laureate economist Joseph Stiglitz writes in the foreword, "This prodigious rate of incarceration is not only inhumane, it is economic folly."

Our team of economic and criminal justice researchers spent the last 20 months testing fourteen popular theories for the crime decline. We delved deep into over 30 years of data collected from all 50 states and the 50

This article appeared in *The Atlantic,* February 11, 2015.

largest cities. The results are sharply etched: We do not know with precision what caused the crime decline, but the growth in incarceration played only a minor role, and now has a negligible impact.

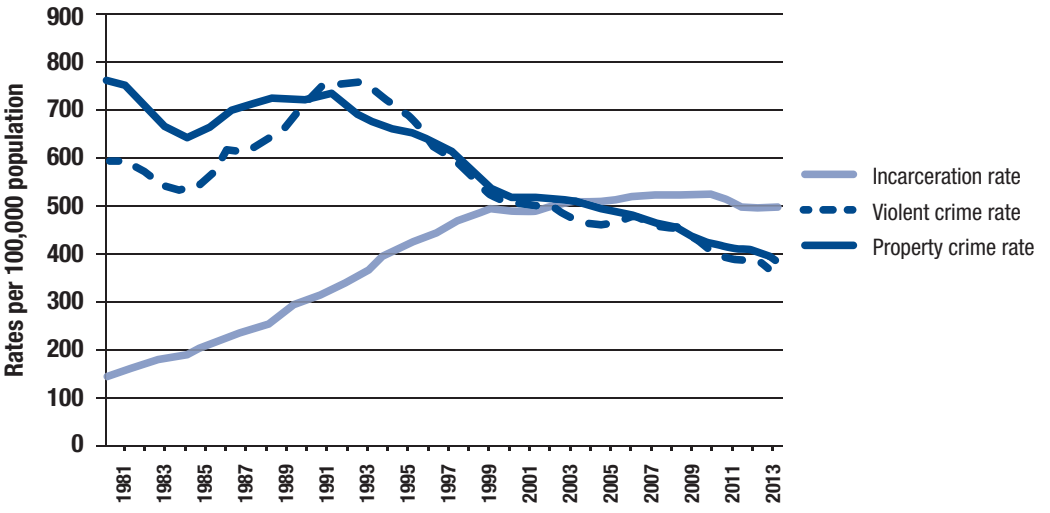
The Crime Decline

The drop in crime stands as one of the more fascinating and remarkable social phenomena of our time. For decades, crime soared. Cities were viewed as unlivable. Politicians competed to run the most lurid campaign ads and sponsor the most punitive laws. Racially tinged "wedge issues" marked American politics from Richard Nixon's "law and order" campaign of 1968 to the "Willie Horton" ads credited with helping George H.W. Bush win the 1988 election.

But over the past 25 years, the tide of crime and violence seemed to simply recede. Crime is about half of what it was at its peak in 1991. Violent crime plummeted 51 percent. Property crime fell 43 percent. Homicides are down 54 percent. In 1985, there were 1,384 murders in New York City. Last year there were 333. The country is an undeniably safer place. Growing urban populations are one positive consequence.

During that same period, we saw the birth of mass incarceration in the United States. Since 1990, incarceration nearly doubled, adding 1.1 million people behind bars. Today, our nation has 5 percent of the world's population and 25 percent of the world's prison population. The United States is the world's most prodigious incarcerator.

Incarceration and Crime Rates 1980-2013



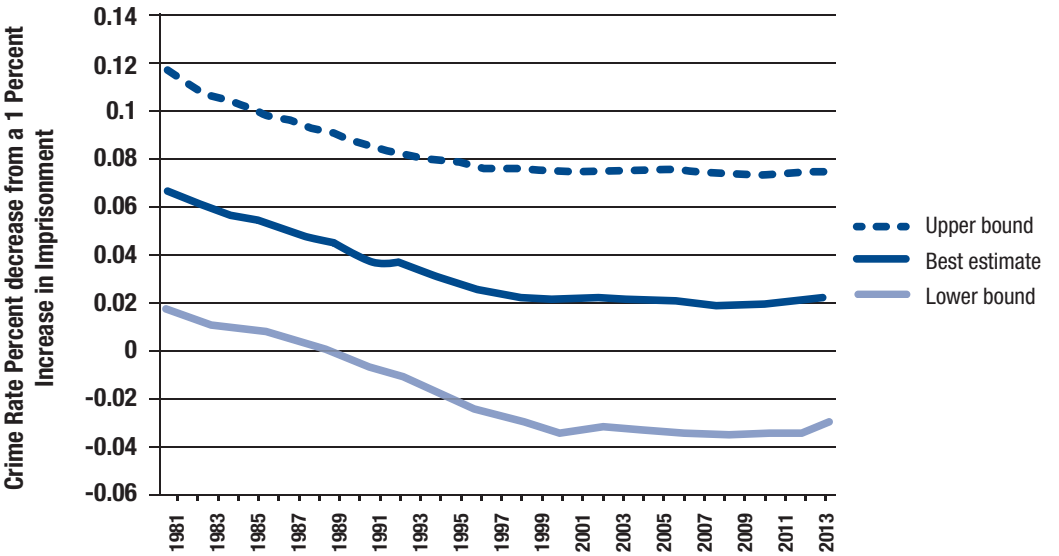
The Role of Incarceration

What do the numbers say? Did this explosion in incarceration cause the crime decline?

It turns out that increased incarceration had a much more limited effect on crime than popularly thought. We find that this growth in incarceration was responsible for approximately 5 percent of the drop in crime in the 1990s. (This could vary from 0 to 10 percent.) Since then, however, increases in incarceration have had essentially zero effect on crime. The positive returns are gone. That means the colossal number of Americans cycling in and out of prisons and jails over the last 13 years was not responsible for any meaningful fraction of the drop in crime.

The figure below shows our main result: increased incarceration's effectiveness since 1980. This is measured as the change in the crime rate expected to result from a 1 percent increase in imprisonment — what economists call an "elasticity." During the 1980s and 1990s, as incarceration climbed, its effectiveness waned. Its effectiveness currently dwells in the basement. Today, a 1 percent increase in incarceration would lead to a microscopic 0.02 percent decline in crime. This is statistically indistinguishable from having no effect at all.

Effect of Increased Incarceration on Crime (1980-2013)



Increased incarceration accounted for about 6 percent of the property crime decline in the 1990s, and 1 percent of that drop in the 2000s. The growth of incarceration had no observable effect on violent crime in the 1990s or 2000s. This last finding may initially seem surprising. But given that we are sending more and more low-level and nonviolent offenders to prison (who may never have been prone to violent crime), the finding makes sense. Sending a nonviolent offender to prison will not necessarily have an effect on violent crime.

How Rising Incarceration's Effect on Crime Waned

There is no question that some level of incarceration had some positive impact on bringing down crime. There are many habitual offenders and people committing serious, violent crimes who may need to be kept out of society. Criminologists call this the "incapacitation" effect: Removing someone from society prevents them from committing crimes.

But after a certain point, that positive impact ceases. The new people filling prisons do so without bringing down crime much. In other words, rising incarceration rates produce less of an effect on crime reduction. This is what economists call "diminishing returns." It turns out that the criminal justice system offers a near perfect picture of this phenomenon.

As incarceration doubled from 1990 to today, it became less effective. At its relatively low levels 20 years ago, incarceration may indeed have had some effect on crime. The positive returns may not have yet diminished.

Incarceration rates have now risen so high that further increases in incarceration are ineffective. Due to the war on drugs and the influx of harsher sentencing laws in the 1980s and 1990s, an increasing proportion of the 1.1 million prisoners added since 1990 were imprisoned for low-level or nonviolent crimes. Today, almost half of state prisoners are convicted of nonviolent crimes. More than half of federal prisoners are serving time for drug offenses. The system is no longer prioritizing arresting, prosecuting, and incarcerating the most dangerous or habitual offenders. In this case, each additional prisoner will, on average, yield less in terms of crime reduction. We have incarcerated those we should not have. This is where the "more incarceration equals less crime" theory busts.

Even those who have argued for the effectiveness of incarceration acknowledge this possibility. University of Chicago economist and "Freakonomics" co-author Steven Levitt found in his 2004 study that incarceration was responsible for over a third of the 1990s drop in violent crime. He noted that, "Given the wide divergence in the frequency and severity of offending across criminals, sharply declining marginal benefits of incarceration are a possibility," which, if present, could have affected his findings.

Decrease in Incarceration and Crime

Can the United States safely reduce its incarcerated population? After all, it would be too bad if reducing incarceration yielded a spike in crime.

Fortunately, there is a real-time experiment underway. For many reasons, including straitened budgets and a desire to diminish prison populations, many states have started to cut back on imprisonment. What happened? Interestingly, and encouragingly, crime did not explode. In fact, it dropped. In the last decade, 14 states saw declines in both incarceration and crime. New York reduced imprisonment by 26 percent, while seeing a 28 percent reduction in crime. Imprisonment and crime both decreased by more than 15 percent in California, Maryland, New Jersey, New York, and Texas. Eight states — Connecticut, Delaware, Massachusetts, Michigan, Nevada, North Carolina, South Carolina, and Utah — lowered their imprisonment rates by 2 to 15 percent while seeing more than a 15 percent decrease in crime.

This is all very significant. Incarceration is not just any government policy. Mass incarceration comes at an incredible cost. "A year in prison can cost more than a year at Harvard," Stiglitz points out. Taxpayers spend $260 billion a year on criminal justice. And there will continue to be less and less to show for it, as more people are incarcerated.

There are significant human costs as well — to individuals, families, communities, and the country. Spending a dollar on prisons is not the same as spending it on public television or the military. Prisons result in an enormous waste of human capital. Instead of so many low-level offenders languishing behind bars, they could be earning wages and contributing to the economy. Incarceration is so concentrated in certain communities that it has disrupted the gender balance and marriage rates. The costs are intergenerational. There are 2.7 million minor children with a parent behind bars. More than 1 in 9 black children have a parent incarcerated.

Research also shows that incarceration can actually increase future crime. Criminologists call this the "criminogenic effect" of prison. It is particularly powerful on low-level offenders. Once individuals enter prison, they are surrounded by other prisoners who have often committed more serious and violent offenses. Prison conditions also breed violent and anti-social behavior. Former prisoners often have trouble finding employment and reintegrating into society due to legal barriers, social stigma, and psychological scarring from prison. Approximately 600,000 prisoners reenter society each year. Those who can find employment earn 40 percent less than their peers, and 60 percent face long-term unemployment. Researchers estimate that the country's poverty rate would have been more than 20 percent lower between 1980 and 2004 without mass incarceration.

This lack of stability increases the odds that former prisoners will commit new crimes. The more people we put into prison who do not need to be there, the more this criminogenic effect increases. That is another plausible explanation for why our massive levels of incarceration are resulting in less crime control.

Our findings do not exist in a vacuum. A body of empirical research is slowly coalescing around the ineffectiveness of increased incarceration. Last year, the Hamilton Project issued a report calling incarceration a "classic case of diminishing returns," based on findings from California and Italy. The National Research Council issued a hefty report last year, finding that crime was not the cause of mass incarceration. And, based on a summary of past research, the authors concluded that "the magnitude of the crime reduction [due to increased incarceration] remains highly uncertain and the evidence suggests it was unlikely to have been large."

We go a few steps further to fully reveal the complex relationship between crime and incarceration. By using thirteen years of more recent data, gathered in the modern era of heavily elevated incarceration, combined with an empirical model that accounts for diminishing returns and controls for other variables, we are able to quantify the sharply declining benefits of overusing prison.

Other Factors Reducing Crime

But if it was not incarceration, then what did cause the crime decline?

There is no shortage of candidates. Every year, it seems, a new study advances a novel explanation. Levitt attributes about half the crime drop to the legalization of abortion. Amherst economist Jessica Reyes attributes about half the violent crime drop to the unleading of gasoline after the Clean Air Act. Berkeley law professor Franklin Zimring credits the police as the central cause. All three theories likely played some role.

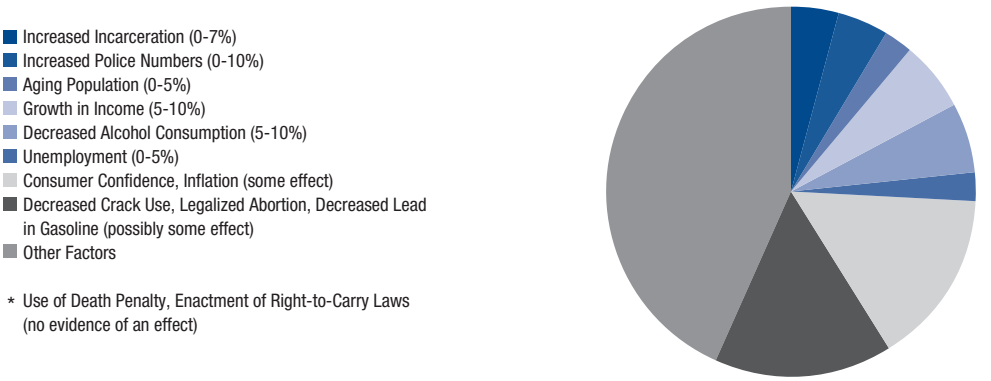
Instead of a single, dominant cause, our research points to a vast web of factors, often complex, often interacting, and some unexpected. Of the theories we examined, we found the following factors had some effect on bringing down crime: a growth in income (5 to 10 percent), changes in alcohol consumption (5 to 10 percent), the aging population (0 to 5 percent), and decreased unemployment (0 to 3 percent). Policing also played a role, with increased numbers of police in the 1990s reducing crime (0 to 10 percent) and the introduction of CompStat having an even larger effect (5 to 15 percent).

But none is solely, or even largely, responsible for the crime drop. Unfortunately, we could not fully test a few theories, as the data did not exist at the detailed level we needed for our analysis. For those, we analyzed past research, finding that inflation and consumer confidence (individuals' belief about the strength of the economy) probably had some effect on crime. The legalization of abortion and unleading of gasoline may also have played some role.

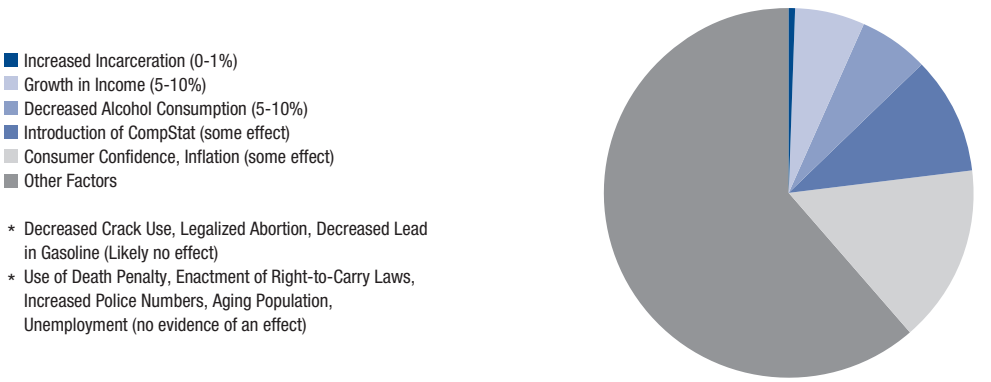
In aggregate, the fourteen factors we identified can explain some of the drop in crime in the 1990s. But even adding all of them together fails to explain the majority of the decrease.

Popular Theories on the Crime Decline

Percent of Crime Decline (1990–1999)



Percent of Crime Decline (2000–2013)



A Sensible Way Forward

No one factor brought down crime. Today, incarceration has become the default option in the fight against crime. But more incarceration is not a silver bullet. It has, in fact, ceased to be effective in reducing crime — and the country is slowly awakening to that reality. Incarceration can be reduced while crime continues to decline. The research shows this and many states are watching it unfold.

Where do we go from here? As President Obama said it in his State of the Union last month, "Surely we can agree that it's a good thing that for the first time in 40 years, crime and incarceration have come down together, and use that as a starting point for Democrats and Republicans, community leaders and law enforcement, to reform America's criminal justice system so that it protects and serves all of us." And indeed, reforming our criminal justice system is emerging as a bipartisan cause. Everyone from Jeb Bush to Hillary Clinton to the Koch Brothers to George Soros has made similar calls.

We should listen to them. There are bold, practical policy solutions starting to gain bipartisan support. Incarceration can be removed as a punishment for many nonviolent, non-serious crimes. Violations of technical conditions of parole and probation should not lead to a return trip to prison. Sentence maximum and minimum lengths can be downscaled across the board. There is little reason to jail low-risk defendants who are simply waiting for their trials to begin. And, government funding streams can change to reward reducing incarceration.

Crime is expensive. We do well to fight it. But increasing incarceration is definitely not the answer.

Solutions: American Leaders Speak Out on Criminal Justice

For decades political leaders competed to propose even more draconian punishments in response to crime. It was the ultimate "wedge issue." Last year, the Brennan Center asked a number of the nation's most prominent public figures, including presidential candidates from both political parties, to join a book of essays urging an end to the harsh criminal justice policies that created mass incarceration.

William J. Clinton, 42nd President of the United States

In this time of increased political polarization, there is one area where we have a genuine chance at bipartisan cooperation: the over-imprisonment of people who did not commit serious crimes. The drop in violence and crime in America has been an extraordinary national achievement. But plainly, our nation has too many people in prison and for too long — we have overshot the mark. With just 5 percent of the world's population, we now have 25 percent of its prison population, and an emerging bipartisan consensus now understands the need to do better.

Now it's time to focus on solutions and ask the right questions. Can we do a better job identifying the people who present a serious threat to society? If we shorten prison terms, could we take those savings and, for example, restore the prison education programs that practically eliminate recidivism? How can we reduce the number of prisoners while still keeping down crime?

Can we do a better job identifying the people who present a serious threat to society?

As the presidential election approaches, national leaders across the political spectrum should weigh in on this challenge — and in this exciting book of essays from the Brennan Center, many of our nation's political leaders step up and offer answers. That in itself, is deeply encouraging. After decades in which fear of crime was wielded as a political weapon, so many now understand the need to think hard and offer real reforms, which, if implemented, can bring about this change in the right way. To address our prison problem, we need real answers, a real strategy, real leadership — and real action. We can show how change can happen when we work together across partisan and political divides. This the great promise of America.

Joseph R. Biden Jr., Vice President of the United States

Dr. Martin Luther King wrote, "Men often hate each other because they fear each other; they fear each other because they don't know each other; they

These essays are excerpted from the Brennan Center book *Solutions: American Leaders Speak Out on Criminal Justice,* April 27, 2015.

don't know each other because they cannot communicate; they cannot communicate because they are separated." We have to bridge the separation between the police and the community.

But the question is: Do we see one another? Does the danger they face prevent the police in your neighborhood from seeing the people they serve? And does fear prevent the community from seeing and engaging with the person behind the badge?

We have to start seeing each other. We have to recognize that the black male on the corner is also a kid who likes to draw, and maybe has a future as an architect. We have to recognize that the cop on the beat is also a mom who plays basketball.

It is the responsibility of every community to recognize the humanity of the men and women who volunteer to put themselves in harm's way, to answer the urgent call in the night, to do the best that they can. And it is the responsibility of every officer who takes an oath to protect and serve to respect the dignity of every person that officer encounters, young or old, male or female, black, white, Hispanic, or Asian.

Cory Booker, U.S. Senator from New Jersey

To truly end mass incarceration, we need a comprehensive approach. We need to do away with harsh mandatory minimum penalties and the one-size-fits-all approach to sentencing. We should give judges — who are our sentencing experts — more discretion in sentencing. We need to adopt policies that push for the early release of those least likely to recidivate. And we need to do more to ensure that people who reenter society after serving time will contribute to society and not commit future crimes.

The road ahead will pose challenges and change will not be easy. It never has been. But nothing is more powerful than an idea whose time has come. We cannot afford to be deterred in this cause to end a cancer in our country that so aggressively eats away at our liberty and our justice.

We must reject the lie of cynicism that tells us that we cannot come together to make criminal justice reform a reality now. We must reject the lie of contentment that tells us to be satisfied with small reforms amidst such giant problems. We must reject the lie of otherness that leads us to believe that this is someone else's problem when we are an interdependent nation that knows "injustice anywhere is a threat to justice everywhere." I have an unshakable faith that our nation will rise to meet, and will eventually overcome, this challenge. Let's get to work.

Chris Christie, Governor of New Jersey

I have a simple view on drug policy: Drug addiction is a disease. It can happen to anyone, from any station in life. And it can be treated. Most importantly, every life is an individual gift from God and no life is disposable. We have an obligation to help people reclaim their lives. And since we have the tools to help those with this disease to save their own lives, we should use them.

We need to realize that when we keep drug addicts in jail, we ensure that they will be a constant drain on our society. Treatment not only costs us less in the short run, but in the long run it produces contributing members to our society — people who are employed and pay taxes, rather than being in jail and draining taxes. These individuals will have the opportunity to become a good father or mother, a good son or daughter, and contribute to the cultural fabric of our society. Requiring mandatory treatment instead of prison for nonviolent drug addicts is only one step — but an important one. Treatment is the path

to saving lives. For as long as I am governor of New Jersey, treatment will be mandatory in our system. In 2014, I also signed legislation to "ban the box" and end employment discrimination against people with criminal records. The Opportunity to Compete Act limits employers from conducting criminal background checks on job applicants until after a first interview has taken place. This will make a huge difference to people who have paid their debts to society and want to start their lives over again.

