DEMOCRACY & JUSTICE COLLECTED WRITINGS BRENNAN CENTER FOR JUSTICE

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The Brennan Center for Justice at NYU School of Law

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

About Democracy & Justice: Collected Writings 2016

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 2016 and 2017. The volume was compiled and edited by Jeanine Plant-Chirlin, Jim Lyons, Erik Opsal, Jessica Katzen, Naren Daniel, and Raffe Jefferson. For a full version of any material printed herein, complete with footnotes, please email jessica.katzen@nyu.edu.

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Introduction from the President

This is an unnerving time. For too long America's dysfunctional democracy failed to address economic inequality and surging social change. In 2016, public anger finally erupted, in startling ways. Now, in 2017, we must wage a great fight to protect core American values: Democracy and freedom. Equality and the rule of law. The Constitution itself.

It's the fight of our lives.

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to strengthen the systems of democracy and justice. We're part think tank, part legal advocacy group, part communications hub. We're independent and rigorous.

This volume offers a taste of our work from 2016 and early 2017.

That work is more vital than ever. We are deeply engaged in the drive to protect the right to vote, to ensure fair and free elections, and to expose corruption and self-dealing. We work to end mass incarceration, and for counterterrorism policies that respect freedom and reject bigotry and Islamophobia. We are working to strengthen the checks and balances that can curb executive abuse.

We aim to be a vibrant hub for innovative reforms. Our plan for automatic voter registration, for example, is being implemented in six states and Washington, D.C., with growing bipartisan support.

In all of this, we reject the glib notion that this is a "post truth" era. Facts matter.

Two decades ago, the Center was launched in honor of the late U.S. Supreme Court Justice William J. Brennan, Jr. He once said, "The Constitution will endure as a vital charter of human liberty as long as there are those with the courage to defend it, the vision to interpret it, and the fidelity to live by it."

Thank you to our Board, supporters, and staff colleagues who strive to live up to those values in this time of testing.

Michael Waldman
President

Democracy & Justice: Collected Writings 2016
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THE NEW ERA: 2017

America Has Entered Unmapped Territory

Michael Waldman

One week after the November election, the Brennan Center's president told a New York City crowd that the time for shock was over — that now is the time to renew a commitment to "the great fight for our Constitution."

It is wonderful to be with you tonight at a moment of celebration and community.

Typically, I would tell you about our successes over the past year. We would take pride in the work we all did to protect the right to vote. Six hundred thousand in Texas alone. We would tell you that six states have now enacted automatic voter registration — including, last week, deep-red Alaska. We would tell you that our coalition of law enforcement leaders had become a powerful force for criminal justice reform. We have so much of which to feel proud.

We must bolster the courts, the media, civil servants, and civic organizations — that can act as a bulwark against abuse.

But this is no ordinary time.

America has entered unmapped territory. This isn't the first ugly time in our history. We've had slavery, and segregation, and the Know-Nothing movement against immigrants. We've had backlash before; economic turmoil before. Our Founders worried about times like this. James Madison, during the constitutional convention, warned that voters might "become the tools of opulence and ambition." And it's not the first change in administration. I've lived through a few.

This is different. This time the fabric of our democracy itself is stretched tight.

Think of what just happened. In this election, a nativist faction seized first one of our great political parties, and then won a low-turnout election despite losing the popular vote. This faction gives voice to a toxic mix of racism and xenophobia. But it laid bare a deep and abiding rage toward an out-of-touch political system and widening inequality.

Now we see the first consequences. A white nationalist installed in the office next to the Oval Office. A vow to seize and imprison and deport up to 3 million people — immediately. A renewed pledge to block Muslims from entering the country. A surge in hate crimes and violence.

Remarks from the *Brennan Legacy Awards Dinner,* November 15, 2016.

Folks, this is not normal. This is not a drill. The values we cherish — freedom and equality, democracy and the rule of law — are at risk. Many of us — many of our fellow Americans — are feeling fear, even terror.

So what can we do about it?

First and foremost, tonight you have our pledge: We will fight for our Constitution.

When the right to vote is under assault, not just in states but for the first time in years in the halls of Congress — we will fight back.

When minority groups are under attack, facing Islamophobia and discrimination, we will fight back.

When the presidential bully pulpit is used … to bully, we will fight back.

The Brennan Center is committed to protecting the system of strong checks and balances, and will do our part as a "check." We must bolster and stiffen the spines of those institutions — the courts, the media, civil servants, and civic organizations — that can act as a bulwark against abuse.