Hillary Rodham Clinton, former Secretary of State

Inequality is not inevitable. Some of the social disparities we see today may stem from the legacy of segregation and discrimination. But we do not have to perpetuate them, and we do not have to give into them. The choices we make matter. Policies matter. Values matter.

Everyone in every community benefits when there is respect for the law and when everyone in every community is respected by the law. All over the country, there are creative and effective police departments proving that communities are safer when there is trust and respect between law enforcement and the people they serve. They are demonstrating that it is possible to reduce crime without relying on unnecessary force or excessive incarceration. There are so many police officers every day inspiring trust and confidence, honorably doing their duty, putting themselves on the line to save lives. They represent the best of America.

We can learn from these examples. We can invest in what works. We can make sure that federal funds for state and local law enforcement are used to bolster best practices, rather than contribute to unnecessary incarceration or buy weapons of war that have no place on our streets.

Ted Cruz, U.S. Senator from Texas

Congress and the president should work together — perhaps through a commission — to scrub the entire United States Code, eliminating crimes that are redundant and converting regulatory crimes into civil offenses. But the political incentives to criminalize disfavored conduct — whether it is inherently evil or not — could prove too great to generate the support needed to undertake this Herculean task. The place to start is with incremental reforms aimed at mitigating the harmful effects of overcriminalization. Congress should begin by requiring that all criminal offenses are put into one title of the Code, Title 18, or if that proves too difficult, Congress can enact a law that prohibits criminal liability on the basis of any statute that is not codified or otherwise cross-referenced in Title 18. Having thousands of criminal laws scattered throughout the entire Code works an intolerable hardship on the public akin to Caligula posting his laws high up to make them difficult for the public to see.

Mike Huckabee, former Governor of Arkansas

We need to re-examine our incarceration objectives. We must make these decisions with an eye toward rationality. The ultimate purpose of the system — beyond establishing guilt, assigning responsibility, delivering justice, and extending punishment — is to correct the behavior that led to the crime. Major first steps include treating drug addicts, eliminating waste, and addressing the character of our citizens and children. We have far too many bureaucratic protocols and sentencing mandates that create career criminals. This doesn't make our streets safer — it just makes our government more expensive. We need commonsense reforms, especially with sentencing. As my corrections director often said, "We need to quit locking up all the people that we are mad at and lock up the people that truly deserve it." Sexual predators, violent offenders, and dangerous criminals need to be locked up, but we must provide treatment options

and real rehabilitation to those who struggle with drug abuse and addiction. Throwing them in prison with a long sentence is a costly, short-sighted, irresponsible response.

Martin O'Malley, former Governor of Maryland

The death penalty is simply inconsistent with the principles of our nation. If the death penalty as applied is inherently unjust, costly, and lacks a deterrent value, we are left to consider whether the value to society of partial retribution outweighs the cost of maintaining capital punishment. I believe that it does not. The damage done to the concept of human dignity by our conscious communal use of the death penalty is far greater than the benefit of a justly drawn retribution. Our laws must be above the human temptation for revenge. They must not be an instrument for us to lash out in pain and anger. This will inevitably leave us with only bitterness and resentment, fraying the ties between each of us. Rather, our laws aim to strengthen those ties by using our resources to strengthen our communities and find innovative solutions to fight violent crime. Far more good will come by ending violence and saving thousands of lives, than by ending the life of one person who contributed to violence.

Rand Paul, U.S. Senator from Kentucky

Our criminal justice system traps nonviolent offenders — disproportionately African-American men — in a cycle of poverty, unemployment, and incarceration. Our government's administrative and regulatory laws have become so labyrinthine that not even our federal agencies, let alone our citizens, know exactly how many laws are on the books. Our nation's criminal justice system is fiscally unsustainable and morally bankrupt. If we come together — liberals and conservatives, Democrats and Republicans — we can create a criminal justice system that makes our streets safer and our communities stronger. As we debate the numerous policies that brought us to this point — mandatory minimum sentences, militarization of the police, over-incarceration, and others — we must remember the lives that have been and continue to be impacted by these flawed policies. States as conservative as Texas and Georgia have shown us that reforming the criminal justice system makes fiscal and moral sense. The states have led the way and their success should spur the federal government to realize the folly of our current criminal justice policies. We can and must work together to create a criminal justice system that punishes nonviolent offenders without incapacitating them and stripping them of their civil rights.

Rick Perry, former Governor of Texas

The results [of the state's criminal reforms] have been remarkable. Texas implemented these reforms in 2007. By the time I left office in 2015, Texas had expanded the number of specialty courts in the state from nine to more than 160. We reduced the number of parole revocations to prison by 39 percent. We saved $2 billion from our budget, not to mention the countless lives saved. We did all this while our crime rate dropped to its lowest point since 1968. And for the first time in modern Texas history, instead of building new prisons, we shut down three and closed six juvenile lock-ups. Taxpayers have saved billions because of our new approach to criminal justice, and they're safer in their homes and on the streets. Fewer lives have been destroyed by drug abuse, and more people are working and taking care of their families instead of languishing behind bars. That may be the most significant achievement of all: By keeping more families together we are breaking the cycle of incarceration that condemns each subsequent generation to a life of lesser dreams.

Marco Rubio, U.S. Senator from Florida

There is an emerging consensus that the time for criminal justice reform has come. A spirited conversation about how to go about that reform has begun. Unfortunately, too often that conversation starts and ends with drug policy. That is an important conversation to have. But when we consider changing the sentences we impose for drug laws, we must be mindful of the great successes we have had in restoring law and order to America's cities since the 1980s drug epidemic destroyed lives, families, and entire neighborhoods. I personally believe that legalizing drugs would be a great mistake and that any reductions in sentences for drug crimes should be made with great care. Nonetheless, we must not let disagreements over drug policy distract us from the pressing need for a thorough review of our entire criminal code. Convicting someone of a crime is the most serious action a government can take. Once a person becomes a "convicted criminal," the government can take his property, his liberty, and even his life. Yet, despite the gravity of criminal law, the federal government has at times been wildly irresponsible in what it treats as a crime and how it proves guilt. No one doubts the need for criminal law, and the federal government has an important role to play in combating offenses ranging from organized crime to white collar environmental crime. But the current state of criminal law, especially federal criminal law, is simply foreign to our Constitution and unworthy of a free people.

Scott Walker, Governor of Wisconsin

Joining many states across the nation, Wisconsin has continued the approach of "problem-solving courts" in an effort to address tough issues presented by alcohol and drug addiction, domestic abuse, and mental illness. No longer do offenders see their judge for only one sentencing hearing. Now, they must return. Back in front of their sentencing judge, offenders face the type of scrutiny that only "eye to eye" accountability affords. Successful outcomes for participants mean lower incarceration rates and potential cost savings for taxpayers. Created in 2012, the Wisconsin Statewide Criminal Justice Coordinating Council has assisted in directing, coordinating, and collaborating with statewide and local governmental and nongovernmental partners to increase efficiency, effectiveness, and public safety. Innovative problem-solving courts are one of the many topics on our docket. Building a strong, efficient criminal justice system improves public safety, saves taxpayer dollars, and ensures justice for all victims. Proactively identifying and targeting barriers that prevent people from moving from government dependence to true independence and personal success have set the contours of our approach. We want every citizen empowered to take charge of his or her life. With true independence, people become educated, obtain gainful employment, provide for their families, find stability and success — and yes, avoid prison.

How Law Enforcement Plans to Reduce Crime and Incarceration

Hassan Aden, Mark Earley, Nicole Fortier, Walter Holton, James E. Johnson, Garry McCarthy, Katherine O'Toole, Ronal Serpas, and Cyrus Vance

For too long, members of law enforcement have been silent on — or opposed to — criminal justice reform. In the fall of 2015, the Brennan Center formed Law Enforcement Leaders to Reduce Crime and Incarceration. It represents more than 160 current and former police chiefs, federal and state chief prosecutors, and attorneys general from all 50 states. In an editorial, The New York Times *called the group's launch "a remarkable moment." In the* Statement of Principles *below, the group lays out its plan to push for reforms to simultaneously reduce crime and incarceration.*

I. LAW ENFORCEMENT'S ROLE IN CRIMINAL JUSTICE REFORM

First and foremost, our role as law enforcement leaders is to protect public safety. We have dedicated our careers to fighting crime and have seen firsthand the toll that lawbreaking takes on communities. We believe it is in the interest of the entire country to be vigilant about pushing back on criminal activity.

We know from experience that it is indeed possible to reduce crime and reduce arrests, prosecutions, and incarceration.

Common sense might suggest that more punishment keeps down crime. But as law enforcement leaders, we know that over-relying on incarceration does not always keep our communities safe. We know from experience that it is indeed possible to reduce crime and reduce arrests, prosecutions, and incarceration. We have a responsibility to work toward these goals simultaneously.

To advance this cause we created the group Law Enforcement Leaders to Reduce Crime and Incarceration ("Law Enforcement Leaders"). We are joining together to urge a nationwide reduction in incarceration while continuing to keep our communities safe. We seek to institute practices in our own offices and support changes to our laws that achieve this goal. This *Statement of Principles* provides our beliefs and the policies we support.

A. The Crisis of Incarceration

Incarceration levels in the United States have reached a crisis point. Today, our country has 5 percent of the world's population and 25 percent of its

The authors comprise the steering committee of Law Enforcement Leaders to Reduce Crime and Incarceration. Excerpted from the group's *Statement of Principles,* October 21, 2015.

prisoners. If the prison population were a state, it would be the 36th largest — bigger than Delaware, Vermont, and Wyoming combined. Too many people are behind bars that don't belong there.

Extensive reliance on prison as a punishment does not keep us safe. Imprisoning people at today's exorbitant levels has little crime control benefit. One recent study finds that increased incarceration has a limited — and shrinking — effect on the nation's crime decline. In some cases, incarceration can increase future crime, as prison often acts as a "crime school." Research shows this especially affects nonviolent offenders, who in prison are surrounded by people with serious and violent backgrounds, and upon release carry the social and legal stigma of convicts.

For the first time in 40 years, both crime and imprisonment have fallen together since 2008. We know that we can reduce incarceration without risking increasing crime. In fact, large states such as California, Michigan, New Jersey, New York, and Texas have all reduced their prison populations while crime has continued to fall.

Our current system is tremendously expensive. Government spending on jails and prisons has grown almost 400 percent over the past 30 years. Today, our vast system of prisons costs $80 billion a year. These dollars could be better spent on what we know works to keep down crime — smart law enforcement policies, reentry services, and mental health and drug treatment for those who need it.

Imprisoning so many people comes at a great cost not only to taxpayers, but also to our communities. Unnecessary incarceration exacerbates economic inequality and racial disparities, and hinders economic opportunity in the communities that need it most. Today, one in three black men will end up incarcerated. And 60 percent of prisoners reentering society face long-term unemployment.

For decades, the problem of unnecessary incarceration has grown in plain sight. In 2013, 16 states passed laws to begin rolling back their prison populations. Congress is considering reform, and virtually everyone running for president has spoken out on the topic. But much more needs to be done. Now is the time for law enforcement, as leaders in the field, to help.

B. Our Group's Mission

Law Enforcement Leaders to Reduce Crime and Incarceration unites more than 120 current and former police and prosecutors from all 50 states to urge for a reduction in both crime and incarceration. We believe the country can reduce incarceration while keeping down crime, and we support changes to our criminal justice system to achieve that goal.

Our mission statement: As current and former leaders of the law enforcement community — police chiefs, sheriffs, district and state's attorneys, U.S. Attorneys, attorneys general, and other leaders — protecting public safety is a vital goal. From experience and through data-driven and innovative practices, we know the country can reduce crime while also reducing unnecessary arrests, prosecutions, and incarceration. We can also reduce recidivism and strengthen relationships with communities. With the goal of building a smarter, stronger, and fairer criminal justice system, we are joining together to urge a change in laws and practices to reduce incarceration while continuing to keep our communities safe.

Our goal is to support and urge for action at all levels that will reduce incarceration, while keeping the country safe.

II. PROPOSED SOLUTIONS

Law Enforcement Leaders is committed to identifying and implementing solutions to simultaneously reduce crime and incarceration. Police departments and prosecutorial offices must adjust policies within our offices that over-rely on arrests and incarceration. However, as law enforcement, we are obligated to enforce the law. Therefore, there is also a need for urgent change to our laws that over-criminalize and over-punish. Within the overarching goal of reducing incarceration while reducing crime, we advocate for four specific changes.

A. Increasing Alternatives to Arrest and Prosecution, Especially Mental Health and Drug Treatment

The Problem

Police officers and prosecutors often come in contact with individuals who would be better served with responses outside the criminal justice system. Often, police and prosecutors are the sole responders in these cases. Unfortunately, law enforcement usually lacks readily available alternatives beyond arrest and prosecution. Today, more than 50 percent of prison and jail inmates have a diagnosed mental illness, and 65 percent of prisoners meet medical criteria for substance abuse and addiction. Many of these individuals need treatment, not arrest and jail time. The criminal justice system cannot serve as a treatment plan, and in many cases, exacerbates illnesses and addictions.

Our Solution

Law Enforcement Leaders supports policy and practice changes within law enforcement agencies that offer alternatives to arrest and prosecution. We urge police departments and prosecutors' offices to adopt policies that prioritize mental health and drug treatment instead of arrests and prosecution, when law enforcement has the discretion to choose this alternative and it would not harm public safety. We also support training of law enforcement to recognize individuals in need of these alternatives.

Law Enforcement Leaders urges federal, state, and local law enforcement agencies to provide their officers and prosecutors with alternatives to address mental illness and addiction outside of the justice system. We will identify and highlight programs that reduce both crime and incarceration. By addressing the underlying cause of criminal activity, such programs successfully reduce repeat criminal activity and are more cost-effective than incarceration.

B. Restoring Balance to Criminal Laws

The Problem

Police and prosecutors are often left to enforce overly harsh laws, resulting in too many people arrested and imprisoned for too long. The number of acts considered crimes in the United States has grown significantly since the 1970s. In other circumstances, existing criminal penalties were increased so that the punishment no longer fits the crime. As a result, jails and courts are flooded daily with people accused of minor offenses. In many states, nonviolent and non-serious crimes, such as shoplifting or writing a bad check, became felonies. The time and resources spent focusing on low-level offenses takes away from handling and preventing more serious and violent crimes. Once in the system, most people

enter a cycle of repeat incarceration in which youthful petty offenders end up in jail or prison multiple times. Each year, 600,000 people leave prison trying to succeed in their old neighborhoods, two-thirds of whom will be rearrested within three years.

Our Solution

Law Enforcement Leaders members seek to restore balance to our criminal laws through efforts such as the reclassification of crimes. We urge Congress and state legislatures to take up changes to reclassify nonviolent felonies as misdemeanors or eliminate petty or duplicative offenses from criminal codes, where appropriate. We will identify and speak out against laws mandating overly harsh punishments. With such steps, police and prosecutors can hold people accountable for breaking the law in a fair and effective way. With proportional sentences, we can reduce both sentence lengths and the possibility of repeat crimes, breaking the cycle of incarceration for low-level offenders, and focus our resources on individuals who have committed serious and violent crimes.

C. Reforming Mandatory Minimums

The Problem

Mandatory minimum, three strikes you're out, and truth in sentencing laws are typically overly punitive. They often impose excessively long sentences for crimes. Their consequences are felt throughout the country: The average prison stay has increased 36 percent since 1990. The federal inmate population grew more than 400 percent since the late 1980s; now, their prisons are 39 percent beyond capacity.

Research has shown that arbitrarily increasing time served does not help keep the public safe. Studies show that longer sentences have minimal or no benefit on future crime. Even worse, research shows a strong correlation between increased prison time and repeat offenses, meaning prison may create more serious and violent offenses when overused. For example, a 2002 study indicates that sentencing low-level drug offenders to prison may increase the likelihood they will commit crimes upon release. Research from the Arnold Foundation indicates that longer pretrial detention is associated with new criminal activity even after the case is resolved.

Our Solution

Law Enforcement Leaders members support reforming mandatory minimum laws. We urge Congress and state legislatures to reduce mandatory minimum sentences set by law, and also reduce maximum sentences. We will identify and speak out against unnecessarily harsh and counterproductive laws. Judges should be allowed more flexibility in sentencing and the discretion to determine appropriate punishments. With proportional sentences, we can reduce both sentence lengths and the likelihood individuals will commit further crimes.

D. Strengthening Community-Law Enforcement Ties

The Problem

Trust between law enforcement and the public is essential. Communities rely on police and prosecutors to protect them from crime and injustice. We, in turn, rely on community support and cooperation in ensuring safety. But in too many neighborhoods across the country, this vital relationship is strained.

Our Solution

Working with community members allows police and prosecutors to effectively reduce crime, protect communities, and ensure justice. Law Enforcement Leaders support agency practice changes to strengthen community relations. We support police departments' collaboration with neighborhood residents in developing policies that identify community problems and implement solutions to produce meaningful results.

Similarly, we support prosecutors' offices in adopting policies informed by community concerns on crime. To better understand these concerns, prosecutors should work within communities and encourage open dialogue on how best to serve neighborhoods.

To ensure effective implementation of these policies, Law Enforcement Leaders urges federal, state, and local law enforcement agencies to train officers and prosecutors in procedural justice and police legitimacy to more effectively engage with community members.

Prisons Shouldn't Create Debtors

Lauren-Brooke Eisen

The Justice Department's investigation of Ferguson, Missouri's pervasive use of criminal justice fees and fines to generate revenue caused widespread outrage. It sparked a nationwide debate about whether asking the most vulnerable members of our society to fund municipalities is either fair or effective. But similar practices are shockingly common in jails and prisons across the country.

Illinois' Johnnie Melton is no model citizen. By January 2013, he had been convicted on drug-related charges at least three times. But when state officials sued Melton for nearly $20,000 to pay for his "care, custody, treatment or rehabilitation" during 14 months served at the state's Logan Correctional Center, Melton decided to fight the bill. The Fourth District Appellate Court ruled that he must pay the charges and the state took his assets.

At least 43 states allow inmates to be charged for the cost of their own imprisonment.

Melton's case is an example of how many localities fund their criminal justice systems largely through fees assessed on the incarcerated, the majority of whom are indigent. Earlier this year, revelations that cities like Ferguson, Mo. collect millions in fees from poor citizens sparked a national debate about whether the practice is predatory. But in a new Brennan Center for Justice report, I found that these policies are just as common inside jails and prisons. At least 43 states allow inmates like Melton to be charged for the cost of their own imprisonment and at least 35 states authorize charging inmates for some medical expenses.

Although the pervasiveness of these practices varies by county, a sampling of correctional facility websites provides a good picture. For example, the Corrections Center of Northwest Ohio charges $68.76 per day. At that rate, it will cost an inmate more than $25,000 per year to stay in jail. The jail's website states that inmates will receive a bill upon release and even provides a phone number for their pay-to-stay coordinator. The Corrections Center has contracted with Intellitech Corporation for collection services.

This disturbing trend increasingly forces inmates, who usually have no meaningful source of income — and often, their families — to pay for basic services, including meals, clothing, toilet paper, dental and medical co-payments and fees for telephone, video visitation and internet access.

The most often cited rationale for the charges is to offset spiraling incarceration costs. But the simple reality is that imposing fees has had mixed results, at best. Some counties have found that administrative costs are greater than what they would have collected in jail fees. In Fairfield County, Ohio, for example, the jail suspended its pay-to-stay program in 2012. They concluded that collection agencies were so ineffective in collecting fees owed that it wasn't worth the cost.

As policymakers recoiled at tax increases to sustain a booming prison population, the burden to raise revenue gradually shifted toward defendants and

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inmates. The country's criminal justice costs — mostly policing, jails, prisons, and courts — rose from $35 billion in 1982 to more than $265 billion in 2012 — an increase of more than 650 percent.

So if the justice system needs the money so badly, why is it such bad policy to charge those, like Johnnie Melton, who use it? Because experts estimate that at least 80 percent of incarcerated individuals are indigent. And, in most cases, it is inmates' families who end up paying their criminal justice fines and fees. This creates a double penalty. Not only does the family suffer from the loss of income from the inmate, but their expenses increase with the addition of criminal justice fees.

Experts estimate that at least 80 percent of incarcerated individuals are indigent.

Every aspect of the criminal justice process has become ripe for charging a fee. In fact, an estimated 10 million people owe more than $50 billion in debt. And successful re-entry into society can be nearly impossible for former inmates who, already facing the difficulty of securing gainful employment with a criminal record, are burdened with immense debt after completing their prison stay. In some places, failure to pay the debt can lead to re-incarceration — creating a cycle reminiscent of the debtors' prisons many believe are a relic of the past.

This debtor-creating system needs reform.

First and foremost, jails and prisons should revisit collection practices. Once inmates leave correctional custody, accumulated debts create prolonged involvement with the system. Chasing down formerly incarcerated people, the majority of whom are poor, to collect these debts is often counterproductive. Collection efforts frequently cost more than jurisdictions recoup in revenue.

Policymakers should also limit the excessive leeway for correctional facilities and sheriffs to charge exorbitant fees — such as the $45 per day charged to inmates at the Duchesne County Jail in Utah. State and federal lawmakers should bolster indigency waivers to ensure those with the least means won't be subjected to charges they can never pay. Lawmakers should also set caps on criminal justice debt, so a prison stay for a petty crime can't take away any possibility of a second chance.

Our nation's high incarceration rates arose from deliberate policy choices. An unintended consequence of the dependence on incarceration has been the burden on state and local budgets. It is time for us to take a collective breath and think carefully about how to fund the nation's jails and prisons in a way that reflects values of fairness, equality, and the real purpose of punishment.

The Reverse Mass Incarceration Act

Lauren-Brooke Eisen and Inimai Chettiar

For decades, the federal government has sent funds to states and localities to increase incarceration. The Brennan Center crafted a new proposal that would reverse this equation, using federal funds to incentivize trimming prison populations while cutting crime.

Leaders across the political spectrum agree: The United States must end mass incarceration. But how? What bold solutions will achieve this change?

Our prison crisis has many causes. One major contributor: a web of perverse financial incentives across the country that spurred more arrests, prosecutions, and prison sentences. A prime example is the 1994 Crime Bill, which authorized $12.5 billion ($19 billion in today's dollars) to states to increase incarceration. And 20 states did just that, yielding a dramatic rise in prison populations.

A web of perverse financial incentives has spurred more arrests, prosecutions, and prison sentences.

To reverse course, the federal government can apply a similar approach. It can be termed a "Reverse Crime Bill," or the "Reverse Mass Incarceration Act." It would provide funds to states to reduce imprisonment and crime together.

The United States has 5 percent of the world's population, yet has 25 percent of the world's prisoners. If the prison population were a state, it would be the 36th largest — bigger than Delaware, Vermont, and Wyoming combined. Worse, our penal policies do not work. Mass incarceration is not only unnecessary to keep down crime but is also ineffective at it. Increasing incarceration offers rapidly diminishing returns. The criminal justice system costs taxpayers $260 billion a year. Best estimates suggest that incarceration contributes to as much as 20 percent of the American poverty rate.

During the crime wave of the 1970s and 1980s, lawmakers enacted stringent laws to instill law and order in devastated communities. But many of these laws went too far. The federal government played an outsize role by financially subsidizing states to incarcerate more people. Today, the federal government sends $3.8 billion to states and localities each year for criminal justice. These dollars are largely focused on increasing the size of our justice system.

But times have changed. We now know that mass incarceration is not necessary to keep us safe. We now know that we can reduce both crime and incarceration. States like Texas, New York, Mississippi, and California have

Excerpted from *The Reverse Mass Incarceration Act,* October 12, 2015.

changed their laws to do just that. For the first time in 40 years, both crime and incarceration have fallen together, since 2008.

How can this momentum be harnessed into action?

Just as Washington encouraged states to incarcerate, it can now encourage them to reduce incarceration while keeping down crime. It can encourage state reform efforts to roll back prison populations. As the country debates who will be the next president, any serious candidate must have a strong plan to reform the justice system.

The next president should urge Congress to pass the Reverse Mass Incarceration Act. It would encourage a 20 percent reduction in imprisonment nationwide.

Such an Act would have four components:

- A new federal grant program of $20 billion over 10 years in incentive funds to states.
- A requirement that states that reduce their prison population by 7 percent over a three-year period without an increase in crime will receive funds.
- A clear methodology based on population size and other factors to determine how much money states receive.
- A requirement that states invest these funds in evidence-based programs proven to reduce crime and incarceration.

Such an Act would have more reach than any of the other federal proposals. It could be implemented through budgeting procedures. It could be implemented as a stand-alone Act. Or, it could be introduced as an amendment to a pending bill.

We Can't Let Reform Momentum Go to Waste

Kimberley D. Harris

Each year, the Brennan Center recognizes outstanding leaders who have advanced the goal of what Justice Brennan called "common human dignity." Last year's honoree was NBCUniversal Executive Vice President and General Counsel Kimberley D. Harris. A former deputy White House counsel in the Obama administration, Harris was honored for her commitment to voting rights and criminal justice reform. She spoke of her experiences in the White House and the current bipartisan consensus on criminal justice.

At a speaking engagement recently, a young lawyer asked me about the proudest moment in my career. My first instinct was to protest the suggestion on her question that I was actually past the best part of my career. But when I got past that point, one moment immediately came to mind, ironically almost four years to the day today, November 21, 2011, which was the day that President Obama granted the first commutation of his presidency to a woman named Eugenia Jennings.

Even though she was a nonviolent offender, Eugenia Jennings was sentenced to 22 years in prison for selling $1,100 worth of crack.

Assisting the president with clemency petitions was not necessarily the most glamorous work in the White House counsel's office. To be frank, more often than not we were in the position of recommending to the president that he deny thousands of applications that were facially inappropriate. And the few pardons that we were able to recommend to the president that he grant were largely ones based on convictions from decades ago where the applicants had already served their time long ago and had returned to being productive members of society.

And unfortunately, most of the time those applicants had filed for pardons because they wanted to get a gun license. That's true. Needless to say, the president was really looking for an opportunity to exercise his extraordinary Constitutional power in a much more meaningful way. Then Ms. Jennings' application for a commutation came to our attention. In 2000, Eugenia Jennings plead guilty to selling $1100 worth of crack to a police informant. Because she had two prior state convictions, each for selling about a gram of crack, she was sentenced as a career offender. So at the age of 23, even though she was a nonviolent offender and a mother of three, she was sentenced to nearly 22 years in prison. The sentencing judge expressed extreme frustration at the length of the sentence and frustration that his hands were tied.

Kimberley D. Harris, the executive vice president and general counsel of NBCUniversal, delivered these remarks at the Brennan Legacy Awards Dinner, November 17, 2015.

In his words at the sentencing hearing: Congress has determined that the best way to handle people who are troublesome is we just lock them up. Ms. Jennings made the most of her time in prison, however. She completed a drug rehabilitation program successfully, she earned a degree, and she became a model prisoner. When her application came to our attention, [then White House Counsel] Kathy Ruemmler and I immediately recognized that this is exactly the kind of application that the president would find meaningful, and happily he agreed with our recommendation and commuted her sentence to expire on December 21, 2011, more than a decade early, just in time for Christmas, and just in time for her oldest daughter's high school graduation.

I remember sitting in the West Wing with Kathy waiting for word that Ms. Jennings had been informed of the president's decision, and without question that was the proudest moment of my career. I discovered in preparing these remarks that unfortunately she died of leukemia two years ago. But she was out for two years and at least she died surrounded by her family and not in a jail cell.

The president has now granted nearly 90 commutations. That's actually more than the previous four presidents combined, and more than any other president since Lyndon Johnson. So take that, *The Washington Post,* who accused us of not doing enough on clemency. But it is a profound mistake to rely on the president's clemency power to fix a criminal justice system that has been incarcerating massive numbers of US citizens for decades.

It is a profound mistake to rely on the president's clemency power to fix the criminal justice system.

The impact of mass incarceration on our society, our democracy and our economy is staggering. Here's just a few statistics. Although the United States makes up just 5 percent of the world's population, I think many people know the statistics now because the Brennan Center has done such a good job of making it public, we account for about 25 percent of the world's prison population. 2.3 million Americans, disproportionately people of color, are behind bars.

Today nearly 1/3 of the adult population or about 70 million Americans have a criminal record, which of course more often than not makes it difficult for them to get a job, just repeating the cycle. Twelve states permanently restrict voting rights for convicted felons. So in 2010 almost 6 million Americans were prohibited from voting due to disenfranchisement laws. We are spending close to $7 billion a year to house federal prisoners, and perhaps most tragically in 2013, 2.7 million American children, that's one in 28 children, had a parent in prison, so much so that "Sesame Street" actually developed a special program for children who had parents in prison.

In his dissent in *Greg vs. Georgia,* Justice Brennan said that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. These statistics suggest that we are failing miserably to meet the standard. Fortunately, as Michael pointed out, we seem to be experiencing a rare moment of widespread agreement that our criminal justice system urgently needs reform.

In just the past four months, both the president and the pope visited a prison. America's first black news anchor, our own Lester Holt, of whom we are very proud, had an exclusive interview with America's first black president, and they talked about criminal justice reform. Bipartisan reform bills have been introduced in both the House and the Senate and they actually appear to have some traction.

And perhaps most extraordinary of all, in its recent book "Solutions," the Brennan Center managed to get a fair number of the 2016 presidential candidates to speak out, some for the first time, on criminal justice reform. I noticed that Donald Trump and Ben Carson aren't included in that, but who knew they would still be in the race at this point in time.

But I have every faith that the Brennan Center will even get them talking about criminal justice reform. We should not let this momentum go to waste. We should demand that our leaders take real action on criminal justice reform soon. I have no doubt that the Brennan Center will do just that, that through research, thought leadership and advocacy the Brennan Center will remind us daily that we need to live up to our American ideals of equality, fairness and justice.

We should demand that our leaders take action soon on criminal justice reform.

President Obama's Unprecedented Prison Visit

Andrew Cohen

President Obama became the first sitting U.S. president to visit a federal prison — something unimaginable even five years ago.

The first round of critical reviews are in for the HBO/Vice special about criminal justice that premiered Sunday night and featured President Barack Obama speaking to inmates in a federal prison in Oklahoma. The reaction, it's fair to say, has been mixed. Some reviewers found the 70-minute documentary "Fixing the System" to be dull and derivative. Others found it revelatory. Anyone who has followed the arc of the story of criminal justice in America recently surely found most of it quite familiar.

Familiar, that is, except for the extraordinary scenes where the president is sitting in a circle talking to men whose lives so far have been ruined or wasted by crime and punishment. At times Obama sounded wonky, as if he knew, with the cameras rolling, that he had to reassure viewers that he wasn't there to serve the men as a public defender. At times he sounded empathetic, telling the prisoners of his own experiences with drugs that might have led him down a different path.

At times he sounded like the professor he once was, telling the inmates what they may or may not have known about the recent history of mass incarceration. At times he sounded as though he were aware and in awe of the scope of the problem of racial injustice in America. He would not admit, on the record anyway, that America's criminal justice systems are "racist." Instead, he was content to acknowledge, as he has before, that those systems have a racially disparate impact.

In conversation with the inmates, President Obama at times sounded as if he was in awe of the scope of the problem of racial injustice.

And at all times he looked and sounded like a counselor, a mediator, someone who excels at, and enjoys, moderating a discussion designed to illicit into words the difficult truths that reside inside people. He did not talk down to the prisoners but it was clear that he was in charge. He did not lecture them but did not excuse their conduct, either. The inmates obviously were props, but so was the President, and this central fact about "Fixing the System" did not obscure the central message of the film: the justice system that brought these men to that prison is broken in countless ways that will be very difficult to fix anytime soon.

Andrew Cohen is a Brennan Center fellow as well as an editor at The Marshall Project, legal analyst for "60 Minutes," and chief analyst and legal editor for CBS Radio News. This article appeared on the Brennan Center website, September 28, 2015.

Then there was a priceless moment when Obama was speaking with the inmates about the challenges of avoiding recidivism. And for a sentence or two he dropped the formal tone of a president and spoke to the men like a man of the street. The inmates instantly got it, and reacted, and I wonder if that is the moment they remember most now that they are back in their cells with the spotlight off them. No other modern president, not even Bill Clinton, could have connected to the inmates on that level as Obama did in that exchange.

There also were parts of the documentary that disappointed me. For example, Obama spoke to the men about the value of reentry programs and his administration's push to "ban the box," to eliminate the question on job applications that seek to know whether a candidate has ever been convicted or incarcerated. But neither he, nor the filmmakers, mentioned the fact that Obama has an abysmal record on clemency; that his administration is authorizing the early release of prisoners at historically low rates. If only one of the inmates, in an unscripted moment, had asked the president: "If you care so much why don't you authorize our release?"

Also disappointing was the show's lack of focus on how, precisely, our politicians, prosecutors, police, judges, and corrections officials can, indeed, "fix the system." Indeed, the title of the special is baffling given how much time was devoted in it to chronicling the problems within the system and how little time was spent educating viewers about what now needs to be done. Sure, the Smarter Sentencing Act got some attention toward the end. And there were brief mentions here or there of the failure of courts and legislators to ensure a meaningful right to counsel for indigent defendants. But the uninitiated surely could have walked away from the special without any clear idea of how, indeed, to "fix the system."

For a sentence or two, Obama dropped the formal tone of a president and spoke to the prisoners like a man on the street.

But all of the reviews of the special, the good and the bad, largely miss the point. The story is that we live in an age of mass incarceration and that after decades of torpor more politicians of all stripes are recognizing the scope of the problem and beginning to try to do something about it. The story is that a sitting president went to a federal prison, and talked to the inmates as equals, and is trying to move the mass of public opinion inexorably toward justice reform. None of this was imaginable even five years ago. That any reviewer would consider it "dull" today is a sign of how far the movement has come. And also how far it has to go.

LEGAL CHANGE & SYSTEMS OF GOVERNMENT

Legal Change: Lessons from America's Social Movements

The Brennan Center has long argued that legal change is created not just through lawsuits or arguments before courts. We forged a model based on the belief that lasting change also comes from smart policy innovation driven by a motivated public. Is this true? In recent years, legal victories on issues like marriage equality have provided valuable case studies for the way in which change can be created. We brought together thought leaders representing perspectives from philanthropy to the academy to organizing to examine the lessons these examples provide.

Shaping the Voting Rights Narrative

Wendy Weiser, Director, Democracy Program, Brennan Center for Justice

What was it about the increased public attention to voting issues that helped shift the legal terrain? At the most general level, the attention signaled that the issue was important and merited close scrutiny and care. More specifically, the public dialogue called into question several basic assumptions that had previously propped up voting restrictions and allowed them to slip by the courts. Those assumptions were that new voting restrictions would harm very few people, that they would be easy to overcome, that voter fraud was a real threat that justified burdening voting rights, and that the laws were well-intentioned efforts by public officials to address a pressing public policy issue. Over time, each of these assumptions has been — I believe successfully — shot down.

Advocates played a major role in shaping the public conversation and setting the record straight. Since the voting rights battles were being fought simultaneously in the courts, in the legislatures, and in the press, it was necessary to build a strong and persuasive public case against new restrictions. To do so, the Brennan Center and others sponsored scores of studies and ensured that those studies were both well accepted by experts and injected into the public debate.

The Supreme Court Follows Public Opinion*

Cass Sunstein, Robert Walmsley University Professor, Harvard Law School

To the Justices, the views of the American people seem to matter for two reasons. The first is that they give a kind of permission slip: If most people agree with what the Court wishes to do, it is less likely to risk its own prestige, or to put its own role in question, if it acts on its wishes.

Excerpted from *Legal Change: Lessons from America's Social Movements,* an event held at NYU School of Law, September 29, 2015.

The second, and perhaps more fundamental reason, directly related to the same-sex marriage issue, is that the views of the American people provide valuable information: If most people have come to share a moral commitment, or if the arc of history is clearly on one side, then judges are likely to pay respectful attention. That is the only way to understand the agreement of five members of the Court with these remarkable sentences: "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

* This is excerpted from a piece that originally appeared at Bloomberg View on June 26, 2015. It is reprinted with permission of the author.

The Importance of Clarity

Evan Wolfson, Founder and President, Freedom to Marry

One of the things we really got right was what I call the ladder of clarity. That clarity is on four rungs. You start with the last one because you need to know where you're going. We were clear about the goal in this marriage campaign. We wanted the freedom to marry. And being able to state your goal with clarity, no matter how crazy or bold or improbable it may seem to many in the beginning, gives people a chance to rally and work toward it and be held accountable as they're going toward it, and see how they could get there.

The clarity of the goal in turn dictated a clarity of strategy. And we always put forward in the freedom to marry campaign what our strategy was for winning. We knew what it was going to take to win, and we talked all along about we're going to win through a decision in the Supreme Court, but we're going to get there having built a critical mass of states and a critical mass of support.

From clarity of strategy in turn we had clarity of what I call vehicles. If we knew we needed a critical mass of states and a critical mass of support, what are the programs, what's the work, what are the organizations, what's the infrastructure, what's the funding we need to assemble in order to be able to win this state, and this state, and this state. And if we could only win so many through litigation but we needed more, then what's the legislative strategy? Once it became clear that even litigation and legislation weren't going to be enough because the anti-gay forces were throwing ballot measures at us, how do we learn to win a ballot measure?

And then, clarity of action steps. We were relatively good at something, which is hard to do, which is to give people the things they can do to bring their piece to this combined whole.

Clarity on these four rungs gave us the ability to assemble what I would say are the three things we needed. A movement that was bigger than any one person, any one battle, any one case, any one state, any one decade. But the movement wasn't just random. The movement did, whether it knew it or not, follow a strategy that had its eyes on the prize and how we were going to get there.

The Improbable Victory of Marriage Equality

John Kowal, Vice President for Programs, Brennan Center for Justice

The successful push to win marriage equality in all 50 states was, in part, a strategic legal campaign played out through litigation and legislative advocacy in courthouses and legislatures across the country. It was also a social movement that inspired countless LGBT Americans and a growing number of allies to engage their families, friends, neighbors, and colleagues. And it was a strategic communications success story, taking an issue that elicited emotions from confusion to strong disapproval and — over two decades — changing millions of minds.

In some respects, the oral arguments in this final appeal — *Obergefell v. Hodges* [in 2015] — seemed less suspenseful than the argument in Windsor a mere two years before. In that short period of time, marriage equality had spread to three-quarters of the states, and public opinion had shifted decisively in favor of marriage equality, with polls showing support hovering around 60 percent. LGBT advocacy groups worked hard to press their advantage, advancing social media campaigns to drive home the point that "America is ready for the freedom to marry."

How Can We End Capital Punishment?

Diann Rust-Tierney, Executive Director, National Coalition to Abolish the Death Penalty

We cannot persuade the [Supreme] Court to outlaw the death penalty so long as it believes that significant public support remains for the death penalty. Nor can we persuade the Court to outlaw the practice while a significant number of states have and use the punishment.

We must work state-by-state to change public attitudes and policy. We must use all of the tools available to us: cogent legal and empirical data and analysis, grassroots engagement insisting that policymakers pay attention, and demonstrated political will to spur policymakers to action when the evidence shows the death penalty must end if our nation is to move forward. At the same time, we must ensure that every individual capital defendant is afforded competent, experienced, and vigorous representation.

The Road to *Heller*

Michael Waldman, President, Brennan Center for Justice

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 may be 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.

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.

The Paths to Change in Environmental Law

Richard Ayres, Ayres Law Group
Mitchell Bernard, Director of Litigation, Natural Resources Defense Council
Frederick A. O. "Fritz" Schwarz, Jr., Chief Counsel, Brennan Center for Justice

"Public sentiment" strongly favors action on global warming. A powerful moral prod came recently from Pope Francis. But despite public sentiment, Congress has not enacted major reforms. Why? One reason that we have explored…is that one of our major parties has chosen, since 1995, to make environmental policy a partisan issue. There are also new factors that impede reform. Changes in the law, as interpreted

by the Supreme Court, and in the political culture, have unleashed floods of money from economic special interests to influence politicians. Huge amounts of that money come from companies and individuals whose fortunes are based upon the fossil fuel industry. These companies and individuals also fund dozens of front groups to throw sand in the public's eyes through claims that the science of global warming is in doubt. Also, in the world's longest lasting democracy, one party, in many states, is now taking steps to make it harder to vote. This adversely affects some of the groups most likely to vote for candidates who pledge to protect the environment.

One result of these changes is to make the environmental movement a natural ally of groups trying to reduce the impact of money in politics and to protect the right to vote. Fundamental issues of democracy are now environmental issues.

The Unlikely Allies Behind Criminal Justice Reform

Marc Levin, Founder and Policy Director, Right on Crime
Inimai Chettiar, Director, Justice Program, Brennan Center for Justice

This year [2015] has been the biggest for criminal justice in more than two decades. For the first time, a sitting president visited a federal prison and made a major speech calling for an end to mass incarceration. In July, President Bill Clinton, addressing an audience at an NAACP convention, expressed regret in signing the 1994 Crime Bill, which served to increase state and federal prison populations. In a new book, leading Republican and Democratic presidential hopefuls offered various proposals to curb the prison population. Congress may pass a criminal justice reform bill. And protesters have filled our cities' streets calling for change.

This is a signal moment in criminal justice reform. Leaders are coming at the issue for a variety of reasons — the religious right who believe in redemption, fiscal conservatives who see waste, libertarians turned off by a sprawling government program, civil rights advocates seeking racial justice, and progressives hoping to eradicate inequities. All draw the same conclusion: The country needs to reduce its prison population while improving public safety. Not only is there bipartisan agreement on the problem, there is also agreement on some solutions, a rarity today.

The New York State Playbook for Reform

Lawrence Norden, Deputy Director, Democracy Program, Brennan Center for Justice
Ian Vandewalker, Counsel, Brennan Center for Justice

Although strong majorities of voters across the political spectrum support reform, Republican elected officials remain staunchly opposed. [Gov. Andrew] Cuomo may have had the ability to secure Republican votes during the budget fight, but he did not, leaving support for reform lopsided. This makes strategies for engaging Republicans and building bipartisan support crucial. Campaign finance is remarkable among reform issues in that the public does not need to be educated about the problem or convinced of its magnitude. However, the widespread belief in the problem is paired with an equally widespread belief that nothing can be done about it. Also unique is the fact that the problematic political process that the movement seeks to change must be relied upon to enact change. Incumbent legislators have a natural inclination to maintain the political process they have mastered.