But we need to do more than that. All around us, old alignments are scrambled and old arrangements are fracturing. That's the very moment when fresh thinking and new ideas can take flight. As Lincoln said, "As our case is new, so we must think anew, and act anew."

For years, I've heard that voters don't care about political reform. Not any more. This year millions of people in both parties rejected a politics dominated by a tiny few, by dark money and super PACs. We will fight for reform and constitutional change. And we will shine the light of accountability on Donald Trump's Washington.

Rigged elections? Let's talk about gerrymandering. We are moving forward as the hub of an exciting litigation campaign to challenge partisan gerrymandering before the U.S. Supreme Court. Even now, even today, we have every reason to believe that we can uphold the true meaning of one of Justice Brennan's greatest legacies — one person, one vote.

And we will continue to work with a broad and growing bipartisan movement to end mass incarceration — the great racial injustice of our time. You've heard our definitive research: There is no massive crime wave. We can reform our laws and keep our communities safe.

In all this work, we need you. We need your help. We need your passion. We are grateful to you for being here, and for all the pro bono work, for all you do in your own lives and with other groups to fight for what is right.

It was exactly one week ago, about now, that a lot of people here saw an election result they did not expect and did not welcome. So many people have spent the week since wondering about the country and their place in it. Well, the time for shock is over. The time for anxiety is over. The great fight for our Constitution is on.

This is not a new fight. It's the oldest and greatest fight — the fight to make our country live up to its true and best self, as the poet Langston Hughes said — to let America be America again.

Executive Power Watch: A Blueprint for Accountability

Wendy Weiser

At no time in the modern era has a presidency posed such direct challenges to American democracy. President Trump has already broken unwritten norms of conduct meant to protect against corruption and abuse — at a time when executive branch authority is at its peak. In early December, as the Center began to rethink its work in light of the new political era, a discussion memo set the tone for a conversation on the kinds of tools we can use to protect the Constitution.

This memo catalogs the potential abuses of executive power we hope to protect against, the checks in our system against executive overreach, and the sources of norms and rules to rein in such overreach. It is intended to stimulate thinking on how we can best address and protect against abuses of executive authority in the coming years. It is not meant to be a comprehensive list; it's aim is purely to stimulate discussion and fresh thinking.

Abuses we are worried about (categories not mutually exclusive):

- Conflict of interest, executive decisions to advance personal aims
  - E.g., foreign relations actions to benefit Trump business interests abroad

- Abuse of regulatory authority to advance partisan or private aims
  - Pressing unreasonable interpretations of the law through rule-making, guidance, etc.
  - Rewarding allies with contracts, favorable rules, approvals, exemptions/punishing opponents (e.g., FTC, FCC, IRS, etc.)
  - Imposing unreasonable conditions on the receipt of federal funds

- Abuse of litigation enforcement authority to advance partisan or private aims
  - Suing opponents/adversaries
  - Investigations (including audits), enforcement actions, subpoenas, harassing discovery
  - Selective enforcement of regulations for partisan or private benefit, including to target opponents
  - Pressing unreasonable interpretations of the law through threatened litigation, direct suits, or amicus briefs

This memo was circulated to Brennan Center staff, December 13, 2016.

- Abuse of law enforcement authority to advance partisan or private aims
  - Spying on opponents/adversaries
  - Suppressing dissent
  - Harassing opponents
  - Intimidating voters

- Abuse of government resources to advance private or partisan aims
  - Using government mail for campaigns or to promote private business or other interests
  - Using government communications

- Abuse of information and undermining independence
  - Destruction or altering of public data
  - Misuse, including selective release, of personal or proprietary information to intimidate, embarrass, or otherwise harm opponents

- Refusal to accept checks on authority
  - Flouting court rulings and consent decrees
  - Undermining judges through public pressure and political threats
  - Ignoring congressional subpoenas or oversight hearings
  - Pressuring/attacking those who attempt to criticize or limit authority, including the press and watchdog groups
  - Undermining IGs, ethics officers, CIA, career civil servants in government
  - Destruction of independent thought through firing and hiring decisions, threatening dissenting staff, questionnaires designed to enforce ideological purity
  - Dismantling rules or norms that provide a check on authority

Methods of checking executive power:

- Courts (enforcing constitutional limits on Article II, constitutional and federal rights, separation of powers)
- Congress
  - Oversight committees
  - Nominations
  - Budget
  - Impeachment
- Ethics office
- Government lawyers — OLC, General Counsels of federal agencies, WH counsel
- Inspectors general
- Independent agencies/offices (IRS, CIA, CBO, DOJ)
- Nonpartisan civil service
- Civil society
  - Press
  - Watchdog groups
  - Voters
  - Civic leaders (business leaders, faith leaders, etc.)