This reality fosters cynicism, and the New York reform effort faced an uphill battle to convince policymakers and others that the possibility for reform was real and that it would actually bring about

change. Nevertheless, the coalition came within a hair's breadth of securing transformative policy solutions in the Empire State, providing a blueprint for the ongoing push for reform in New York and across the nation.

Policing the Police

Faiza Patel, Co-Director, Liberty & National Security Program, Brennan Center for Justice

Playing offense on national security reform is tough. Any attempt to roll back the extraordinary authorities granted to the government since the 9/11 attacks is met with resistance — partly based on genuine concern about terrorism, and partly due to entrenched bureaucratic interests in maintaining power and budgets. One instance in which the Brennan Center was able to pursue and achieve positive change was our campaign to establish an inspector general for the New York City Police Department (NYPD).

Having led this initiative for the Brennan Center, I think its success can — at least in part — be fairly attributed to the Center's preferred way of approaching an issue, which relies on comprehensive research to identify solutions and uses public education and communications to build support for proposed reforms. Of course, no organization operates alone. We worked closely with Muslim, Arab, and South Asian (MASA) groups, and were fortunate to forge an early alliance with police accountability groups in New York City who were organized under the banner of Communities United for Police Reform. This cooperation was critical to persuading the City Council, under the leadership of Council Members Brad Lander and Jumaane Williams, to pass legislation [in 2013] establishing an inspector general for the police.

Does the Civil Rights Movement Model Still Work?

Nicole Austin-Hillery, Director and Counsel, Washington, D.C., office, Brennan Center for Justice

The civil rights movement developed a successful model for social change that relied on several key features. First, the movement recognized the importance of having visionary leaders to serve as its spokespeople and tacticians. Second, it organized activists and concerned citizens into an effective mass movement. Third, it garnered support through messaging that appealed to the American public's sense of fairness and justice. And fourth, it looked to the courts as a forum for redress.

One need not look far to see that the template created by the civil rights movement continues to serve as a roadmap for new fights for equality affecting the next generation. The "Dreamers," who seek to secure the rights of children of the undocumented who came to the U.S. at a young age, have used similar techniques to successfully garner attention from the public and support from the White House to expand their opportunities.

Unlike the 1960s, today's problems facing the African-American community are less blatant and more wide-ranging. Many of the problems — from economic inequality to mass incarceration — are systemic problems not easily dealt with through a court order.

We should start by examining whether the tools of change that were so heavily relied upon in the 1960s are still viable to address the problems facing the African-American community in the early 21st century. This question is significant not only for the current civil rights movement, but also for the movements that will follow.

A Voting Rights Act for Reproductive Rights?

Nancy Northup, President & CEO, Center for Reproductive Rights

Not only is it time for the Supreme Court to reiterate the constitutional protections for access to abortion services, but it is also time for the equivalent of the Voting Rights Act for reproductive rights. In response to states' relentless efforts to curtail constitutionally-protected voting rights, Congress shored up those protections by passing the Voting Rights Act of 1965, which limits states' ability to enact election laws that undermine meaningful access to the ballot.

One in three women in the United States makes the decision at some point in her life that terminating a pregnancy is the right decision for her. Her decision is based on her individual circumstances, her health, and her life. And when a woman makes that decision, she needs access to good, safe, reliable care from a health care provider she trusts, in or near the community she calls home. Today, however, a woman's ability to access safe and legal abortion care increasingly depends on the state in which she happens to live. In response to stealth efforts to suppress the votes of low-income people and people of color, Congress made clear with the Voting Rights Act that the right to vote cannot depend on the state in which a person lives. Congress and the Supreme Court must make clear that the same is true of a woman's fundamental right to access abortion. We know that the Women's Health Protection Act has a long road from conception to enactment. But we are ready to take that long road to ensure that every woman in the nation has an equal ability to exercise her constitutional rights.

How Philanthropy Builds Infrastructure

Gara LaMarche, President, Democracy Alliance

From its earliest days in the early years of the last century, organized philanthropy has played an important part in movements to transform the legal profession and to use the law to protect and advance civil liberties, human rights, and social and environmental justice. I've been fortunate to have a ringside seat for the last generation of such foundation investments in legal change.

My experience in funding legal change at the Open Society Foundations — and also at the Atlantic Philanthropies, where I was president from 2007 to 2011, and in my present post as president of the Democracy Alliance, which supports the Brennan Center, the American Constitution Society, and the Constitutional Accountability Center — has offered up a few lessons (some learned the hard way) that I think may be useful for other donors interested in supporting legal reform. Most are applicable to philanthropy more broadly as well:

1. Start with the ultimate goal you are seeking, and work back from there.

2. Who are the principal stakeholders in the change you are seeking, and are those with the most at stake involved?

3. Pay greater attention to language, story, and narrative to draw a wider range of groups into reform efforts.

4. Leadership, supported by investments in people, is essential to any movement for social change.

5. Don't forget the importance of time. Important change feels urgent, and a sense of urgency is a powerful fuel for social movements. At the same time, everything we know about social change tells us that it takes time, and a kind of patience — or in any case, tenacity and resilience.

A 21st Century Model for Change?

Keesha Gaskins, Program Director, Democratic Practice – United States, Rockefeller Brothers Fund

Increasingly, Americans no longer see government as the primary way to change the policies that guide the way we live. Constituent communities, however, still place enormous pressure on government, and have higher expectations for social justice groups, organizers, and advocates to be effective as policy influencers and movement builders.

Today, however, much of the current political and populist energy is focused on elevating the "99 percent," a very different base. The "99 percent" is diverse, culturally fragmented, and majoritarian. Any attempt to bring a majority of U.S. residents together challenges the fundamental conceptions of identity politics, partisan allegiances, and class identification that many 20th century models for movement building depended upon.

Simply importing historical models may be insufficient to effect change today. New organizing, advocacy, and communications strategies are needed for engaging a significant majority who share economic self-interest, but are often politically, socially, and culturally divided.

How Does Legal Change Happen?

Michael Waldman, Barry Friedman, Helen Hershkoff, and Kenji Yoshino

Do advocates have to win in the court of opinion before winning in a court of law? Can the same arguments that appeal to the public work in court? And ultimately, is lasting social change more likely to come through the legislatures than the courts? Brennan Center President Michael Waldman and three professors from New York University School of Law discussed.

MICHAEL WALDMAN: At the Brennan Center we say that you have to win in the court of public opinion before you win in court. How true, as a general matter, do you think that is?

BARRY FRIEDMAN: It depends what your goal is. It's possible to win in court in a one-off. But if you want lasting change, then I think it's correct that there has to be some relationship between public opinion and your goals. Nothing you achieve in any form is likely to be enduring, unless you can bring the public along with you. And I think that's equally true in court as it is in a legislative body or elsewhere.

KENJI YOSHINO: I think it is a question of what we mean when we talk about a court of law. So if we're talking about the United States Supreme Court, absolutely. The Supreme Court is much more willing to wash out outliers than to start social revolutions. But if you're talking about state supreme courts, when I look at my own area of gay rights and same-sex marriage in particular, the *Goodridge* opinion, in 2003, was a game changer in terms of changing public opinion. Because the state had [gay] marriage through a judicial opinion, and from the Massachusetts high court, it then was able to live under the reality of [gay] marriages thereafter.

The reality that the sky didn't fall on Massachusetts after people started getting married was transformative for the national conversation. And then the Connecticut and the Iowa decisions were both court decisions. It was only after those court decisions that we got legislative victories in states like New Hampshire and Vermont. So it's always a dialogue, because a court of law is instructing the court of public opinion about what's possible.

Barry Friedman is the Jacob D. Fuchsberg Professor of Law, Helen Hershkoff the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, and Kenji Yoshino the Chief Justice Earl Warren Professor of Constitutional Law at the New York University School of Law.
Excerpted from *Legal Change: Lessons from America's Social Movements,* September 29, 2015.

HELEN HERSHKOFF: I think it's also important to focus on what you mean by public opinion or democratic discourse. The public does not speak with a uniform voice. The Supreme Court has nine voices and may speak through a majority, plurality, concurring, or dissenting opinion. The public speaks through multiple voices and at different times. Sometimes public opinion will endorse the status quo. And sometimes public opinion will want to move in favor of change, at least for certain segments of that public. I think it's also important to recognize that these are fundamentally questions of power. And unless you have multiple counterpoints to the existing status quo, it's very difficult to secure any change. As Kenji said, it's not simply a matter of persuading broad swaths of the public, or getting a particular judicial outcome. You need different levers, and you need to secure support along many different channels if one is going to consider serious change that really foments a fundamental, transformative improvement in society and politics.

FRIEDMAN: I think that there's some consensus that often what moves social change is backlash. There certainly are studies — though there are too few of them and they are not good enough — that suggest that when a visible court, like the United States Supreme Court, decides a case, those who have succeeded will often go rest on their laurels. Those who have lost will be motivated to step out into the public and begin to make their case. One example of that is certainly abortion, where I think the people that were pro-choice felt that they had won a victory and at some level sat on their hands while much of the country mobilized and moved the politics in the country very much to the right. It was true in gay rights after *Bowers v. Hardwick*. I think that the loss in that case was an energizing moment for the gay rights movement. So it's very often a reaction to what's been said that starts the process rolling.

HERSHKOFF: Does that set of observations apply across the board? Let's take certain economic issues. When the Supreme Court decided against a right to a living income, to public assistance, in the *Dandridge* case, it was very difficult, if not impossible, for those who were shut out of the court to mobilize in public or even on the streets or in public discourse, because they were so inherently excluded from political life. They have no channel. So although for certain issues a Supreme Court decision can mobilize backlash and have counterproductive effects, on other issues, a judicial order is absolutely essential for those who want access to the political process who otherwise don't have it.

Public Arguments vs. the Legal Case

WALDMAN: Given the interplay between judicial direction and public opinion and political intermediaries, what about those situations where the arguments that are mobilizing arguments for the public are not the arguments ultimately that one wants to bring either to the court or maybe to a legislature? I'll give you an example from the work the Brennan Center does right now. *Citizens United* is an opinion that I would suggest flies somewhat in the face, Barry, of what you've written about the Court not stepping out too far ahead of public opinion. Political equality is one of the main reasons the public doesn't like *Citizens United*. But that word — "equality" — is verboten in making the arguments to the courts. The Roberts Court has made clear that even breathing mention of "equality" may be enough to put a statute at constitutional jeopardy. So what is the interplay between the types of arguments one can make to the public and to the courts? Must there be a broad synchronicity between them? Are they really different audiences?

FRIEDMAN: I think it is important to speak in the public sphere about things that might not be appropriate to speak about in court, and yet it's not that courts don't hear it — and in fact, it penetrates. If you want to talk about rapid transformational change, you can't fail to talk about the Affordable Care Act case, which is also a very perplexing one around the question of public

opinion. It would be too simplistic to take anything I'm saying as "we can take a poll and then we know what the Court's going to do." I have never suggested that and I never would. And I think it would be a horrible thing if it were true. But certainly, in the first Affordable Care Act case, nobody thought that the Court was going to take any Commerce Clause argument seriously; that there was any chance that the Court was going to find that the law violated the Commerce Clause. Indeed, once the folks in Washington started to get concerned about it, I helped lead an effort to write an amicus brief to the Court on the subject. I called lots of leading conservatives, who are friends, and said, will you join this? And they said, "Look, I can't join it. But everybody knows you're going to win. This whole thing is ridiculous." Well, of course by the time it got to the court, it wasn't ridiculous at all. On the contrary, it was a very good example of what [Yale Law School Prof.] Jack Balkin talks about as the move from off-the-wall arguments to on-the-wall arguments. Those arguments get on the wall, I believe, because of a public discourse that isn't always the same as the legal discourse. And I think it is extremely important that when fighting issues in a legal arena, you'll also be fighting in other places, and that you'll also be articulating your positions in ways that appeal to common sensibility.

HERSHKOFF: I think there's a view in the United States — this is a broad overstatement, of course — that politics are intended to be authentic and sincere and transparent. And we try to avoid any discussion of the Machiavellian or strategic aspects of politics. But what about the actual practice of politics? Consider the conservative success of the last 40 years. No one was going to speak about the language of racial discrimination or class oppression. Yet it became convenient to talk about state rights and the 10th Amendment. Ultimately, arguments about state's sovereign immunity prevailed and did so much harm to progressive causes in the United States. So I think that there is a form of law talk that is made in the courts. And I even think that there's a form of political discourse made within the corridors of power. These forms of rhetoric may be quite different from the real motivators of policy. But I don't think that there's anything new about that development. One can go back to Roman classical texts and see that there's always a dissonance between what people are actually asking for and the way in which they say it.

Legislative Wins or Winning in the Courts?

WALDMAN: When he was teaching at the University of Chicago Law School but was a state senator, Barack Obama said that he thought it was a tragedy of the civil rights movement that it became so court focused. That there was a tendency to lose track of the political and community organizing activities on the ground, he said, that can put together the coalitions of power through which you bring about redistributive change. Another version, perhaps less sincerely: Chief Justice Roberts's dissent in the marriage case, where he said the proponents of change were winning in legislatures and in public opinion and had the wind at their back. What do you think of the argument that it is better and creates deeper social change to win through the democratic branches, the democratic activities of legislating and elections, even if a win in the courts is available?

FRIEDMAN: One might have asked your question exactly the opposite way. Which is to say, why would you ever go to the democratic arena when, given constitutional politics, you can achieve much more lasting change in the courts? But I think that the answer ought to be both. They are dialogic. Everything I wrote in my early career had the word "dialogue" in the title, because I so firmly believe in everything Kenji was saying, which is that there's an ongoing conversation that happens among the broader public — or at least the informed or elite broader public — and the different branches of government. It is the wise social change organization that understands that it should be present in a variety of arenas.

WALDMAN: If you look especially at the way social change unfolded in the past, it was often differentiated. During the civil rights movement, for example, Thurgood Marshall belittled Martin Luther King's tactics. Some organizations were litigation focused, some were lobbying groups, some were think tanks. Often, people have not tended to see these as kind of unified parts of a strategy, over the long run.

HERSHKOFF: Is that how the civil rights movement unfolded? I'm not convinced there was a bifurcation or trifurcation of communication, strategy, and law. When the NAACP litigated, it always had people in the field who were trying to determine what community sentiment was — the sit-down strikes, the boycott in Montgomery, the march from Montgomery into Selma. Along the way the civil rights movement became branded as a court-centered strategy, certainly after *Brown v. Board of Education*, and largely by academics. But I don't think that it represents the reality of what happened.

YOSHINO: Joe Biden said in the gay rights movement "Will & Grace" was just as important as any court decision. I think that was absolutely true. It brought gay people's lives into the living rooms of Americans. This was a hit NBC show for close to a decade. And then other shows continued in that vein. So I agree with Barry that it's not either/or, and I agree with Helen that this is not only true in the past but it's also true in the modern civil rights era. I just don't see this bifurcation. The place that the question becomes interesting for me is what is the end game envisioned to be? I think that the end game in the gay rights arena for marriage was always a Supreme Court ruling. So all eyes were ultimately on the Supreme Court. I think that the gay rights movement would never have said that its ultimate goal was to wait until the 50th state was willing, through its own legislation or a referendum process, some non-judicial avenue, to secure its rights. I think from the very beginning the strategy was to ultimately end up in the Supreme Court. And the reason for that is to prevent the backsliding that occurs when something is not secured at the Supreme Court level under the Constitution. So if you really believe that the right to same-sex marriage is a constitutional right, then you'd be crazy not to ask for it as a matter of constitutional right at the United States Supreme Court, because otherwise states that might once have been friendly could backslide from that understanding.

Rethinking Campaign Finance: Toward a Pro-Democracy Jurisprudence

Americans of all ideologies are deeply unhappy with the growing role of big money in elections. That state of affairs is the direct result of a series of closely divided decisions by the Roberts Court. The Brennan Center brought together leading legal scholars who believe the Court's majority view of the First Amendment and its role in politics is simply wrong. Here, they lay out alternative understandings of the law of democracy and the First Amendment that many believe are more consistent with the Constitution's true meaning. These approaches could provide a path forward for restoring a campaign finance system more consistent with the nation's history and values.

Protecting Electoral Integrity

In *McCutcheon v. Federal Election Commission*, the Court's most recent campaign finance case, the four dissenting Justices embraced the concept of "electoral integrity" to explain why the majority's current jurisprudence and narrow conception of corruption is wrongheaded, and to offer an approach that could break through the conceptual strictures imposed by *Buckley*. Consistent with the Court's longstanding recognition of fair elections as crucial to the success of our democracy, they suggested campaign finance rules and limits can be justified as part of an effort to ensure free and fair elections.

We care about corruption not because it is a particularly offensive crime, but rather because it undermines faith in our public institutions.

We care about corruption, Justice Breyer explained, not because it is a particularly offensive crime, but rather because it undermines faith in our public institutions. Protecting electoral integrity goes to the core of the First Amendment: "Where enough money calls the tune, the general public will not be heard [and] a free marketplace of political ideas loses its point."

By recognizing the government's interest in protecting electoral integrity, the dissenters would put democracy at the center of the First Amendment. Refocusing our attention on the democratic function of elections would allow for regulations that ensure our elections pick people who answer to all Americans, not just a privileged few. It would also allow for regulations to combat the pervasive public cynicism spawned by the belief by most Americans that the fix is in. A majority of the Supreme Court, in an opinion authored by Chief Justice Roberts, recently endorsed a similar concept of judicial integrity in the context of a decision related to fundraising in judicial elections. Although the Court's reasoning would seem to apply equally to other elected offices, the Court specifically limited the decision to judicial elections.

Excerpted from *Rethinking Campaign Finance: Toward a Pro-Democracy Jurisprudence,* June 11, 2015.

The *McCutcheon* dissent cited Yale Law School Dean Robert Post's 2014 book, *Citizens Divided*, which argues that the Constitution requires government be allowed to protect the integrity of elections. He explains that the First Amendment protects the rights to speak, publish, and organize in order to allow Americans to communicate with their elected representatives and participate in democratic self-government. But these rights are hollow if the electoral process doesn't result in the selection of officials who actually pay attention to their constituents. Government regulations that limit the influence of wealthy donors are consistent with the First Amendment if they help protect the voters' faith in the integrity of our elections, and therefore, in our democracy. According to Post, the Court's principal error in recent decisions was to "imagine electoral integrity as a matter of law, rather than of fact," and to refuse to assess whether or not the actuality or "appearance of influence or access" "cause[s] the electorate to lose faith in our democracy" and thus justifies legislative solutions.

The right to speak to representatives is hollow if the electoral process does not select officials who pay attention to constituents.

Professor Burt Neuborne of New York University School of Law goes a step further, arguing that the structure of the First Amendment, as well as the entire Bill of Rights, make democracy a structural principal of the Constitution, like separation of powers or federalism. Applying this reading of the Constitution, Neuborne concludes that political spending should be "demoted to a form of 'communicative conduct' entitled to significant First Amendment protection, but subject to good-faith regulation" aimed at making democracy work by reinforcing political equality and preventing corruption.

Rethinking Corruption

In *Buckley*, the Supreme Court held that government can regulate campaign finance to prevent corruption and the appearance of corruption. But there are many ways to define "corruption." Several prominent constitutional law scholars have argued that the Roberts Court's view of corruption is inconsistent with the purpose of the First Amendment and the goals of the Constitution. A broader definition of corruption could mean a very different constitutional law that would allow Congress and state legislatures to pass many laws the current Court would deem unacceptable.

One alternative, championed by Professor Lawrence Lessig of Harvard Law School, is that corruption occurs when our politicians become overly reliant on (and therefore overly responsive to) a small group of wealthy donors. Lessig argues that our democracy requires that elected officials are "dependent upon the People alone." Therefore, even the slightest competing or conflicting loyalty is a corruption of the governing relationship. In Lessig's view, campaign finance may be regulated to prevent elected officials from becoming dependent on funders rather than the American people.

Lessig traces the government's interest in preventing this kind of "dependence corruption" back to the nation's founding. "The Framers were well aware," Lessig explains, "that in republics, persons elevated from the mass of the community by the suffrages of their fellow-citizens to stations of great pre-

eminence and power may find compensations for betraying their trust." In other words, people elected to positions of political power would suddenly find themselves with wealthy friends. So the Framers tried to create a system of government that would be accountable to all of the people, not just a "favored class." In Lessig's view, wealthy special interests pose precisely the type of threat to democracy that the Framers sought to address in the new Constitution.

The Supreme Court's assertion in Citizens United *that independent expenditures cannot be corrupting is provably false.*

Zephyr Teachout, Fordham Law Professor and author of *Corruption in America*, agrees that the nation's founders were "obsessed with corruption." At the Constitutional Convention, George Mason of Virginia stated that "if we do not provide against corruption, our government will soon be at an end." During the Convention, the problem of corruption was discussed more frequently than many other significant challenges facing the new country, such as factions, violence, and instability. Based on her historical research, Teachout agrees with Lessig that the corruption that concerned the Framers was broader than bribery. The Constitution's authors, she argues, were concerned "with corruption as a loss of political integrity, and systems that predictably create moral failings for members of Congress."

Returning to this view of corruption, which is deeply embedded both in the Supreme Court's case law and in the nation's history and culture, would allow government to regulate political spending to ensure that elected officials can be responsive to the will of the voters, not just a handful of wealthy donors. Professor Deborah Hellman of the University of Virginia School of Law offers another potentially fruitful avenue for exploration when it comes to corruption, which she explains is a "derivative concept." In order to define corruption of an official or institution, one needs an account of how the official ought to act or the institution ought to function. "Legislative corruption thus depends on a theory of a representative's role in a democracy," she writes. Drawing an analogy to apportionment and gerrymandering cases, she argues that issues that "address the foundational questions about the form of our democracy" provide a rationale for "judicial deference to legislative judgment."

Other critiques of the Court's corruption rationale focus on the fact that its assertion in *Citizens United* and subsequent cases that independent expenditures cannot be corrupting is provably false. The Court's reasoning assumes that only an explicit, verbal agreement can mark improper conduct. But judicial doctrines from many other areas show that is not so: in antitrust laws, securities laws, and government contractor laws, among others, it is assumed that a decision maker can be improperly swayed by non-explicit but improper activities by another. Indeed, the Court has recognized that independent expenditures create an unacceptably high risk and appearance of bias and improper influence in the context of judicial elections, but has of yet refused to extend this reasoning to other elections. Renata Strause and Professor Daniel P. Tokaji of the Moritz College of Law have set out a research agenda to demonstrate that "a reasonable legislator [c]ould feel pressure to act in [a] way that is different from the preferences of her constituents or the public interest" even if that money is not directly given to a candidate. This would enable the Court to embrace a broader definition of corruption that would allow for greater regulation of political spending.

The Slave State Origins of Modern Gun Rights

Eric M. Ruben and Saul Cornell

The Second Amendment has recently been used to bolster arguments against gun regulation, and now underlays challenges to laws that restrict carrying arms in public. But those interpretations of the Second Amendment rely on cases from the antebellum South, which represent less a national consensus than a regional exception rooted in the unique culture of slavery and "honor."

Gun-rights advocates have waged a relentless battle to gut what remains of America's lax and inadequate gun regulations. In the name of the Second Amendment, they are challenging the constitutionality of state and municipal "may issue" regulations that restrict the right to carry weapons in public to persons who can show a compelling need to be armed. A few courts are starting to take these challenges seriously. But what the advocates do not acknowledge — and some courts seem not to understand — is that their arguments are grounded in precedent unique to the violent world of the slaveholding South.

Public-carry advocates like to cite historical court opinions to support their constitutional vision. But those opinions are highly problematic.

Claims that "may issue" regulations are unconstitutional have been rejected by most federal appellate courts — that is, until last year, when a court in California broke ranks and struck down San Diego's public-carry regulation. This year, a court did the same with the District of Columbia's rewritten handgun ordinance. Both decisions face further review from appellate courts, and perhaps also by the Supreme Court. If the justices buy this expansive view of the Second Amendment, laws in states such as New York, New Jersey, Rhode Island, Massachusetts, and Hawaii with the strictest public carry regulations — and some of the lowest rates of gun homicide — will be voided as unconstitutional.

Public-carry advocates like to cite historical court opinions to support their constitutional vision, but those opinions are, to put it mildly, highly problematic. The supportive precedent they rely on comes from the antebellum South and represented less a national consensus than a regional exception rooted in the unique culture of slavery and honor. By focusing only on sympathetic precedent, and ignoring the national picture, gun-rights advocates find themselves venerating a moment at which slavery, honor, violence, and the public carrying of weapons were intertwined.

The opinion most enthusiastically embraced by public-carry advocates is *Nunn v. State,* a state-court decision written by Georgia Chief Justice Joseph Henry Lumpkin in 1846. As a jurist, Lumpkin was a champion both of slavery and of the Southern code of honor. Perhaps, not by coincidence, Nunn was the first case in which a court struck down a gun law on the basis of the Second Amendment. The U.S. Supreme Court cited Nunn in District of *Columbia v. Heller,* its

Eric M. Ruben is a Second Amendment fellow at the Brennan Center. Saul Cornell is a professor of history at Fordham University. This article, based on a piece the authors published in *The Yale Law Journal,* appeared in *The Atlantic,* September 30, 2015.

landmark 2008 decision holding, for the first time in over 200 years, that the Second Amendment protects an individual right to possess a handgun in the home for self-defense. Why courts or gun-rights advocates think Lumpkin's view of the right to bear arms provides a solid foundation for modern firearms jurisprudence is puzzling. Slavery, "honor," and their associated violence spawned a unique weapons culture. One of its defining features was a permissive view of white citizens' right to carry weapons in public.

As early as 1840, antebellum historian Richard Hildreth observed that violence was frequently employed in the South both to subordinate slaves and to intimidate abolitionists. In the South, violence also was an approved way to avenge perceived insults to manhood and personal status. According to Hildreth, duels "appear but once an age" in the North, but "are of frequent and almost daily occurrence at the [S]outh." Southern men thus carried weapons both "as a protection against the slaves" and also to be prepared for "quarrels between freemen." Two of the most feared public-carry weapons in pre-Civil War America, the "Arkansas toothpick" and "Bowie knife," were forged from this Southern heritage.

During the antebellum years, many viewed carrying a concealed weapon as dastardly and dishonorable.

The slave South's enthusiasm for public carry influenced its legal culture. During the antebellum years, many viewed carrying a concealed weapon as dastardly and dishonorable — a striking contrast with the values of the modern gun-rights movement. In an 1850 opinion, the Louisiana Supreme Court explained that carrying a concealed weapon gave men "secret advantages" and led to "unmanly assassinations," while open carry "place[d] men upon an equality" and "incite[d] men to a manly and noble defence of themselves." Some Southern legislatures, accordingly, passed laws permitting open carry but punishing concealment. Southern courts followed their lead, proclaiming a robust right to open carry, but opposing concealed carry, which they deemed unmanly and not constitutionally protected. It is this family of Southern cases that gun-rights advocates would like modern courts to rely on to strike down popularly enacted gun regulations today.

But no similar record of court cases exists for the pre-Civil War North. New research produced in response to *Heller* has revealed a history of gun regulation outside the South that has gone largely unexplored by judges and legal scholars writing about the Second Amendment during the last 30 years. This history reveals strong support for strict regulation of carrying arms in public.

In the North, publicly carrying concealable weapons was much less popular than in the South. In 1845, New York jurist William Jay contrasted "those portions of our country where it is supposed essential to personal safety to go armed with pistols and bowie-knives" with the "north and east, where we are unprovided with such facilities for taking life." Indeed, public-carry restrictions were embraced across the region. In 1836, the respected Massachusetts jurist Peter Oxenbridge Thacher instructed a jury that in Massachusetts "no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property." Judge Thacher's charge was celebrated in the contemporary press as "sensible," "practical," and "sage." Massachusetts was not unusual in broadly restricting public carry. Wisconsin, Maine, Michigan, Virginia, Minnesota, Oregon, and Pennsylvania passed laws modeled on the public-carry restriction in Massachusetts.

This legal scheme of restricting public carry, it turns out, was not new. Rather, it was rooted in a longstanding tradition of regulating armed travel that dated back to 14th-century England. The English Statute of Northampton prohibited traveling armed "by night [or] by day, in [f]airs, [m]arkets ... the presence of the [j]ustices or other [m]inisters" or any "part elsewhere." Early

legal commentators in America noted that this English restriction was incorporated into colonial law. As early as 1682, for example, New Jersey constables pledged to arrest any person who "shall ride or go arm'd offensively." To be sure, there were circumstances where traveling armed was permitted, such as going to muster as part of one's militia service or hunting in select areas, but the right of states and localities to regulate the public carrying of firearms, particularly in populated places, was undeniable.

Today, Americans disagree about the best way to enhance public safety and reduce crime, and that disagreement is voiced in legislatures across the nation. Throughout most of the country and over most of its history, the Second Amendment has not determined the outcome of this debate nor stood in the way of popular public-carry regulations. Then, as now, such regulations were evaluated based on the impact they would have on crime and public safety. At the end of this deadly summer, the debate rages on over how best to balance public safety against the interests of people who wish to "pack heat." If elected officials decide to restrict the right to carry to those persons who can demonstrate a clear need for a gun, present-day judges should not intervene on the basis of opinions about the right to bear arms from the slave South and its unique culture of violence.

As early as 1682, New Jersey constables pledged to arrest any person who "shall ride or go arm'd offensively."

The Rule of Law in Global Perspective

Justice Stephen Breyer

The Jorde Symposium, named for Brennan Center Board Member Thomas M. Jorde and hosted at UC Berkeley School of Law, is an annual event first created in 1996 to sponsor scholarly discourse about issues central to the legacy of Justice William J. Brennan, Jr. Last year's speaker was Justice Stephen Breyer, who discussed why American judges should take greater account of foreign laws in making rulings in an increasingly interdependent world.

If the Constitution does not write a blank check, what kind of a check does it write? Look through the opinion to see what that says about it. Nothing. I'll be honest with you, virtually nothing. And I say, why doesn't it say something? And I'll say, because we don't know. That's why. Because in fact there are many different situations. Beware of going too fast too quickly. You'd end up going too far too fast. Beware of that.

Now, we have not a solution, we have a problem. The problem is one that at least in my view could extend quite a long time with all kinds of threats that come from all kinds of different places in the world. Instead of a glorious suggestion, I just have an inglorious question. How do we answer this kind of question without knowing something about the security problems? How do we answer this kind of question without knowing something of what's going on in respect to security likely beyond our borders? Isn't it likely to be helpful in answering these kinds of questions, which I'd suspect we surely will have, to know something about how other countries with similar problems deal with it? Not because the other countries are right. They may or may not be but because knowledge of different methods of going about similar problems might help us reach a correct solution if there is no blank check. It might help us to fill it in a little better.

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Let's try commerce, that's pretty obvious. Commerce. Commerce is international. We have in front us the man from Thailand, Supap Kirtsaeng, a student at Cornell. He gets to Cornell on a scholarship and he discovers that the books in Thailand - the very same books - are much cheaper. So he writes home and asks his family to send him some. And they send him a few copies. Actually, they sent him quite a few more than a few copies. And he thought it's a very nice idea to sell them to others which he did and began to make a nice profit. The publishing company thought that was a bad idea and brought a lawsuit.

Excerpted from remarks by U.S. Supreme Court Justice Stephen Breyer, September 24, 2015.

Now, whether he can do that or not or whether it's stopped by something called the first-sale doctrine or permitted by the first-sale doctrine, that is a really technical copyright question, really technical. It's in there in the statute. I mean it is. So I get the briefs in my office. Briefs, that's what we read… There are briefs there from lawyers all over the world, from Asia, from Europe, businesses all over the place. I could not figure out why in this case, there are so many briefs from so many different people until I read a brief that said, you realize, I hope, that copyright today is not just a question, not just a question of books or film or music. Go buy a car. The car has software. The software has copyrights. Or go into a store, whichever one you want, and look at those products, they have labels. Many of those labels are copyrighted. And quite a few come from overseas.

So we are told by one brief that this case will affect $3 trillion worth of commerce. Even today, that's a lot of money, $3 trillion. And that's why all those briefs are there. There is no way, in my opinion — you can make up your own mind reading the opinions — but in my way there is no way to resolve that case satisfactorily without knowing something about the copyright laws and how they work in other countries and what the publishers are trying to do. Are they trying to divide markets and something about the other industry? That's going to take us well beyond our shores.

There is no way to resolve the case satisfactorily without knowing something about how laws work in other countries.

Or take an antitrust case — the man from Ecuador. The plaintiff sues the defendant, Dutch. What is he doing? He is a distributor in Ecuador of vitamins produced by a cartel, one member of which is Dutch and then mostly European but there is an American and he sues in New York. Now, why did he sue in New York? Maybe because if they were so expensive, this cartel raised all the prices and he was too weak to get to Europe. It's possible. Another possible reason, treble damages. Treble damages and attorney's fees. Can he or not? We have to interpret again some words that are pretty obscure, very obscure. We are given briefs by the European Union authority, antitrust authority, enforcers all over the world were trying basically to enforce slightly different but basically similar anti-cartel, anti-price fixing laws. And there is no way to resolve the correct interpretation of this American statute without knowing how they work so that we can reach an interpretation that allows those different enforcers to work together harmoniously and doesn't create chaos.

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Or if you want a different area, try Dolly Filártiga. Dolly Filártiga, here in the '70s from Paraguay. In New York, she sees the man from Paraguay who tortured her brother to death working for the dictator Stroessner. She finds the law passed nearly 200 years ago that says, an alien can bring a suit for a violation of the law of nations and recover damages. And she did and she did. She won. And she went back to Paraguay. She said, "I came to the United States to look the torturer in the eye and I came away with so much more."

But that statute then began to grow in terms of use. And more and more people found that they could fit their case into that statute because there are human abuses, human rights abuses throughout the world. And then the

question begins to arise more and more — well, how should it be interpreted? Who are today's pirates? More than that, what happens if an interpretation creates interference with the laws of other countries?

South Africa files a brief and says, "We are dealing with apartheid, its victims, and its perpetrators. We have truth and reconciliation, that's our method. And we do not want federal judges in New York or any other place in the United States interfering one way or the other." How do we interpret it to take that into account? How do we interpret it so this law which seems like a pretty good idea works out uniformly or roughly uniformly and doesn't keep getting in each other's way and causing infinite trouble in many countries of the world which may have somewhat similar or not quite similar or possibly similar laws?

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I understand what you're worried about. You're worried about, well, if we refer too much to what goes on abroad or the decisions of foreign courts undermine our basic American values, which are in that document, the Constitution, values such as democracy, human rights, rule of law, broad areas for trade. And what I'm trying to show you, that person who's objecting, in this book is, given the world as it is, the best way to preserve our American values is to participate. Take part. Find out what goes on elsewhere. Write your decisions in light of what goes on elsewhere in part where that's relevant and you will reach better solutions, solutions that help to preserve American values and work better for Americans and others.

And then my motive behind the motive, I think, is to say that's important for us to do because we're trying to prove something or at least take a step towards proving something. And that is we can help to ameliorate if not totally resolve the problems that will face all of you more than they will face me because they're going to continue and show that the rule of law or a law or a rule produced through fair methods can in fact help with those problems.

And then the motive underlying the motive underlying the motive is when Sandra O'Connor and I went to India. When we went to India, we were there on the day of 9/11. Emotionally, we saw what was happening on the television. The Indians were wonderful. The judges there were very sympathetic. So they figured out ways of continuing without having dinners and so forth, continuing our work. The lawyers were wonderfully helpful and the judges were. Everyone we met were sympathetic.

I came away with an emotional reaction that the important differences in the world are really not between different geographic areas or races or religions or nationalities but rather between those who believe there's a basic way of living and resolving human problems in a rule of law and those who don't, who think of more violent or other ways of solving problems. And we know which side we're on. But it's an important thing to prove even to some of the others that this rule of law and this system, complicated though it is of laws and rules and administrative efforts and even treaties and agreements and so forth, that it can help solve these problems. That it can help. That it isn't hopeless. That it isn't just I give up, let's try, et cetera. And I can't prove that either. But I hope someone reading this and getting some knowledge of how we on the Supreme Court are faced with problems thrown enough by the world, very concrete ones, how we are facing challenges are important, may possibly be solved or at least ameliorated, and that will help with what we believe in, the rule of law.

Right Result on Judicial Campaign Solicitations

Daniel I. Weiner and Matthew Menendez

At a time of rising spending in judicial elections, the Supreme Court's April ruling to uphold certain limits on judicial campaign fundraising was an important victory for court integrity. Since the decision touches on the intersection of First Amendment rights and campaign finance regulation, its logic could have implications for other kinds of election law down the road.

In a decision handed down on April 29 in *Williams-Yulee v. Florida Bar,* the U.S. Supreme Court upheld limits on the ability of judicial candidates to personally solicit campaign contributions, recognizing that such common-sense rules are often necessary to safeguard the integrity of the judiciary. The overwhelming consensus among commentators is that this result will have little if any short-term impact on the court's broader treatment of efforts to regulate money in politics, which it eviscerated in Citizens United and other cases.

The court focused on the integrity of the judiciary, but the integrity of our other democratic institutions is equally important.

For now, this conventional wisdom is probably right.

Over the long run, however, much of the court's logic with respect to judicial races could also apply to other kinds of elections. The court focused on the integrity of the judiciary, but the integrity of our other democratic institutions is equally important — and can also be compromised by out-of-control campaign spending bankrolled by a tiny portion of the electorate.

Lanell Williams-Yulee wanted to be a county judge in Hillsborough County, Florida, which is an elected position. She needed to raise money to run, so she sent a fundraising letter asking for contributions for the primary. There was just one problem: The letter violated a provision of Florida's Code of Judicial Conduct prohibiting judicial candidates from personally soliciting such campaign contributions (would-be judges can still form campaign committees to ask for contributions on their behalf).

Williams-Yulee claimed the prohibition violated her First Amendment rights. Given the Roberts Court's track record on campaign finance, she had reason to be optimistic that five justices would agree. In less than a decade, a narrow court majority has invalidated many other campaign finance laws designed to protect the integrity of our democratic institutions, ushering in an era of unprecedented election spending by super PACs and dark-money groups that can raise unlimited funds. As a consequence, our politics are increasingly dominated by a small coterie of incredibly wealthy mega-donors. Judicial elections have fallen victim to this same trend, and many observers thought that yet another domino was about to fall on the way to completely unregulated campaigns.

Integrity of the Judiciary

That didn't happen, thanks to Chief Justice John Roberts. He joined the court's four liberals to uphold Florida's rule, reasoning that it furthered

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the state's compelling interest in protecting "the integrity of the judiciary." Litigants who come before a court, he reasoned, are entitled to the "utmost fairness" and impartiality. They should not have to weigh a lawyer's political contributions before deciding whether to retain her. Because allowing judicial candidates to solicit contributions breaks the bond of trust between judges and the public, a state can appropriately choose to prohibit such conduct. Remarkably, this is the same John Roberts who, just one year ago in *McCutcheon v. FEC,* equated politicians' campaign contributors with constituents, and proclaimed that the use of large contributions to win preferential treatment from elected officials is a fundamental constitutional right.

Has the chief justice had a change of heart? Probably not. The Williams-Yulee decision rests on the premise that judges are unique. Judges, even when elected, "are not politicians," according to Roberts' opinion for the court. A judge "must be perfectly and completely independent, with nothing to influence or control him but God and his conscience." Politicians, on the other hand, are "appropriately responsive to the preferences of their supporters." In the real world, this is all too often the wealthy backers who bankroll their campaigns.

The court surely is right that judges should not be considered just another set of politicians. Something is uniquely troubling about lawyers and litigants using campaign donations to curry favor with those who might one day rule on their cases. For that reason, judicial candidates probably should be subject to more stringent restrictions than other people running for office.

Nevertheless, courts do not have a monopoly on integrity. Citizens have the right to be treated fairly in all their dealings with the government, not just when they come before a judge. And if judges can be unduly swayed by campaign spending on their behalf, plainly so can other officials. Just look at how much money major federal contractors spend on political donations to candidates. The reason they do so is obvious: to curry favor with those in a position to steer federal dollars in their direction.

To be sure, a certain school of thought sees nothing wrong with such money-driven "ingratiation and access" (as Roberts put it in McCutcheon), one that actually posits such practices as a core feature of our democracy.

But most Americans take a different view — and, until fairly recently, so did the court. As recently as 2003, a majority of justices held that using campaign finance laws to curb efforts to gain "undue influence" over elected leaders was entirely appropriate and constitutional. And although those justices recognized that balancing freedom of expression against the need to safeguard the integrity of our civic institutions is rarely easy, they were more inclined to let the American people and their elected representatives make the hard choices for themselves.

Williams-Yulee shows that even the current court has not entirely lost sight of such restraint. The decision doesn't mark a sea change, but it is certainly a reassuring step in the right direction — perhaps a bigger one than we realize.

Bankrolling the Bench: The New Politics of Judicial Elections 2013-14

Alicia Bannon, Allyse Falce, Scott Greytak, and Linda Casey; edited by Laurie Kinney

The latest in a groundbreaking series on judicial election spending by the Brennan Center, Justice at Stake, and the National Institute on Money in State Politics found that special interest money is flooding state Supreme Court elections, threatening the impartial justice the constitution promises. The series was cited four times by the Supreme Court in its Williams-Yulee *decision. It therefore serves as a powerful example of how new research can help win victories in the courts. But it also sounds a warning about the increasing politicization of judicial elections.*

Over the last decade and a half, state Supreme Court elections have been transformed into politicized and costly contests, dominated by special interests seeking to shape courts to their liking. The most recent 2013–14 cycle was no different, as the pressure of big money — increasingly reflected in outside spending by special-interest groups — threatened the promise of equal justice for all.

In the 23 contested state Supreme Court seats this cycle, 21 — or over 90 percent — were won by the candidate whose campaign raised the most money.

Thirty-eight states conduct elections for their highest courts. There are partisan and nonpartisan contested elections, where multiple candidates vie for a single seat. And there are judicial retention elections, where sitting justices face yes-or-no votes. In total, almost 90 percent of state appellate court judges must regularly be reelected. Elections mean campaigns, and campaigns cost money — as candidates, their campaign contributors, political parties, and special-interest groups all know.

Fundraising success was highly correlated with success at the ballot box this election cycle: in the 23 contested seats this cycle, 21 — or over 90 percent — were won by the candidate whose campaign raised the most money. Multiple factors likely contributed to this relationship, but research suggests that in judicial elections, both incumbents who were initially appointed, as well as challengers, gain electoral advantages from heightened spending.