- Federalism/States and localities
  - AG lawsuits and investigations of conflicts or violations of law
  - Refusal to cooperate with unconstitutional or inhumane policies (e.g., sanctuary cities)
  - Fill litigation gaps (e.g., may have standing to demand compliance with some consent decrees)
  - Fill funding, regulatory gaps

Sources of rules and norms for reining in executive overreach or abuse:

- U.S. Constitution
- Federal laws that limit executive discretion or authority
- Court decisions
- Practice throughout U.S. history
- Executive branch legal opinions and memos
- Opinions of experts or authorities (e.g., past presidents, prominent Republicans, etc.)
- Comparative:
  - Practice and norms in the states
  - Principles U.S. imposes on other countries
  - Other countries' experiences
  - International instruments

Judiciary Grabs Back on Trump's Immigration Ban

Elizabeth Goitein

The notion that the executive branch could be immune from constitutional review is as baseless as it is dangerous.

The February 9 decision by a three-judge panel of the Ninth Circuit Court of Appeals, which upheld a trial judge's decision to temporarily stay President Trump's travel ban, broke no new legal ground. And yet it may well be remembered as one of the most important rulings in modern American history.

Its significance lies in its unanimous reaffirmation of the basic constitutional principle of checks and balances, at a time when that principle is under unprecedented attack.

The ban itself raises disturbing constitutional questions, as several judges have now found. It bars people from seven majority-Muslim countries from entering the U.S. for a period of 90 days.

Although its stated purpose is to protect the country from terrorist attack, official statistics reveal a dearth of domestic terrorism perpetrated by nationals of these countries. This fact, combined with Trump's many references to a "Muslim ban," strongly suggest that the order's intent is to discriminate against Muslims.

Under well-settled law, favoring one religion over another is unconstitutional, even when cloaked in seemingly neutral terms.

More alarming than the ban, however, was the administration's claim that the courts could not review its legality.

Justice Department lawyers pointed out that the Constitution gives Congress and the executive branch authority over immigration. They also noted that the president is entitled to great deference in his national security judgments. In both assertions, they were on solid ground. But they took their case one giant step further, arguing that the president's action was "unreviewable."

Favoring one religion over another is unconstitutional, even when cloaked in seemingly neutral terms.

In one sense, they had to make that argument. The order could not withstand even the gentlest scrutiny. The administration offered no evidence that would justify the ban as a security matter. Indeed, the only probative evidence on this point was a declaration by prominent former national security officials, submitted by the state of Washington (which had challenged the ban), explaining how the order would make the country less safe.

The lawyers' solution, however, was ill-conceived. The notion that the executive branch could be immune from constitutional review is as baseless as it is dangerous. The Ninth Circuit panel cited case after case in which the Supreme Court had reviewed — and, in some cases, invalidated — executive branch actions on immigration and national security matters.

This op-ed originally appeared at *The Hill,* February 10, 2017.

The ample precedent left the judges with no doubt: "[I]t is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action."

This holding is important precisely because Trump has questioned that authority, in a manner no other president has done. Disagreeing with a judicial decision is the right of every litigant, including the president.

Trump, however, has publicly challenged the legitimacy of the judges issuing the decisions. In a blizzard of tweets, he referred to the trial judge as a "so-called judge." He derided courts as "so political" — a bizarre response, considering that the trial judge and one of the panel judges were appointed by Republican presidents.

And he tried to cow them into retreat, threatening that blood would be on their hands.

Against this onslaught, the Ninth Circuit's unapologetic defense of its constitutional role is heartening. After all, the legal battle over the travel ban is just beginning.

The same trial judge who temporarily stayed the order must now decide whether to continue the stay until he reaches his final decision in the case. This time, government lawyers will present evidence to justify the order, and there is sure to be disagreement over how strong that evidence is — and how strong it needs to be.

However the judge rules, the losing party will appeal, perhaps all the way to the Supreme Court. And all of that is before the trial court even gets to the "merits" phase — the proceedings that result in the trial court's final ruling.

Moreover, the ban itself is only the first step envisioned by the executive order. Trump also charged the secretary of Homeland Security with developing a new vetting system while the ban is in effect. Reports of how customs officials have been treating Muslims coming into the U.S., including American citizens, give some indication of what this vetting may entail.

It is the courts that will ultimately decide these weighty constitutional issues, along with others implicated by actions Trump has either taken or proposed. That is their role in our constitutional system of checks and balances.

Travelers have been interrogated about their religious beliefs, political views, and attitude toward the administration.

Their cell phones have allegedly been seized and copied, and they have been required to turn over their social media passwords — a requirement DHS Secretary John Kelly wants to make standard practice when foreign nationals seek to enter the U.S.

Such a system would raise the constitutional stakes to a level not seen since the McCarthy era. It is the courts that will ultimately decide these weighty constitutional issues, along with others implicated by actions Trump has either taken or proposed. That is their role in our constitutional system of checks and balances.

The Ninth Circuit's decision is a powerful vindication of that role.

Voting Fraud Inquiry? The Investigators Got Burned Last Time

Michael Waldman

A decade ago the Justice Department suffered its biggest scandal since Watergate. A push to find imaginary voter fraud came up empty. So political aides fired top prosecutors instead. After a scandal erupted, the attorney general resigned. History offers some lessons for the new administration as it pursues "illegal" voters: such witch hunts rarely end up well.

For days President Trump has promoted the absurd notion that 3 million to 5 million people voted illegally in the presidential election. On Wednesday morning, Mr. Trump went further. "I will be asking for a major investigation into VOTER FRAUD," he tweeted, "including those registered in two states, those who are illegal."

When a president demands an investigation of voter fraud, what could go wrong? Based on recent history, a lot.

Little more than a decade ago, the Justice Department made investigating and prosecuting voter fraud a major priority. When top prosecutors failed to find the misconduct and refused to make partisan prosecutions, they were fired. In the fallout, Attorney General Alberto Gonzales was forced to resign in the biggest Justice Department scandal since Watergate.

It seems like an odd bit of history to try to repeat — unless the goal is to clear the path for voter suppression.

Let's begin with the underlying fact: There is no epidemic of voter fraud. After Mr. Trump claimed the election was rigged, election officials from both parties, scholars, journalists, and experts noted that there was simply no widespread fraud. Mr. Trump's lawyers even confirmed this in their own court filings in recount efforts in Michigan.

There was no extensive voting fraud in 2002, either, when President George W. Bush's attorney general, John Ashcroft, made finding it a top priority for the Department of Justice. And the federal prosecutors kept coming up empty. After years of trying, they had charged more people with violating migratory bird laws than voting statutes.

The White House was agitated by this failure. In October 2006, President Bush told Mr. Ashcroft's successor, Mr. Gonzales, that he had heard about fraud in Albuquerque, Milwaukee, and Philadelphia. Karl Rove, Mr. Bush's aide, warned Mr. Gonzales he had "concerns" about voter fraud.

Soon top officials concocted a way to get results: If you can't find the crime, fire the prosecutors. In a highly unusual move, seven United States attorneys were forced to resign, on top of two more pushed out earlier.

David Iglesias, a conservative Republican, was the United States attorney in New Mexico. Local Republicans became angry that he refused to bring corruption cases against Democrats. Shortly after the 2006 election he was dismissed. In his book *In Justice: Inside the Scandal That Rocked*

This op-ed originally appeared at *The New York Times,* January 26, 2017.

the Bush Administration, Mr. Iglesias summed up his experience: "First would come the spurious allegations of voter fraud, then unvarnished legal manipulations to sway elections, followed by a rigorous insistence on unquestioned and absolute obedience and, finally, a phone call from out of the blue."

In Missouri, the United States attorney clashed with superiors when he refused to sign off on a lawsuit demanding a purge of state voter lists. After firing the prosecutor, Justice Department officials slipped a political aide into the position.

The United States attorney in Washington State, John McKay, declined to bring voter fraud charges after a close governor's race. Summoned to a White House interview about becoming a federal judge, Mr. McKay instead found himself grilled about party activists' accusations that he had "mishandled" the election. Instead of becoming a judge, Mr. McKay was fired. "There was no evidence," he later told reporters about the fraud allegations, "and I am not going to drag innocent people in front of a grand jury."

Soon scandal erupted. At one congressional hearing, Attorney General Gonzales answered "I don't recall" or some variant 64 times. In August 2007, after his top aides quit or had been fired, he resigned.

All this should rattle the new administration. The attorney general-designate, Jeff Sessions, who unsuccessfully prosecuted black voting rights activists as a United States attorney in Alabama three decades ago, had his confirmation hearing before Mr. Trump's Twitter eruption. He now should pledge to refrain from politicizing voting rights enforcement and resist any effort to pressure prosecutors to chase imaginary fraud.