The stakes are high for all of us. Approximately 95 percent of all cases initiated in the United States are filed in state courts, with more than 100 million cases coming before nearly 30,000 state court judges each year. State Supreme Courts, the final authority on state law, set legal standards

Scott Greytak is senior policy counsel and Laurie Kinney is director of communications and public education at Justice at Stake. Linda Casey is lead researcher at the National Institute on Money in State Politics. Excerpted from the report *The New Politics of Judicial Elections 2013-14*, October 28, 2015.

that determine individuals' and businesses' rights and liabilities. Their dockets address issues as diverse as education, the environment, contract and commercial disputes, voting rights, criminal justice, real estate, health care, and corporate accountability. Yet while these decisions affect people's everyday lives in significant ways, the culture of influence from well-to-do donors and special interests may threaten the ability of judges to deliver impartial justice. In 2013–14, state Supreme Court election spending took place in 19 states and exceeded $34.5 million — much of it coming from special interests. Overall spending was slightly lower than in other recent cycles because of an unusually high number of unopposed races. However, in states with the most expensive races, spending patterns were consistent with recent trends.

Since 2000, The New Politics of Judicial Elections series has told the story of the politicization of state Supreme Court elections, highlighting the news and trends that defined each election cycle. This edition goes deeper, connecting these spending numbers to particular interests and showing how individuals, industries, and special interests tried to shape the courts. From deep-pocketed trial attorneys in Illinois to a charter school advocate in North Carolina, this report looks at who stands to win — and who stands to lose — when money floods our courtrooms.

Here are the five big takeaways:

Outside Spending by Special-Interest Groups Made Up a Record Percentage of Total Spending

Spurred in part by the U.S. Supreme Court's 2010 ruling in *Citizens United v. FEC,* special interests are increasingly taking out their own ads and sponsoring other election materials in judicial races rather than contributing directly to candidates. In 2013–14, outside spending by interest groups, including political action committees and social welfare organizations, was a higher percentage of total spending than ever before, accounting for over 29 percent of total spending, or $10.1 million, topping the previous record of 27 percent in 2011–12. When outside spending by political parties is also included, the percentage rises to 40, a record for a non-presidential election cycle and just short of the all-time non-candidate spending record of 42 percent in 2011–12. Much of this spending came from groups that were not required to publicly disclose their donors, or who were not required to disclose their expenditures under state law, making it hard to discern the interests seeking to shape state courts.

Outside spending by interest groups was a record percentage of total spending.

Big Spenders Dominated

State court judges rule on cases that affect us all, but their campaigns are overwhelmingly supported by wealthy interests, enabling a system that may disproportionately elevate the preferences of wealthy spenders. The top 10 spenders this cycle, for example, accounted for nearly 40 percent of total spending nationwide. This economic power was even more concentrated when it came to television spending, as the top 10 TV spenders paid for

67 percent of total TV spending. Furthermore, in 15 of the 19 states where candidates raised money, a majority of their contributions came from donors who were willing and able to shell out at least $1,000 — a substantial figure in the context of relatively low-cost judicial elections. Nearly one-third of these direct contributions came from lawyers or lobbyists, many of whom could be expected to have interests before the courts.

"Tough on Crime" Was the Most Common Campaign Theme

National groups and their state affiliates spent an estimated $4.8 million on state Supreme Court races.

The politicking in judicial elections around criminal justice issues is intense. A record 56 percent of television ad spots this cycle discussed the criminal justice records of judges and candidates. These ads typically either touted a candidate's history of putting criminals behind bars or attacked them as soft on crime. Previous highs for criminal justice-themed ads compare at 33 percent in 2007–08 and 2009–10. While most of these ads were positive in tone (praising a candidate as "tough on crime"), criminal justice was also the single most common theme of attack ads. Overall, 82 percent of attack ads discussed criminal justice issues, including an ad that claimed one sitting North Carolina Supreme Court justice was "not tough on child molesters" and "not fair to victims." Who funds these ads? Often, groups with no demonstrable interest in criminal justice issues, suggesting that criminal justice may be used strategically as a wedge issue. The stakes are high: recent research suggests that the prominent role of criminal justice issues in judicial races may ultimately be influencing judicial decision-making.

National Organizations Continued to Target State — and Even Local — Races

Spending on state judicial elections is also increasingly nationalized. National groups and their state affiliates spent an estimated $4.8 million on state Supreme Court races, approximately 14 percent of total spending. (Because this figure excludes contributions by national groups to state organizations that did not spend exclusively on state Supreme Court elections, the real number is likely much higher.) While data limitations make comparisons over time difficult, several metrics, including an analysis of TV sponsorship, suggest that national groups paid greater attention to state Supreme Court races in 2013–14 than in other recent cycles. And though voters of all political persuasions care about the fairness of our courts, most of the spending by national groups targeting judicial elections came from the political right. The Republican State Leadership Committee (RSLC) led the pack, spending nearly $3.4 million across four state Supreme Court elections — as well as one county court race — through its publicly announced "Judicial Fairness Initiative." Other major spenders included the Center for Individual Freedom and American Freedom Builders.

Retention Elections Remained a Battleground for Special Interests and Partisan Politics

Retention elections, in which the public casts a yes-or-no vote for a sitting justice, have also become political battlegrounds in recent cycles. These races used to be fairly low-cost and low-attention affairs, and, on average,

many still are. But in a handful of states, retention campaigns have become intense, high-profile, and expensive — frequently in response to a decision in a controversial case or when there is an opportunity to change the ideological composition of a court. Average per seat spending in retention elections in 2009–14 reflects a tenfold increase from the average over the previous eight years. Overall, nearly $6.5 million was spent on retention races in four states in 2013–14. Multi-million-dollar elections in Illinois and Tennessee were some of the most expensive and contentious races this cycle. The trend puts new pressures on judges who had previously been largely insulated from politicized judicial elections.

The 2013-14 election cycle reflects pressing challenges for all those who believe we need to keep our state courts fair, impartial, and equitable for all: record levels of influence by outside spenders, increased political pressure from legislatures and governors, and a growing economy of influence that threatens to tip the scales of justice toward the wealthy and powerful and away from ordinary citizens.

A Political Depression

Chuck Todd

A changing economy, global insecurity, and other factors have divided our country. One of the keys to fixing that will be getting the best and brightest young people back to Washington.

We need to appreciate the fact that we are in a time of anxiety. Voters don't know exactly why they're concerned, but there's this anxiety out there. One big reason why it's out there is that Americans don't know what the middle class is going to look like next. If you look at our history, twice in the last 100 years we've had this tumultuous political situation. I think right now it closely resembles the story of 1964 to 1980, where in 1964 the Republican Party nominated somebody totally unelectable in Barry Goldwater, and in 1972 the Democratic Party nominated somebody totally unelectable in George McGovern.

For 12 straight years two-thirds of the country has said we're headed in the wrong direction.

What was going on at that time? We had social unrest, deep distrust of government, deep distrust over Watergate, over Vietnam. Well, sound familiar? The election of Jimmy Carter was something that nobody thought was possible in 1975. I've come to the realization you cannot assume anything with this electorate. For 12 straight years, two-thirds of the country has said we're headed in the wrong direction.

For about four years it was over Iraq, for about six years it was over the economy and Wall Street, and I think over the last three years it's on our political system. I think we're in a political depression.

There's three giant challenges that the next president has to look at. Number one is this economic anxiety. We don't know what we're going to make next. I'd like to say my glass is half full and to say 100 years ago, when we were transitioning from an agrarian to an industrial economy, if you go back to election statistics back then, we had a lot of tumultuous politics.

We had the rise of some third parties. We had Congress changing hands a lot. We had a lot of domestic migration. People were uncertain how this new industrial age was going to work for them and there was concern and there was nervousness and all those things. Well, we're at that same point now.

Chuck Todd, moderator of "Meet the Press" and political director for NBC News, delivered these remarks at the Brennan Legacy Awards Dinner, November 17, 2015.

The economy has gotten better but the public still remembers the Great Recession. And there is a small C conservatism that has gone on with the way people have been handling their own money, their own de-leveraging. And there is this concern about what are the next set of jobs going to look like, and we can't really yet picture what the service sector economy looks like.

The other part of the economic recovery that has gotten lost a little bit is that on the coasts it's going well. I always like to tell people, look at a road atlas. You go on I-95 from Miami to Boston, boy, things are going great. You go from I-5 from San Diego to Seattle, and things are great. But you go to a place like where my dad grew up, in Waterloo, Iowa, its economic engine was a meat packing plant and John Deere. The meat packing plant's gone.

Go to these middle America towns and see how many empty storefronts there are. John Deere is still in Waterloo, by the way, but they make a bunch of tractors in China. They have opened a casino though. So some great $9 an hour jobs in Waterloo. The point is, it is an uneven recovery, as what happened 100 years ago, which is why we had so much domestic migration.

The political marketplace for ideas is broken.

That is also why there is a great divide. Urban America does see a growing economy. Young people are moving to cities. There's real innovation that's going on. In smaller town middle America that's not happening, people are fleeing.

The second biggest thing is global insecurity. I think the next challenge for the next president is how does America use its superpowers. In the last 15 years we've had two presidents struggle to use them. They've tried using them in different ways and it doesn't feel to many Americans like either way works. I mean on the issue of foreign policy, President Obama is about to have the same approval rating as President Bush had in the same year.

They've managed the Middle East quite differently. But the result with the American public has been almost identical. That would be challenge enough for the next president.

But the biggest issue is our broken democracy and broken politics. And my biggest disappointment so far is how little attention this is getting in the presidential race. The political marketplace for ideas is broken. We now have politicians afraid of offering ideas because the minute they put it down on paper, an opponent will find the one thing to blow it up. It is so easy to kill a piece of legislation.

We have a core problem in Washington right now, which is the best and the brightest don't want to come and when they come, they can't wait to leave. Washington is not seen as a destination to get things done, it's not seen as a destination to make government work. There is a sense of hopelessness that has entered, and I'm really concerned that it's really entered into millennials and a whole new generation.

I was blown away in a negative way by a statistic I learned about a month ago about the federal government and civil servants. This is not even political appointees. Just 7 percent of the federal workforce is under 35. How are we ever going to have innovation in the federal government if millennials aren't working there?

Just 7 percent of the federal workforce is under 35.

But they don't see Washington as a place to come, and you sort of have to ask yourself why. Let's say you are among the best and the brightest. It will take you 20 years to get to a position to get anything passed, to get a bill through committee, whatever it is. More first-term senators don't run for re-election. A lot of House members, they maybe go two or three cycles, they get out. They realize they can't move up, they can't get anything done, Congress doesn't work.

We've got to get to where millennials want to come to Washington. We're at a generation that isn't excited about coming to Washington. They want to go to Silicon Valley. We've got to do a lot of things in the federal government to make it feel as if it touches the American public again, to restore that trust. I think it begins with restoring trust in the democracy. And when you restore trust in the democracy, that people think it's fair, that people think elections are competitive again, that people think anybody can, anybody can win if they're fully qualified to do it, then we've got to get a point where when you actually get into government you can get things done.

Recovering the Structural Harmony of the First Amendment

Burt Neuborne

In remarks drawing on his book, Madison's Music: On Reading the First Amendment, *Neuborne argues that Founding Father James Madison's dream of an egalitarian democracy has been replaced by the Supreme Court's "rootless" reading of the First Amendment, resulting in a "judge-made plutocracy."*

How does the modern Supreme Court read the First Amendment? Unfortunately, instead of seeking to read the entire 45 words of James Madison's First Amendment — the six textual clauses, punctuation and all - as a coherent whole that should function as democracy's best friend, a majority of the current Supreme Court tears 10 words — "Congress shall make no law abridging the freedom of speech" — from the First Amendment's full 45 word text, discards the three untidy words "the freedom of" as an inconvenient man-made legal concept that requires us to think a little too hard about what should be inside and outside "the freedom of" speech, and reads the remaining seven word text-fragment as though the entire First Amendment read: "Congress shall make no law abridging speech."

The resulting judge-made constitutional command is an immensely powerful, but ultimately rootless, First Amendment that mandates the deregulation of virtually all efforts to regulate the processes of communication, without accepting any judicial responsibility for the institutional consequences of a wholly unregulated speech market. Today, we live under an Imperial seven-word free speech clause that redoubles its deregulatory efforts, long after it has lost sight of its Madisonian goals.

For example, in a series of First Amendment opinions beginning in 1976 with *Buckley v. Valeo*, which held that spending an unlimited amount of cash to influence an election is a form of "pure speech" immune from effective government regulation, and accelerating since 2000 with decisions like *Citizens United* granting free speech protection to huge for-profit corporations seeking to leverage massive economic power into electoral control, and *McCutcheon v. FCC*, holding that the free speech clause assures the ultra-rich the power to contribute as much money as they wish to sway the outcome of a national election, as long as they spread the contributions around, the Supreme Court has construed the free speech clause as rendering it virtually impossible to deal effectively with the corrosive role of big money on American democracy.

Burt Neuborne, founding legal director of the Brennan Center, delivered these remarks as part of his inaugural lecture as the Norman Dorsen Professor of Civil Liberties at New York University School of Law, February 17, 2015. *Madison's Music* was published by The New Press.

The Court has even gone so far as to invalidate public financing schemes, like Arizona's, that use matching funds to seek to allow poorly-funded candidates to match the campaign spending of well-heeled candidates up to a point. Matching campaign subsidies, the Court ruled, unconstitutionally "penalize" the First Amendment right of the rich to spend as much money as they wish to win an election.

As a result, instead of the Madisonian dream of a well-functioning, egalitarian democracy, we live today in a judge-made plutocracy of "one dollar one-vote;" — a badly weakened democracy where the Supreme Court's rootless reading of seven words in the free speech clause assures the ultra-rich the power to dominate electoral politics, where legislators are expected to favor their large contributors, where rampant partisan gerrymandering distorts the fairness of our system of representative government, while virtually eliminating genuinely contested legislative elections from American political life; where fewer than half the eligible electorate actually votes — 38 percent in the most recent 2014 elections — the lowest turnout since 1942 when millions of men were away fighting WWII, reaching a nadir in New York State, with a 19 percent turnout in the gubernatorial election; and where cynics seeking partisan advantage place hurdles in the path of the weak and poor when they try to vote, and pack large number of black and Hispanic voters into so-called "safe minority districts" designed to waste their votes in an election that is never in doubt.

The sad truth is that, forced to operate under the harsh tutelage of a rootless free speech clause, American democracy functions today in an airless First Amendment box where the top 1/10 of 1% of the economic tree — about 5,000 American oligarchs — exercise massively disproportionate power over our electoral lives, and the rest of us endure what we must.

It doesn't have to be that way. The music of a functioning Madisonian democracy — Madison's Music — is present in the full text of Madison's First Amendment, if only we'll take the trouble to recover the ability to hear it.

Today, we hear only scraps of Madison's music. The Supreme Court reads the First Amendment, indeed the entire Bill of Rights, as a set of isolated words and phrases, as though the Founders threw a pot of ink at the wall and allowed the splatter to dictate the order and structure of our most important political text.

Worse, as I've noted, the current Supreme Court majority relies on a truncated seven-word Imperial free speech clause that eviscerates the independent roles of the press, assembly, and petition clauses in Madison's careful textual scheme.

The Court never asks why Madison begins the Bill of Rights with the First Amendment, or why he begins the First Amendment with two Religion clauses — Establishment and Free Exercise - that appear to point in different directions. The Court does not ask why the crucial free speech clause is in third place, and why press, assembly, and petition follow in that order. The relationship of the seventh, judge-made non-textual First Amendment right, freedom of association, to the six textual ideas is never even considered; nor is the question of whether other non-textual First Amendment rights — like the right to vote — are hiding in plain sight in the white spaces of the First Amendment, just waiting to be discovered.

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If we take the time and effort to hear the structural harmony of Madison's Music in the First Amendment, we can never tolerate a rootless free speech clause that functions, not as democracy's best friend, but as its very bad parent — a bad parent who imposes excessive discipline on reasonable, viewpoint neutral efforts to regulate campaign finance, but who is nowhere to be found when politicians gerrymander contested elections out of the system, and cynically prevent the poor from voting.

A First Amendment rooted in Madison's democratic music, would never mandate the domination of the electoral process by the ultra-rich, and by huge for-profit corporations.

A First Amendment rooted in Madison's democratic music would never allow the virtual elimination of contestable legislative elections from American political life.

A First Amendment rooted in Madison's democratic music would never tolerate cynical efforts to make it harder for the poor to vote.

A First Amendment rooted in Madison's structural recognition of the primacy of conscience in a functioning democracy would never tolerate a case like *Employment Division v. Smith* that requires the victims of religious intolerance by the government to prove that it was intentional in order to invoke the protection of the free Exercise clause.

A First Amendment rooted in Madison's democratic music would never tolerate a truncated seven-word Imperial free speech clause that eviscerates the independent roles of the Free Press clause, the Free Assembly clause and the Petition clause as guarantors of the proper functioning of crucial phases of an egalitarian democracy. A revived Madisonian Free Press clause would preserve the speech-amplifying role of a technologically-sophisticated free press in a functioning democracy, providing the press with a right of investigatory access to government information, substantial insulation from liability for merely disseminating the speech of others, but accepting viewpoint neutral regulation of powerful technological speech amplifiers when the regulation is needed to assure weak voices a chance to compete in a genuine free market in ideas.

A revived Madisonian Free Assembly clause would carefully protect the only speech that is really free — the ability of the poor to engage in body rhetoric, paid for by sweat equity, to assure consideration of their interests in the free market in ideas.

A revived Madisonian Petition clause would protect the right of the people to present a proposal to the legislature for formal enactment — it would allow the people, not the politicians, to set the legislative agenda, and make it possible for the people to pass judgment on the voting record of an elected representative.

LIBERTY & NATIONAL SECURITY

Democracy in the Dark

Frederick A. O. "Fritz" Schwarz, Jr.

In a new book, the Center's chief counsel reviews the long history of government secrecy, from the Revolutionary era to the Cuban Missile Crisis to 9/11. He concludes that while some control of information is necessary, our government has increasingly fallen prey to a culture of secrecy that harms our democracy.

"And ye shall know the truth and the truth shall make you free." These words, from the Gospel according to Saint John, are carved in large letters on the left- hand marble wall of the huge entrance lobby to the CIA's headquarters in Langley, Virginia.

I walked through that lobby in early 1975 on my way to a meeting with CIA Director William Colby. A young litigator, without previous ties to any senator or to the intelligence community, I had just been appointed chief counsel of the United States Senate's Select Committee created to undertake the first investigation of America's intelligence agencies — commonly known as the Church Committee after its chair, Sen. Frank Church of Idaho. I met Colby at a formal lunch in his conference room. A careful man who revealed little, Colby was checking on me and a colleague to see if we could be trusted to handle highly secret information. My first visit to the FBI's fortress- like headquarters had no such subtlety. No genial probing. No fancy meal. Instead, at the start, I was shown photos of severed Black heads on an American city street. The implication was clear: this was done by vicious killers; we protect America against such enemies; stay away from the secrets about how we operate. As it turned out, the CIA, the FBI, and the rest of the Ford administration, eventually cooperated with the Church Committee as it conducted the most extensive investigation of a government's secret activities ever, in this country or elsewhere. This eighteen-month investigation began my long- term interest in government secrecy.

Too much is kept secret not to protect America *but to keep embarrassing or illegal conduct* from Americans.

From the Church Committee, I learned three big lessons about government secrets. First, too much is kept secret not to *protect America* but to keep embarrassing or illegal conduct *from Americans.* Examples abound, including FBI efforts to drive Martin Luther King Jr. to commit suicide; the CIA enlisting Mafia leaders in its efforts to kill Cuba's Fidel Castro; and a thirty-year NSA program to get copies of telegrams leaving the United States. The Church Committee also discovered that every president from Franklin Roosevelt to Richard Nixon had secretly abused their powers.

Excerpted from the book *Democracy in the Dark*, published by The New Press, April 7, 2015.

The second lesson was that some government secrets are legitimate and worthy of protection. Indeed, one of the reasons the Church Committee succeeded, and the simultaneous House committee investigating intelligence agencies failed, is that we understood and respected the government's legitimate needs for secrecy for some information, while the House committee did not.

The third lesson was that the public must be informed when things go wrong — when agencies act illegally, improperly, or foolishly, and when presidents, other executives, or Congress fail in their responsibilities. Throughout the investigation, I pushed hard for disclosure, believing, as the Church Committee concluded, that "the story is sad, but this country has the strength to hear the story and to learn from it."

Human nature and bureaucratic incentives favor secrecy over openness.

With the committee, I saw my main job as exposing illegal and embarrassing *secrets* in order to build momentum for reform. Therefore, I did not then think deeply about the culture of *secrecy.* In recent years, there have been near-constant revelations about government secrets and secret programs. Now, with knowledge of a wide range of secrets and secret programs over the course of generations, including many that followed in the wake of 9/11, I use that knowledge to analyze and understand government secrecy and the ways in which its overuse undermines our experiment in democracy.

The subject of government secrecy is often viewed too narrowly. We focus on the classification system when we should also look at the underlying secrecy culture in which it flourishes. The American government operates within a secrecy culture that asks not how much information can be shared with citizens but instead decides to withhold from citizens information needed to exercise their role in our democracy. Far too much information is stamped secret, and then kept secret for much too long. Crown-jewel secrets must remain secure. But secrecy has too often been used to cover over costume jewelry. Where lies the boundary between legitimate and illegitimate government secrets? And when there is disagreement, who decides where the boundary should be drawn? Too often the country has been having the wrong argument. Instead of focusing only on the dangers of disclosure, the American public and government should give greater consideration to the dangers of secrecy.