Many Americans now fear pervasive voter misconduct. That vague unease, aimed at minority voters, has been used to justify a new wave of laws to make it harder for many people to vote.

These charges, of course, have a deeper political purpose. Many Americans now fear pervasive voter misconduct. That vague unease, aimed at minority voters, has been used to justify a new wave of laws to make it harder for many people to vote. Federal courts have blocked many of the worst new laws, finding them discriminatory or unconstitutional. Now it seems Mr. Trump and his allies may push for federal voting laws, requiring a passport, birth certificate, or other proof of citizenship to register. Millions could find themselves disenfranchised.

The president of the United States is peddling conspiracy theories that undermine our democracy for political gain. Lessons from recent history suggest that the ultimate victims of such a witch hunt will be those who pursue it.

Why Donald Trump Can Spy Better Than J. Edgar Hoover

Elizabeth Goitein

Many fear that Donald Trump will seek expanded power to spy on political opponents or American Muslims. But the truth is that he doesn't have to. Because of the systematic stripping of civil liberties protections since 9/11, Trump already has all the power he needs.

President-elect Donald Trump is about to inherit the most powerful surveillance apparatus in history. Combining unprecedented technological capabilities with a lax legal regime, his spying powers dwarf anything the notorious FBI Director J. Edgar Hoover could have fathomed.

Many privacy and civil rights advocates worry Trump will seek to expand these powers further in order to spy on Muslim Americans, activists, and political opponents. The truth is, he won't have to. Because of our country's rush to strip civil liberty protections from surveillance laws after the September 11 terrorist attacks, Trump will already have all the powers he needs and more.

Donald Trump is about to inherit the most powerful surveillance apparatus in history.

How did we get here? The laws that until recently safeguarded Americans from sweeping government intrusion were established in the 1970s, after a special Senate investigation revealed widespread abuses of intelligence-gathering. Almost every president dating to Franklin D. Roosevelt had a version of Richard Nixon's infamous "enemies list," resulting in wiretaps of congressional staffers, executive officials, lobbyists, law firms, and reporters. Between 1956 and 1971, under the program dubbed COINTELPRO (short for "counterintelligence program"), the FBI routinely spied on anti-war protesters and civil rights organizations. The bureau targeted Martin Luther King, Jr. with particular ferocity, bugging his hotel rooms and using the resulting evidence of infidelity to try to induce him to commit suicide.

To stem the abuses, the government implemented laws and regulations that shared a common principle: Law enforcement and intelligence agencies could not collect information on an American unless there was reason to suspect that person of wrongdoing. In some cases, this meant showing probable cause and obtaining a warrant, but even when no warrant was required, spying without any indication of criminal activity was forbidden.

The thinking was that if officials had to cite objective indications of misconduct, they wouldn't be able to use racial bias, political grudges, or other improper motives as a reason to spy on people. This logic was borne out, as government surveillance abuses went from being routine to being the occasional scandalous exception.

Then came September 11. As swiftly as the principle had been established, it was rooted out. In 2002, the FBI abolished a rule barring agents from monitoring political or religious gatherings without suspicion of criminal activity. A 2007 law allowed the National Security Agency to collect calls and emails

This op-ed originally appeared at the *Los Angeles Times,* December 7, 2016.

between Americans and foreign "targets" with no warrant or demonstration of wrongdoing by the American or the foreigner. Revisions to Justice Department guidelines in 2008 created a category of FBI investigation requiring no "factual predicate" — meaning no cause for suspicion. The list of erosions goes on.

There is every reason to fear that Trump and his administration will target people for surveillance based on religion, political activism, and personal vendettas.

The instinct to remove any restrictions on surveillance when facing a national security threat is understandable, but misguided. Dragnet surveillance does not make us safer. The massive amount of useless data collected today only obscures the real threats buried within. Even the 9/11 Commission, which issued dozens of recommendations to improve national security, did not propose surveillance without suspicion.

When privacy advocates and civil libertarians pushed Congress to restore protections, Obama administration officials said it was unnecessary because no abuse had been shown. Despite evidence that law enforcement was monitoring the Occupy and Black Lives Matter movements, lawmakers and much of the public accepted the government's claim and continued to trust it with broad surveillance powers. Warnings that future administrations might be less trustworthy went unheeded.

Those warnings now seem prescient. Trump has specifically called for more surveillance of American Muslim communities. His pick for national security adviser, Michael Flynn, has described Islam as a "cancer," while his nominee for attorney general, Sen. Jeff Sessions, has called the NAACP "un-American." As a possible secretary of Homeland Security, Trump has floated Milwaukee Sheriff David Clarke, who compared Black Lives Matter to the Islamic State group and described peaceful protests against Trump as "temper tantrums" that should be "quelled." Trump's tendency to hold grudges is legendary: Referring to Republicans who did not support his candidacy, a Trump surrogate stated, "Trump has a long memory and we're keeping a list."

In short, there is every reason to fear that Trump and his administration will target people for surveillance based on religion, political activism, and personal vendettas.

Having gutted legal protections against such abuses, are we powerless to stop them? No, but it will require vigilance and action from many quarters. Independent oversight entities, including inspectors general and congressional committees, must aggressively investigate how Trump uses his powers. Federal courts must shed their historical reluctance to hear lawsuits challenging government surveillance. We all must fiercely defend journalists and whistleblowers who expose surveillance overreach.

Most important: When surveillance legislation comes before Congress — as it will in late 2017, when a key surveillance law is set to expire — lawmakers should shore up protections, not further erode them. They have bipartisan incentive. After all, politicians from both parties may be on Trump's enemies list, too.

The Little-Noticed Campaign Promise That Could Yield a New HUAC

Faiza Patel

In the 1940s and 1950s, fears of Communism led to a "Red Scare." The House Un-American Activities Committee (HUAC) was a forum for baseless charges that destroyed lives. Now Donald Trump has proposed what his supporter Newt Gingrich lauded as a "new HUAC."

The president-elect's suggestions during his campaign to ban Muslims from entering the country and to possibly establish a registry of Muslims have stirred fears about religious discrimination.

But a more easily realized and less publicized proposal by Donald J. Trump may also threaten civil liberties. That is a Commission on Radical Islam, which his campaign website says would "identify and explain to the American public the core convictions and beliefs of radical Islam, to identify the warning signs of radicalization, and to expose the networks in our society that support radicalization." As hate crimes against American Muslims soar, such a commission could further incite distrust and undermine Muslim leaders and civil society.

As hate crimes against American Muslims soar, such a commission could further incite distrust and undermine Muslim leaders and civil society.

Presidents Barack Obama and George W. Bush were careful to avoid tarring all Muslims with the terrorism brush. Six days after the September 11 attacks, Bush visited a mosque to warn against the harassment of American Muslims and underline the need to respect Islam. Obama has sent the same message, refusing to even use the term "radical Islam." This does not mean that the United States government has simply ignored the belief systems of terrorists. To the contrary, there are reams of research and several congressional reports on the topic. It seems unlikely that a Commission on Radical Islam would add anything.

Trump's commission would be charged with identifying "warning signs of radicalization," allowing it to veer easily into examining political and religious views. Both the New York City Police Department and the FBI have said that indicators of terrorism included political activism and signs of Muslim religiosity, such as growing a beard, wearing a head scarf, or giving up smoking and drinking. Although these ideas have been thoroughly debunked by research, they continue to be influential and could serve as a basis for categorizing tens of thousands of American Muslims as potential terrorists requiring monitoring by law enforcement (or worse).

Research has also found little evidence of support for terrorism among American Muslims. James Comey, the director of the FBI, said, "The threat here focuses primarily on troubled souls in America who are being inspired or enabled online to do something violent." This makes the proposed commission's mandate of ferreting out networks that support radicalization sound like a witch hunt that could ensnare politically active

This op-ed originally appeared at *The New York Times,* November 18, 2016.

American Muslims and the civil society groups that work to protect the community's rights.

That seems to be what Newt Gingrich, one of the president-elect's top advisers, has in mind. Earlier this year, Gingrich called for a new House Un-American Activities Committee to deal with "Islamic supremacists." That notorious committee's hearings and the investigations by Sen. Joseph McCarthy into suspected Communists represented some of the most severe political repression in American history and destroyed lives. Today, as falsehoods are spread quickly on the internet and accepted as true, this risk may be even more acute.

Like many campaign promises, Trump's commission may never become reality. But it would be far harder to challenge in court than a Muslim ban or registry.

These fears are not theoretical. Conspiracy theorists and pseudo-experts poised to peddle lies about prominent Muslim officials and groups have garnered support in both Congress and Trump's inner circle.