Why does the secrecy system have such pervasive influence? And why is it so hard to limit? Sometimes, the motive is to conceal illegality or avoid embarrassment. But secrecy stamps are also often applied, and maintained, for more banal reasons. Human nature and bureaucratic incentives favor secrecy over openness. Secrecy is seductive. In addition, secrecy that causes harm is sometimes secrecy that was appropriate at the outset. To give just one example: the warnings sent to the White House in the summer of 2001 about "spectacular" al-Qaeda attacks were, at the outset, appropriately classified top secret. But as they accumulated into sustained and serious warnings, the White House should have made the gist of them public and distributed them to all government officials

responsible for protecting America against terror attacks. Had this been done, the 9/11 attacks likely would have been prevented. But the culture and seduction of secrecy is such that initial decisions on secrecy are rarely rethought.

It is expensive to maintain increasingly higher mountains of classified documents. The proliferation of secret documents also makes it harder to protect legitimate secrets. But the profligate use of secrecy stamps is a manifestation of a deeper problem tied to secrecy's many psychological attractions and the insulation and narrowness secrecy creates. The United States cannot have a flourishing democracy unless We the People are fully and fairly informed about our government. Yet for decades Americans have been living in a Secrecy Era in which the government limits public information about itself while simultaneously collecting more information about its citizens.

Secrecy and democracy have always been in tension. To appreciate openness, or government transparency — secrecy's rival — America must recall the aspirations of its democracy. In the Declaration of Independence, Jefferson said governments "deriv[e] their just powers from the consent of the governed." In the Federalist Papers, Madison said that, through voting, the people are the "primary control on the government." For American democracy to attain its aspirations, both our consent and our vote must be informed. But when excessive secrecy conceals acts of our government and obscures the character of our leaders, our consent and our vote become little more than window dressing. In his Gettysburg Address, eighty- seven years after the Declaration, 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. If it is, we become a democracy in the dark.

It might seem strange to link Dick Cheney's name with Jefferson's, or Madison's, or Lincoln's. But in 1987, in a hitherto unnoticed piece of policy advice buried in part of his lengthy dissent from Congress' *Iran- Contra Report,* then-Congressman Cheney extolled transparency and warned against excessive secrecy. While Cheney claimed presidents had "monarchical" powers to disregard congressional legislation, he also argued that the White House, if it is to have lasting success in dealing with hard foreign policy or national security issues, must engage in "democratic persuasion." As Cheney put it, "unless the public is exposed to and persuaded by a clear, sustained and principled debate on the merits" democratic persuasion cannot succeed. To succeed, a wise White House should not, in Cheney's 1987 view, have an "excessive concern for secrecy."

Later, as vice president, Cheney cast aside democratic persuasion and ignored his own caution against excessive concern for secrecy. Analyzing why Cheney abandoned his earlier views helps explain the seductive appeal of secrecy. But Cheney is hardly alone in changing his tune on secrecy. Other examples, from Woodrow Wilson to Harry Truman to Barack Obama, are chronicled throughout this book.

Secrecy is a hot topic today. It will continue to be. Former CIA employee and NSA contractor Edward Snowden's 2013 revelations about NSA operations reveal a preoccupation with secrecy in the highest levels of government and dramatize how a leak can force debate about what the government seeks to hide. Among the secrets Snowden exposed are that NSA was covertly collecting "metadata" — location data, duration, unique identifiers, and phone numbers for phone calls across America. The metadata program signaled a fundamental change in the relationship between the American government and the American people. Of course, the program raised questions about legality, about privacy, and about the balance between safety and secrecy in an increasingly connected world. But the NSA revelations raise a more fundamental point about government secrecy. Before George W. Bush veered in a new direction, and Obama continued to do so, the White House should have fostered an open democratic debate about the wisdom of the broad surveillance program.

Democracy is about more than holding elections, as we have learned throughout modern history, most recently from Egypt and Libya. America is lucky to have pillars that buttress real democracy, including free speech and a vibrant civil society. But unless our leaders are more open with the people and foster clear and public debates about major government policies — particularly those that fundamentally alter the relationship between government and citizen or drift away from our values and laws — America will continue blindly to depart from its founding ideals.

After putting secrecy in historical perspective, briefly examining secrecy and openness from the Garden of Eden through the British monarchy, and, at much greater length, in America from the founding to today, this book elaborates on America's Secrecy Era, detailing the seductive power of our secrecy culture, the dangers it poses to democracy, and the ways in which secrets are exposed, exploring the question of whether checks on secrecy are working. Openness is the antidote to secrecy. So this book devotes substantial attention to newspapers, muckraking journalism, and organizations that push for greater government transparency.

American democracy must confront its secrecy problem. The toughest problem faced by secrecy proponents and critics is where to draw the line. This book is meant to contribute to debate on that question. The book ends with some thoughts on possible guidelines with which we can distinguish between legitimate and illegitimate secrets and offers some encouraging signs that a cure to our secrecy problem is possible.

To Protect Our Privacy, Make the FISA Court Act Like a Real Court

Faiza Patel and Elizabeth Goitein

The authors examined the legal evolution of the Foreign Intelligence Surveillance Court and found that its problems — such as not publishing even redacted decisions — are far more than cosmetic. In many cases, it poses an active threat to Americans' constitutional rights. Fundamental changes in the law governing the court are necessary.

The expiration of key surveillance authorities this spring will force Congress to grapple with the sprawling spying activities exposed by Edward Snowden. Defenders of the status quo sound a familiar refrain: The National Security Agency's programs are lawful and already subject to robust oversight. After all, they have been blessed not just by Congress but by the judges of the Foreign Intelligence Surveillance Court, or FISA court.

When it comes to the NSA's mass surveillance programs, however, the FISA court is not acting like a court at all. Originally created to provide a check on the executive branch, the court today behaves more like an adjunct to the intelligence establishment, giving its blanket blessing to mammoth covert programs. The court's changed role undermines its constitutional underpinnings and raises questions about its ability to exercise meaningful oversight.

The FISA court was born of the spying scandals of the 1970s. After the Church Committee lifted the curtain on decades of abusive FBI and CIA spying on Americans, Congress enacted reforms, including the Foreign Intelligence Surveillance Act of 1978. The law established a special court to review government applications to intercept communications between Americans and foreigners overseas for the purpose of acquiring information about foreign threats.

Members of Congress debating the law were concerned about a court that would operate in secret and hear only the government's side of the argument. The Constitution limits courts to resolving actual "cases or controversies." This generally requires the presence of two parties with adverse interests, as well as a concrete dispute that allows the court to apply the law to the facts of the case.

Although even the Justice Department agreed it was a "difficult question," Congress decided that the FISA court procedure was constitutional because of its similarity to regular criminal warrants. There, too, the court hears only from the government, yet constitutional requirements are satisfied because the subject of the search eventually must be notified and may mount a challenge at trial. (The analogy is imperfect, as subjects of FISA surveillance are notified only if legal proceedings result, which is rare in foreign intelligence cases.) And, like their counterparts reviewing criminal warrant applications, FISA judges would apply the law to the facts of a particular case.

Nearly four decades later, the core assumptions about what made the FISA court legal have been upended. Take the court's role in approving the NSA's bulk collection of Americans' phone records. The Patriot Act allows the FBI to obtain business records if it demonstrates to the

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FISA court that they are "relevant" to a foreign intelligence investigation. As Snowden revealed, the FISA court accepted the government's argument that all Americans' records are "relevant" because some relevant records are buried within them. It allowed the NSA to create a massive database of highly personal information without any individualized offer of proof.

A similar abandonment of case-by-case adjudication resulted from the FISA Amendments Act of 2008. These amendments removed the law's requirement that the government obtain an order from the FISA court each time it collects communications between a foreign target and an American.

Judicial approval should be required each time the executive branch seeks to acquire an American's business records or communications with a foreign target.

Today, when collecting such communications, the government need only implement procedures to ensure the program adheres to broad statutory requirements. The FISA court's role is limited to approving these procedures; it has no role in judging how the government applies them in individual cases. Given the explosion in global communications, this means that millions of Americans' phone calls, emails and text messages are collected by the NSA, no individualized court order required.

These judicial activities look nothing like the granting of warrants in criminal investigations. Judges in criminal cases do not issue orders allowing police officers to search any and all houses, on the ground that some surely contain evidence of a crime. Nor do judges secretly approve general guidelines for searching homes, leaving the application of them to the discretion of police officers.

There are good reasons the Constitution charges courts with adjudicating disputes between parties rather than pre-approving broad government programs. It preserves the separate functions of the branches of governments. And it ensures that courts do not take on a role that they are ill-equipped to handle. Time and again, as the Snowden archives reveal, the FISA court was blindsided by how the NSA actually implemented the vast programs the court approved.

Lawmakers have introduced bills to require greater disclosure of FISA court decisions and to establish a public advocate to argue against the government in some cases. Though helpful, these measures would not fully address the fundamental problem: The FISA court simply does not act like a court anymore.

Congress can fix this when it tackles surveillance legislation. Judicial approval should be required each time the executive branch seeks to acquire an American's business records or communications with a foreign target. Challenging surveillance after the fact should be made easier too. That would require more robust disclosure and a dismantling of the jurisdictional barriers that stymie legal challenges to surveillance.

By shoring up the court's role as an independent check on the executive branch, these reforms will better safeguard Americans' privacy and prevent abuse. That was Congress' original purpose in creating the FISA court. After decades of drift, it's time to return the court to its constitutional moorings.

The Dystopian Danger of Police Body Cameras

Rachel Levinson-Waldman

After a year with numerous tragic and controversial encounters between police officers and civilians, an expansion of police-worn body cameras would seem to offer many benefits. But important questions remain about this technology's implications — particularly as it begins to creep into other uses.

Police-worn body cameras are the newest darling of criminal justice reform. They are touted as a way to collect evidence for criminal investigations, oversee and expose abusive police practices, and exonerate officers from fabricated charges. While the nation continues to debate how effective these body cameras are for police departments, less attention has been paid to the appearance of body cameras in other public sectors, most recently in our schools.

Since Michael Brown was shot by a member of the Ferguson, Missouri, police department last summer, at least 16 cities have introduced body camera programs. In the past month alone, at least seven cities have begun studying, initiated, or expanded body camera programs. President Obama has asked Congress to allocate $75 million for technology and training in body-worn cameras, and the Department of Justice recently provided the first $20 million in grants.

As these programs began to proliferate, schools took notice. In Houston, Texas, 25 school officers have started wearing body cameras in a pilot program, and the school district plans to expand the program to all 210 members of the force.

An Iowa school district has even taken this initiative one step further, buying cameras for principals and assistant principals to wear while interacting with students and parents. While the administrator overseeing the program has said the cameras are not intended to monitor every activity, he expressed the hope that any complaint could be investigated through body camera footage, suggesting that principals would need to record early and often.

The spread of body cameras into our schools may come as surprise to some, but it shouldn't. It is not unusual for surveillance technologies to leap from one world to another, or to be deployed for one purpose and gradually used for many more. Several examples tell the story.

The spread of body cameras into our schools may come as a surprise to some, but it shouldn't.

Local police departments have been making liberal use of a controversial new surveillance tool originally meant for terrorism investigations. Called Stingrays, these devices can ferret out the location of a target's cell phone in real time, often sucking up bystanders' phone and location information in the bargain. Police and the FBI frequently do not request a warrant to use a Stingray, and when they do, the applications are often so vague and misleading that judges may not know what they are approving. Most notably, while the money to pay for Stingrays frequently

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comes from federal anti-terrorism funds, they are routinely used for run-of-the-mill criminal investigations.

On the federal level, fusion centers are a prime example of mission creep. Originally meant to remedy the shortcomings in information-sharing identified after 9/11, fusion centers were supposed to focus narrowly on preventing future terrorist attacks. Faced (thankfully) with a shortage of terrorist threats, however, their goals were expanded to include "all hazards" and "all crimes," including combating thefts from bakeries. Indeed, a scathing 2012 Senate report found that the centers produced reports that were not only "shoddy, rarely timely, [and] sometimes endangering citizens' civil liberties," but also "more often than not unrelated to terrorism." Even the Department of Homeland Security inadvertently reinforces fusion centers' mission creep: the three "success stories" for 2014 touted on DHS's web page, while combating assuredly important crimes, have nothing to do with terrorism.

This history suggests that for body cameras — and any other surveillance technology — the right question to ask is not, "are we comfortable with this particular technology, used for the particular governmental purpose currently asserted, with the particular controls currently in place?" Rather, the more accurate and far-reaching question is, "what do we think of the other uses that might be spawned once this technology is introduced?"

For body cameras, it is already evident that they will be introduced in many more contexts than simply law enforcement. If they are being placed on principals, they will eventually be placed on teachers. If they are placed on teachers, they will eventually be placed on child care providers, and then on youth ministers, and so on and so on.

It is already evident that body cameras will be introduced in many more contexts than simply law enforcement.

The normalization of one kind of surveillance technology will also help hasten the normalization of other types. Indeed, the plans in both Iowa and Houston were justified in part on the fact that the school hallways are already lined with surveillance cameras — so why not add body cameras to the mix?

Body cameras may turn out to do exactly what their proponents are hoping: foster a more accountable police while improving behavior on both sides of the badge. But we cannot forget that when we approve a tool of surveillance for one purpose, we are simultaneously approving it for many other purposes as well, and we would do well to make that a part of the discussion.

Five Myths About Classified Information

Elizabeth Goitein

Much of the commentary about Hillary Clinton's private email account when she was secretary of state fundamentally misunderstands how the classification system works. The sad reality is that our nation's system for managing secrets is dysfunctional, with rules so vague and broad that they actually put national security at risk.

The controversy over Hillary Clinton's use of a private email account while she was secretary of state has centered on whether she used it to send or receive classified messages. This focus obscures the larger question of whether Clinton's setup affected the State Department's compliance with the Freedom of Information Act and legal requirements for federal agencies to retain records, as well as myriad other questions about agencies' information-management practices. Moreover, much of the commentary has been more confusing than illuminating, because it fundamentally misunderstands how the classification system works. Correct a handful of prevalent myths, and it's clear that this aspect of the story reveals more about our nation's dysfunctional system for managing official secrets than it does about Clinton.

1. Information can be "classified," even if no one has classified it.

Many news reports and commentators have suggested that "information is classified by [its] nature" (as Sean Davis writes in *The Federalist*), even if no agency or official has classified it yet. These accounts treat "classified" as a quality rather than an action — one that is inherent, immutable and self-evident. If information is sensitive enough, it's classified, no matter what.

When it comes to "original classification" — the initial decision to classify information — that portrayal is simply wrong. Under the executive order that governs classification, the 2,000-plus officials who have this authority "may" classify information if its disclosure reasonably could be expected to damage national security. The determination of harm is often highly subjective, and even if an official decides that disclosure would be harmful, he or she is not required to classify.

The nation's system for managing official secrets is dysfunctional.

Information provided by foreign governments in confidence is different. The executive order cautions that the release of such information is "presumed" to harm national security; the rules provide that such information "must be classified." There is a difference, however, between "must be classified" and "is classified." After all, when an official receives information, its source and the circumstances of its disclosure may not be apparent. This category of information is not self-identifying, let alone self-classifying.

An official who transmits that information without classifying it has violated agency rules. But the recipient now possesses information that someone else should have classified — not classified information. (Of course, classifying the information, then sending it through

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unclassified channels to a private email account also would be impermissible. Emails released by the State Department show that some of Clinton's correspondents dealt with this byasking to set up conversations over secure telephone lines.)

2. It's easy to figure out whether information has been classified.

There is a common refrain that Clinton "should have known" there was classified information in emails she got, even if it wasn't marked. As commentator Andrew McCarthy put it, "Classified information … is well known to national security officials to be classified — regardless of whether it is marked as such or even written down."

The classification rules treat this myth as if it were true. Once information has been classified by an authorized official, anyone who retransmits it must mark it as classified, even if it was not marked when received. This is called "derivative classification," and it can be performed by any of the 4.5 million individuals who are eligible to access classified information. They rely on "classification guides" — a kind of index of original classification decisions, mostly kept on secure Web sites — to determine what information has been classified and therefore must be marked.

Derivative classification is intended to be a straightforward, ministerial task. But the system breaks down in practice. The categories of information listed in guides are sometimes so broad or vague that they leave officials to guess whether any given piece of information has been classified. In 2009, President Obama ordered agencies to review their guides and purge outdated material, but his directive did not address the lack of specificity.

And while the number of original classification decisions is on the wane, there were still almost 50,000 new secrets created last year — on top of the 2 million created in the 10 previous years. It is virtually impossible to distill this sprawling universe of classified information into usable guidance. There are more than 2,000 federal classification guides, some of them hundreds of pages long. To expect every official to be thoroughly familiar with all the relevant guidance and apply it without error is simply unrealistic.

3. Anything classified is sensitive.

Many discussions of Clinton's email assume that all classified information deserves to be classified, often using the terms "classified" and "sensitive" interchangeably. The same assumption underlies frequent blanket statements by officials that "unauthorized disclosure of classified information jeopardizes national security."

In fact, the classification system is marked by discretion (intended) on the front end and uncertainty (unintended) on the back end. This lack of clear boundaries opens the door to a huge amount of unnecessary classification.

There are multiple incentives, unrelated to national security, to classify. It is easier and safer for busy officials to classify by rote rather than to pause for thought. Classification is a way for officials to enhance their status or protect agencies' turf. It can hide embarrassing facts or evidence of misconduct. There are no countervailing disincentives, as classification decisions normally go unreviewed, and agencies do not punish overclassifying. The result is massive overclassification, a phenomenon noted by experts and blue ribbon commissions for decades. Current and former government officials have estimated that 50 to 90 percent of classified documents could safely be released.

One need look no further than Clinton's own emails for evidence of this problem. In February 2010, Clinton's top foreign policy adviser emailed that he was unable to send her a statement by former British prime minister Tony Blair because someone had entered it into the State Department's classified system, "for reasons that elude me." Clinton responded incredulously: "It's a public statement!" Yet her adviser was unable to access it, let alone send it to an unsecured email address. Clinton also has come under fire for emails that referenced the CIA's "top secret" drone strikes in Pakistan — a program well known to our friends and enemies around the world.

4. Any mishandling of classified information is illegal.

Some 2016 presidential candidates have not hesitated to label the mishandling of classified information as criminal, with former Arkansas governor Mike Huckabee calling Clinton's actions "beyond outrageously illegal." Even an article in *The New York Times* stated flatly "Mishandling classified information is a crime."

In fact, in a nod to the complexities of handling classified information, the law criminalizes only violations that are "knowing," "negligent" or the like. The law falls short, however, in failing to give express protection to knowing releases of classified information by whistleblowers. The Obama administration has used the Espionage Act — a statute meant to target spies and traitors — to prosecute federal employees who revealed waste, fraud and abuse. Judges allowed these cases to go forward even though none of the defendants harmed or intended to harm national security.

The lack of protection for whistleblowers allows the government to graft its own "intent" requirement onto the law through selective prosecution. Those who seek to reveal government misconduct are prosecuted. Those who don't — including high-level officials who have acted carelessly, as well as those given tacit approval for leaks that cast the administration in a positive light — are not (or, in the unusual case of Gen. David Petraeus, are given a deal to avoid jail time).

This double standard has rightly been criticized. It should be eliminated, not by prosecuting every slip, but by focusing on actions that are intended and likely to harm national security — and by protecting disclosures that serve the public interest by revealing wrongdoing.

5. Our classification system protects us from harm.

This myth flows naturally from the assumptions that all classified information is automatically and self-evidently sensitive and that any release of classified information would compromise national security. "On hundreds of occasions, Hillary Clinton's reckless attempt to skirt transparency laws put sensitive information and our national security at risk," GOP Chairman Reince Preibus said last month.

Actually, it is our bloated classification system that puts our security at risk. Some classification is unquestionably necessary to keep the nation safe, but overclassification not only stifles public discussion and debate; it also discourages people from following the rules. Officials who routinely encounter innocuous information marked "top secret" lose respect for the system. They are more likely to handle information carelessly or even engage in unauthorized disclosures, believing that little harm will result. The danger is that the baby could get thrown out with the bathwater: A casual approach to classified information jeopardizes the real secrets buried within the excess.

It is easier and safer for busy officials to classify by rote rather than to pause for thought.

Overclassification also creates practical barriers to compliance. The procedures for storing, accessing and transmitting classified information are burdensome. That's a feature, not a bug: These logistical barriers not only prevent unauthorized access but also aim to keep the bar for classifying information appropriately high. But when onerous security measures must be followed to transact even the most routine official business, the burden can become untenable.

Indeed, departure from protocol is not uncommon. Clinton's emails revealed that career diplomats were sending foreign government information through unclassified channels. As one former intelligence official put it, "It's inevitable, because the classified systems are often cumbersome, and lots of people have access to the classified emails or cables."

Even those who scrupulously attempt to comply with the rules may find themselves unable to do

so. With so much classified information coursing through the system, it is simply impossible to avoid some spillage.