In 2012, five members of Congress asked the State Department's inspector general to investigate the influence of the Muslim Brotherhood on the department, citing family ties of Huma Abedin, Secretary of State Hillary Clinton's closest aide. (The alleged connections were so convoluted that they inspired a *Daily Show* sketch.) This summer, Sen. Ted Cruz held a hearing in which a witness smeared the Islamic Society of North America, an umbrella organization for Muslim groups, claiming it had links to terrorist groups. The same witness also insinuated that the two Muslim members of the House of Representatives, Keith Ellison and Andre Carson, supported terrorism because they attended the group's events, as had the Homeland Security secretary, Jeh Johnson.

The FBI has a policy of marginalizing the Council on American-Islamic Relations, the country's largest Muslim civil rights organization. The FBI's stance, which it claims is based on vague concerns over potential connections to terrorism, is difficult to understand given the Bureau's broad powers to seize the assets of any organization supporting terrorism. So unfounded is the FBI's stance that it has been resisted by its own field offices and the Justice Department, and the Council is a frequent partner of local police departments and other agencies.

Baseless insinuations about Muslim groups and individuals are a regular feature on Breitbart, the website run by Stephen Bannon, chief strategist to the incoming president.

Like many campaign promises, Trump's commission may never become reality. But it would be far harder to challenge in court than a Muslim ban or registry. It must be vigorously resisted as a threat not only to American Muslims, but all Americans who dread a return to McCarthyism.

When Will Progressives Make Democracy Reform a Top Priority?

John F. Kowal

When conservatives gain power, they quickly focus on rewriting the rules of democracy. Progressives often ignore the issues, focusing instead on supposedly more immediate issues. It is time to focus on renewing and modernizing our democracy to make it responsive to the people and not just to special interests.

The election results, which brought us President Donald Trump and continued Republican control of Congress, were the product of a dysfunctional democratic system that screams out for repair. Consider the many ways our creaking, antiquated institutions of democracy distorted and subverted the will of the people in 2016.

For the second time in 16 years, the candidate chosen by a majority of the nation's voters has lost the election. How can such a result be considered democratically legitimate in the 21st century?

Electoral College

Let's start with the archaic, undemocratic Electoral College. In the stunned reaction to Tuesday's election results, too little attention has been paid to the fact that Trump lost the national popular vote. It wasn't even close. The slow trickle of results from California and Washington has obscured the final result: Analysts project that Hillary Clinton is on track to top Trump's total by as many as *2 million votes*. So, for the second time in 16 years, the candidate chosen by a majority of the nation's voters has lost the election. How can such a result be considered democratically legitimate in the 21st century?

As if that weren't bad enough, the race to win 270 electoral votes stunted and distorted the campaign in ways that hurt the progressive cause. The focus on electoral votes, and not the people's vote, incentivizes the campaigns to focus their energies on winning a few battleground states while ignoring the rest. For example, since the July convention, Clinton visited North Carolina 10 times and Pennsylvania 13 times. Her supporters blanketed those states to turn out every last voter, with evident diminishing returns. Imagine what the results would have been if the Democrats had an incentive to encourage citizens to make their voices heard in New York and California as well. Under the current system, these states received almost no attention from the Democratic nominee apart from fundraising events featuring the chance for a photo op with Cher. Abolishing the Electoral College would free the candidates to go where their bases are, with the goal of rallying the most voters to their side.

This article originally appeared on the Brennan Center's website, November 11, 2016.

Ending the Electoral College would seem to require a constitutional amendment, which is an uphill challenge to say the least.

We did dodge one looming disaster. If this had turned out to be a squeaker in electoral vote terms, we would have all learned about the vow of Robert Saticum, a "faithless elector" in Washington State who just can't bring himself to honor the will of the state's voters, who happened to choose Clinton by a wide margin. If he follows through on his intention to vote for someone else — and there is no law that can stop him — his self-indulgence would merit a footnote in the history books, along with the Washington State elector who spurned Gerald Ford to give Ronald Reagan an electoral vote in 1976. But in a razor-thin election, Saticum actually wanted to force the election into the House of Representatives, sealing a victory for Trump. "I hope it comes down to a swing vote and it's me," he crowed. "Maybe it'll wake this country up." A fitting bit, perhaps, for the blooper reel of this reality show election, but it's no way to run a democracy.

Ending the Electoral College would seem to require a constitutional amendment, which is an uphill challenge to say the least. Small rural states with outsize voting strength in the current system, and battleground states used to being courted, would be less likely to ratify it. But there is a credible reform option on the table that bypasses this obstacle: the National Popular Vote reform plan proposed by John Koza. Under this proposal, state legislatures would agree through an interstate compact to award their electoral votes to candidate who receives the most popular votes in the 50 states plus the District of Columbia. Already, 11 states possessing 165 electoral votes have signed on. Once the compact expands to include other jurisdictions with 270 or more electoral votes, the plan guarantees that the winner of the national popular vote would become president.