These problems could be solved. Meaningful limits could be placed on officials' discretion to classify, and an internal oversight system could be established to ensure that officials do not overstep these lines. Declassification could be made automatic after a reasonable time, rather than allowing agencies to create a bottleneck by conducting lengthy reviews. Shrinking the pool of secrets would make it easier to ensure that classified information is properly marked and protected, which would enhance national security and relieve the burden on busy officials. Without such measures, overclassification is sure to continue.

Remembering the Supreme Court's Abandonment of Torture Victims

Dorothy Samuels

The U.S. Supreme Court's refusal to hear several cases brought by Bush-era torture victims means it has abdicated its crucial oversight role envisioned by the Constitution, further harmed America's reputation around the world, and shut off one of the last remaining avenues for accountability.

The Supreme Court speaks not only through its rulings in cases argued before it, but also through its choice not to hear certain cases — the ones denied certiorari, in legal lingo.

By refusing to hear claims brought by victims of Bush-era torture and detention practices, and failing to decisively reject the government's array of bad excuses for denying them a modicum of justice, the Court in recent years has sent an appalling message of indifference and impunity.

By refusing to hear claims of torture victims, the Supreme Court has sent an appalling message of indifference and impunity.

These missing cases constitute a profound stain on the court's record, and they are worth recalling on this week's tenth anniversary of John Roberts' swearing-in as chief justice.

Consider, for starters, the Supreme Court's 2007 brush-off of Khaled el-Masri, an innocent German citizen of Lebanese descent who was kidnapped four years earlier while on vacation in Macedonia. Mr. Masri had been detained and tortured in a secret C.I.A. black site in Afghanistan as part of the George W. Bush administration's legally and morally deficient anti-terrorism program.

A lower federal appeals court dismissed Mr. Masri's civil lawsuit, wrongly bowing to the Bush administration's flimsy assertion that proceeding would risk revealing "state secrets." Mr. Masri then turned to the Supreme Court. Instead of grabbing the case and using it as a vehicle to rein in the Bush team's habitual abuse of state secret claims and perhaps lay out procedures for handling potentially sensitive evidence, the justices took a pass. Certiorari denied.

Then there's the awful saga of Maher Arar, an innocent Canadian seized by federal agents at Kennedy International Airport in 2002 based partly on bad information from Canadian officials. After being held incommunicado and harshly interrogated without proper access to a lawyer, he was shipped off to Syria, an example of the Bush administration's notorious "extraordinary rendition" program at work. Mr. Arar was tortured and held for almost a year in a grave-size underground cell before being let go.

After an investigation, the Canadian government formally apologized and paid him nearly $9.8 million. But the Supreme Court, unimpressed, could not muster the four votes necessary to hear

Dorothy Samuels is a Brennan Center senior fellow. She served for a record 30 years on *The New York Times* editorial board. This article appeared on The Huffington Post, September 29, 2015.

his appeal from an atrocious lower court ruling that quashed his civil rights lawsuit without any evidence being taken, holding that the Constitution provides no remedy for his horrible treatment. Certiorari denied.

Similarly, in 2011, the Supreme Court declined to take a case brought by five other individuals with credible claims that they were kidnapped and tortured in overseas prisons. The lead plaintiff, an Ethiopian citizen and resident of Britain named Binyam Mohamed, was arrested in Pakistan in 2002 and turned over to Moroccan interrogators by the C.I.A. His brutal treatment, he said, included having hot, stinging liquid poured on his penis after it was cut with a scalpel.

Mr. Mohamed's petition for Supreme Court review called on the justices to reject the Bush-think peddled by the Obama administration and embraced by a lower appellate court, which decided that allowing torture victims a chance to make their case in court using non-secret evidence would risk divulging state secrets. The justices' response: certiorari denied.

In another travesty a year later, the Roberts Court brushed off the conspicuously deplorable case of an American citizen named Jose Padilla. Arrested by the Bush administration in 2002 and declared an "enemy combatant," Mr. Padilla was transported to the Navy brig at Charleston, S.C., where he was held without charges for almost four years, during the first two of which he said he was denied contact with his family or lawyers.

During that period, Mr. Padilla alleged he was subjected to an extreme regimen of cruel and inhumane treatment, some of it indisputably torture. He told of being shackled for prolonged periods, forced into painful stress positions, and enduring sleep deprivation, physical roughing-up, deafening noises at all hours, exposure to noxious fumes and serious threats of further torture and abuse.

Notwithstanding that conscience-shocking litany, the Supreme Court couldn't find a place on its docket for Mr. Padilla's attempt to reinstate his wrongly dismissed civil action against former Defense Secretary Donald Rumsfeld and other officials for their roles in his unlawful detention and torture. Certiorari denied.

The cavalier move by the justices amounted to a grant of immunity for horrifying executive branch misconduct against an American on American soil. Mr. Padilla was eventually moved out of military custody and convicted, in 2007, of terrorism-related charges. But that did not alter his right to fair and decent treatment or the government's duty to provide it.

The cavalier move by the justices amounted to a grant of immunity for horrifying executive branch misconduct against an American on American soil.

It is likely that some members of the court voted against accepting these cases not for lack of caring about the apparent mammoth violation of rights but out of fear of a majority ruling espousing a dangerously expansive view of executive power in the national security sphere. Yet, no one commented or issued a dissent. And the fact that ducking the cases may have been sound strategy to avoid a rights-regressive ruling insensitive to torture victims does not make the Roberts Court look any better.

History will not look kindly on the court's missing-in-action performance here, which stands in marked contrast to its proud (pre-Roberts) decisions standing up for the rule of law by rejecting the argument that Guantanamo lies outside the reach of federal courts and establishing, over Chief Justice Roberts' dissent, that detainees there have the constitutional right to habeas corpus (which it has failed to defend, regrettably, against drastic narrowing in implementation by the Court of Appeals for the District of Columbia).

The Bush White House disgraced itself by authorizing torture and failing to comply with constitutional limits and Congress disgraced itself

by allowing it. But, as Jameel Jaffer of the ACLU says, "the signal failure at this point is the failure of courts to enforce those limits."

In swatting away the appeals of torture victims with serial denials of review, the Roberts Court abdicated its crucial oversight role envisioned by the Constitution, further harmed America's reputation around the world, and shut off one of the last remaining avenues for accountability.

Muslims and American Fear

Faiza Patel

The Justice Department has launched a new program to "counter violent extremism." Everyone can agree that preventing terrorism must be a priority. But this initiative, like previous instances of Muslim-American surveillance, is likely to fail. That's because it depends on the same faulty premise that one can find obvious signs of a budding terrorist.

As my kids have grown into teenagers, their behavior has changed. My daughter is less interested in hanging out with me and prefers sitting in her room glued to her computer. My son plays Nintendo war games. When current events are discussed in our home, we sometimes disagree vehemently. According to Homeland Security adviser Lisa Monaco, I should be on my guard because these might be signs that my kids are about to head off to join the Islamic State.

Sounds absurd, right? But that's the message to Muslim communities as part of the administration's initiative to "counter violent extremism."

The "countering violent extremism" effort risks placing Muslim youth on watch lists for normal teenage behavior.

In September, the Justice Department announced it was launching the program and piloting it in Boston, Los Angeles and Minneapolis. The stated aim was to bring together community, religious leaders and law enforcement to "develop comprehensive local strategies and share information on best practices" for countering violent extremism. Although the initiative doesn't mention the word "Muslim," those adherents are clearly the targets. The secretary of the Department of Homeland Security has promoted it to Muslim communities across the country. It has the support of the White House, which is hosting a summit on the topic this week.

Clothed in the language of community policing, the effort sounds like a kinder, gentler alternative to the well-documented surveillance of American Muslims. But it's unlikely to engender useful results because it's founded on the same faulty premise — that there are obvious signs that a person is about to become a terrorist. It also risks placing Muslim youth on watch lists for normal teenage behavior.

Like its previous iterations, the current initiative seems to be premised on the disproven theory that there are discernible pre-terrorism indicators in everyday behavior. The Federal Bureau of Investigation and the New York City Police Department have created lists of behavior that they think indicate someone is heading toward terrorism in the name of Islam: going to the mosque, wearing traditional religious clothing, participating in Muslim social or political groups, even growing a beard. This is all nonsense.

These so-called indicators of terrorism have long been discredited by empirical studies. There is no profile of someone who will become a terrorist and no reliable way to predict who will turn to violence.

This article appeared in the New York *Daily News,* October 25, 2015.

Now, the administration is embracing another untested theory: that parents will be able to tell when their children are in danger of becoming terrorists. In some cases, of course, parents might legitimately be concerned about their child. But there's a big difference between suspicion that your son is about to commit a crime and worrying that he seems distant and disengaged.

Social workers, teachers and others charged with countering violent extremism will also be asked to judge whether somebody is likely to become a terrorist. While some of the factors identified as relevant make sense (for example, a significant history of violent behavior), most are commonplace in a wide swath of young people. Feeling "unjustly treated," ''withdrawn" and having "no connection to group identity" pretty much describes my teenage years.

The current initiative is not just pointless; it may be harmful. By pulling in teachers and social workers, it expands the pool of agencies that relate to Muslims only in terms of security.

A similar approach was tried in England, where a program named "Prevent" required teachers and social workers to identify kids they considered to be "cognitive radicals" so those youths could be given "mentoring and tailored interventions" to divert them from their extremist ideas. While Prevent still limps along, it's hardly a model of success.

If the government really wants to partner with Muslim communities, it should address their concerns about ensuring these programs won't target speech or belief.

If the government really wants to partner with Muslim communities, it should tell them about the difficulty of distinguishing between a troubled teen and a potential terrorist. It should address their concerns about ensuring that programs won't target speech and belief. Rather than simply saying that these programs won't be used to spy, the agencies involved should share the policies and procedures that ensure that community outreach and intelligence work will be kept separate. They should also make clear when they will move from outreach to prosecution.

While everyone can agree that preventing terrorism is a priority, the government should embrace truth and transparency to build relations with Muslim communities rather than pushing unproven psychobabble.

To Keep the FBI Accountable, Protect its Whistleblowers

Michael German

Brennan Center Fellow Michael German was a special agent with the Federal Bureau of Investigation, specializing in domestic terrorism and covert operations. He left the FBI in 2004 after reporting deficiencies in FBI counterterrorism operations to Congress. German found no effective avenue within the Bureau to report those findings. In March, he testified before the U.S. Senate Judiciary Committee on improving protection for FBI whistleblowers.

Congress must ensure FBI employees are protected for chain-of-command disclosures and disclosures to Congress.

At his nomination hearing, FBI Director James Comey said whistleblowers were critical to a functioning democracy. He argued that "[f]olks have to feel free to raise their concerns, and if they are not addressed up their chain-of-command, to take them to an appropriate place." This sounds good, but any agents who follow his advice would not be protected under the Justice Department regulations governing FBI whistleblowers. These regulations require FBI employees to bypass the normal chain of command and report misconduct only to a handful of high-level officials in order to receive protection. In the field, the lowest ranked official authorized to receive protected disclosures is a Special Agent in Charge (SAC).

Compelling the Justice Department to protect whistleblower disclosures to supervisors is an essential reform.

I can't overstate how difficult it would be for an agent to break protocol and report directly to an SAC. I served as an FBI agent for 16 years, was assigned to three different field offices, and worked undercover investigations in at least three more. In all that time, I had no more than ten personal audiences with an SAC, none of which occurred at my request. If I asked for a meeting with the SAC, he or she would immediately call the Assistant Special Agent in Charge to find out what I wanted, who would then call my supervisor with the same question, who would then call me in to ask what the heck I thought I was doing. My experience as an FBI whistleblower demonstrates how difficult it is to follow these procedures, and how illusory the protections are in reality.

Compelling the Justice Department to protect whistleblower disclosures to supervisors is an essential reform necessary to ensure FBI employees will report internal waste, fraud, abuse, mismanagement, and illegality that might threaten both our security and our civil liberties. Likewise, explicitly protecting disclosures to Congress will ensure that FBI employees will feel comfortable providing their elected representatives with information necessary for them to satisfy their constitutional oversight obligations.

Excerpted from testimony before the U.S. Senate Committee on the Judiciary, March 4, 2015.

Congress should ensure FBI whistleblowers receive a timely, independent investigation of their retaliation complaints.

The current Justice Department regulations give the Inspector General discretion to hand responsibility for whistleblower retaliation investigations back to the FBI Office of Professional Responsibility or the FBI Inspection Division. A 2009 Inspector General audit of the FBI's disciplinary processes "found problems with the reporting of misconduct allegations, the adjudication of investigations, the appeals of disciplinary decisions, and the implementation of discipline that prevent us from concluding that the FBI's disciplinary system overall is consistent and reasonable." FBI whistleblowers should not have to depend on inconsistent and unreasonable investigations of their complaints.

Congress should require the Justice Department to utilize Administrative Law Judges and procedures in adjudicating whistleblower retaliation complaints, subject to judicial review.

All FBI whistleblowers should have the right to go to federal court to enforce their rights once administrative appeals are exhausted.

The Justice Department's regulatory process for adjudicating FBI whistleblower complaints is insufficient to meet its statutory requirements to provide relief "consistent with" the Whistleblower Protection Act. The Office of Attorney Recruitment and Management (OARM) simply is not an independent and impartial adjudicator, and its processes lack the transparency and regularity necessary to ensure due process. As the American Civil Liberties Union and the National Whistleblower Center argued in a 2013 briefing memo to the Attorney General, FBI whistleblowers should be afforded a full, on-the-record hearing before statutory Administrative Law Judges, and all proceedings should comply with Administrative Procedures Act (APA) standards. Reasonable time periods for adjudication and rulings should be established. All decisions should be published, subject to redactions necessary to protect the privacy of claimants and witnesses, so that litigants have equal access to precedential opinions. The adjudication delays the GAO documented and the lack of transparency under the current regulatory procedures amount to an effective denial of due process for too many FBI whistleblowers.

Like other federal employees, all FBI whistleblowers should also have the right to go to federal court to enforce their rights once administrative appeals are exhausted. FBI employees reporting violations of their rights under Equal Employment Opportunity laws regularly adjudicate their cases in federal court without imperiling national security. There is no reason to believe federal courts couldn't take adequate measures to protect sensitive information during FBI whistleblower cases as well.

Concerns regarding the Justice Department's proposed amendments to FBI whistleblower regulations.

While several of the Justice Department's proposed amendments to the FBI whistleblower regulations are welcome and may significantly improve outcomes for FBI employees reporting misconduct, a few raise concerns. For

instance, giving OARM the power to sanction litigants who violate protective orders is unnecessary and potentially risky, given the lack of transparency and accountability over OARM decision-making in FBI whistleblower claims. In a worst-case scenario, OARM sanctions against a litigant might even amount to an unlawful reprisal against a whistleblower seeking relief. Where litigants before OARM engage in misconduct related to OARM proceedings, OARM can simply refer the allegations to the appropriate disciplinary authority. Likewise, Congress should examine closely the Justice Department's proposal to establish a mediated dispute resolution program for FBI whistleblower cases. While exploring alternative dispute resolution options is always attractive, and may provide an avenue for addressing some whistleblowers' concerns, such positive outcomes require good faith that is too often absent in these cases. FBI officials should not need a mediator to tell them they shouldn't retaliate against FBI employees who conscientiously report waste, fraud, abuse, mismanagement or illegality within the Bureau. It is the law. If FBI and Justice Department leaders allow agency managers to ignore the law in favor of misplaced institutional loyalty, it is hard to imagine mediators can convince them to follow it. However, if combined with effective investigatory and adjudicatory reforms, a mediation process could afford all parties with an alternative to litigation. For mediation to work, FBI managers and employees must have confidence that the FBI whistleblower protection mechanisms are effective, timely, and accountable.

For the first time, the Justice Department is acknowledging its procedures in FBI whistleblower reprisal cases needs reform.

Conclusion

I believe the Justice Department's review of its regulatory performance in FBI whistleblower matters provides a unique opportunity for Congress to act. For the first time, the Justice Department is acknowledging its procedures for investigating and adjudicating FBI whistleblower reprisal cases are not as effective as they should be, and need to be reformed. The GAO study adds substantial evidence to support this conclusion. The door is open for Congress to enact legislation that would codify reforms that will finally provide the protections that the hard-working and conscientious FBI employees deserve. Protecting FBI whistleblowers will help ensure the FBI remains as effective and accountable as it possible.

Why We Have the Fourth Amendment

Michael Price

The tragic terrorist attacks in Paris have fueled a renewed debate on counterterrorism and government surveillance — and should prompt Americans to reflect on the Revolutionary-era roots of the protections laid out in the Fourth Amendment.

The Paris attacks have fueled a debate over surveillance on both sides of the Atlantic that, while not new, has reached a level of hysteria that I have not witnessed since the weeks and months following 9/11. There is great cause for grief and great cause for concern over whether those horrific events could have been prevented. But in our desire to prevent such a tragedy at home, it is vital for Americans to remember the values that drove the birth of our nation, and to guard them jealously. It is not "handwringing" to fret over the future of privacy rights, religious freedom, and free speech. At a time when the British government has spent months discussing its desire to implement a "Snooper's Charter" and ban strong encryption, we would do well to remember that the Brits are the reason we have the Fourth Amendment (and the First), rather than echoing their arguments for broader surveillance powers.

It is not "handwringing" to fret over the future of privacy rights, religious freedom, and free speech.

The UK may have a spell on us. In recent days, U.S. officials have exploited the Paris attacks to demand increased surveillance in the U.S., reflexively regurgitating UK proposals already rejected by the White House. CIA Director John Brennan called for the easing of the post-Snowden reforms to U.S. surveillance practices. Former CIA Director James Woolsey and former NSA chief Mike McConnell have been vocal advocates for more electronic surveillance, while local officials in New York City have renewed their calls for an end to strong data encryption, as in the United Kingdom. Prominent members of Congress have joined the surveillance bandwagon, as have some presidential candidates. The idea is to force big technology companies to build security flaws into their software — aka "backdoors" — that facilitate government surveillance. Of course, those flaws also facilitate unauthorized access by criminals and other non-state actors.

Also courtesy of the UK and other parts of Europe comes the idea of "soft surveillance," better known stateside as Countering Violent Extremism (CVE), which aims to have community members and schoolteachers identify would-be terrorists using a vague set of "risk factors" developed by law enforcement. The notion has appeared in various iterations since 2007, but all of them rest on a debunked and overly simplistic, conveyer-belt theory of radicalization with no basis in empirical evidence. Still, the theory has gained traction in the U.S. with official pilot programs launching in Los Angles, Boston, and Minneapolis-St. Paul. Unsurprisingly, community groups have

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had difficulty connecting with law enforcement following previous surveillance incidents masquerading as outreach. Civil rights advocates (including the Brennan Center, my employer) regularly question whether the models track Muslim stereotypes better than would-be terrorists. (We have more than a half-dozen public records requests pending for additional information about CVE programs, the specifics of which are generally not known, almost all of which are approaching a year old.)

Europe is not always a good model for the U.S. when it comes to balancing civil liberties and security.

The takeaway is that Europe is not always a good model for the U.S. when it comes to balancing civil liberties and security. The French, for example, have implemented a three-month state of emergency, complete with warrantless home searches, following on the heels of the most expansive surveillance charter that Europe has seen in decades. Those French laws, enacted in the wake of the Charlie Hebdo attacks, brought newfound surveillance authority that sadly did not prevent the most recent disaster in Paris. The proposed powers granted by the "Snooper's Charter" would be similarly sweeping and most likely, equally unhelpful. These new UK powers would, however, be sure to expand intrusive surveillance and violate human rights principles.

Thankfully, we as Americans have a bit of experience calibrating the balance between liberty and national security. In fact, it's pretty central to the birth of our nation (and we weren't taking pointers from the British then, either). So, at some point (i.e., 1789), we decided to write these principles down, for seemingly obvious reasons (despite what some presidential candidates have argued). And for our current purposes, there are a couple of important parts to remember:

The First and Fourth Amendments were a product of colonial revulsion toward "writs of assistance" and "general warrants" used by agents of the British Empire, as I recount in a recent law review article. The Fourth Amendment was designed to guard against the kind of arbitrary and invasive searches and seizures that were systematically used to suppress dissent in England. John Adams and the Sons of Liberty found common cause with British dissidents like John Wilkes and set out to craft a broad prohibition on unreasonable searches and seizures in the Massachusetts Declaration of Rights that specified "papers" as a category worthy of special protection. Adams's language is widely credited as the basis for the Fourth Amendment.

In short, the British are the reason we have a Fourth Amendment, which guarantees freedom from government surveillance in the form of unreasonable searches and seizures. And lest we forget, the British are the reason we have a First Amendment too, which guarantees the right to freedom of worship, assembly, and speech. These are fundamental American values that must not be bartered away for the snake-oil promise of perfect security, which is simply not possible. Mass surveillance will not make us more secure, as the Paris attacks demonstrated. And blanket surveillance of American-Muslim communities is not only ineffective, it's also unconstitutional (as the Third Circuit recently reminded us).

We all want to feel safe and secure and the intelligence community undoubtedly has an important job to do. But as Americans, we are also committed to a few basic values that we do not fail to mention time-and-again from atop our shining city on a hill — liberty being chief among them. We may debate about the merits of a particular policy, but at the end of the day (at least in theory), we will always march to our own, exceptional drum.

So this Thanksgiving, I'm thankful that what was good enough for the British was not enough for the Founding Fathers. And don't forget to give thanks to King George III — without him, we wouldn't have a Fourth Amendment.

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