The National Popular Vote plan is a promising first step, but it doesn't go far enough. It fails to provide for the contingency of multiple parties, which could reduce the winning candidate's plurality of the vote to an unacceptably low level. It also leaves in place the Constitution's least democratic feature: the provision that empowers the House of Representatives to choose the president, with each state casting one vote, in the event no candidate wins 270 electoral votes. But enactment of the compact, making the national popular vote a fait accompli, could reduce resistance to a better tailored and more enduring reform in the form of a constitutional amendment.

Redistricting

All through this intensely fought campaign, the presidency and control of the Senate hung in the balance. But thanks to the way political districts were redrawn after the 2010 census, a process controlled in most states by Republicans, the fate of the House of Representatives generated little suspense. The aggregated national vote for House races appears to have been close: Republicans currently lead by a tally of 56.3 million versus 53.2 million, but that margin is likely to shrink when all votes from California and Washington are finally tallied. And yet, Republicans easily maintained a sizeable majority with only a handful of competitive

races. This is ironic, to say the least. The Framers intended the House to be the institution of government most responsive to the public mood. But while political gerrymandering goes back to our nation's beginnings, the founding generation could have never envisioned how modern technology allows politicians to create impregnable districts with ruthless precision. Just look at Pennsylvania: The state was fought to a near draw in the presidential election, but 13 of its 18 House seats went to Republicans thanks to the creative handiwork of a GOP-controlled legislature five years ago.

It doesn't have to be this way. Democrats are gearing up to beat the Republicans at this game after the 2020 census, and maybe they'll succeed. But progressives can set their sights on more enduring change by taking redistricting out of the hands of self-interested politicians and investing this power in the hands of an independent citizen commission. These commissions, like the one in California, have increased partisan competition and ensured that minority communities have fair representation.

Voting

American elections are in need of repair. One in four eligible citizens can't vote because they aren't registered. And those who do vote have to deal with long lines, outdated voting machines, and — in many states — with impediments put in place specifically to make it harder for targeted populations to cast a ballot.

This was the first presidential election following the Supreme Court's 2013 ruling in *Shelby County v. Holder*, which gutted a core provision of the Voting Rights Act. Where the Act once required states with a history of racial discrimination to obtain federal government preclearance to enact changes in voting laws and practices, the Court opened the door to a raft of discriminatory measures including photo ID laws and cutbacks to early voting. While advocates pushed back some of these measures in court, these voter suppression measures contributed to reduced minority turnout in many states.

Progressives should demand that Congress fix the Voting Rights Act to its former strength. They should also support Automatic Voter Registration (AVR), a transformative policy innovation crafted by the Brennan Center that would permanently add up to 50 million eligible voters to the rolls. AVR would save money, increase accuracy, curb the potential for fraud, and protect the integrity of our elections. Already, six states — Oregon, California, Vermont, West Virginia, Connecticut, and Alaska — have enacted AVR measures and they're now being implemented. Finally, progressives should insist on other measures that make voting easier, including expanded early voting. Reduced early voting opportunities in many key states surely dampened turnout.

Money in Politics

Ever since the Supreme Court opened up the floodgates to massive, unlimited campaign spending in the *Citizens United* case, Americans of all political stripes have been worried about the growing power of large donors. The domination of elections by a handful of big donors is a threat to democracy and good governance. As long as politicians spend so much time chasing the big donors, a growing number of Americans — progressives and conservatives alike — will continue to believe that the system is rigged.

The 2016 election proved that campaigns with a big bankroll didn't always succeed. The Clinton campaign raised and spent more than Trump, and Jeb Bush raised $155.8 million for his campaign and super PAC to little avail. At the same time, many closely fought Senate races turned out to be not so close after all. Is it a coincidence that the big money donors on the Republican side, turned off by Trump's campaign, redoubled their donations to keep the Senate in Republican hands? A

recent Brennan Center analysis found that this year, for what is probably the first time, supposedly "independent" spenders — free from contribution limits and very often concealing the identities of their donors — outspent the parties and candidates in 10 key Senate races.

Progressives saw in the Bernie Sanders campaign a different way. While Hillary Clinton raised money the traditional way, through fundraising events that provided access to the candidate as a reward for campaign contributions, Sanders's campaign was fueled with an impressive surge of small donor contributing averaging, as Sanders proudly boasted, $27. Clinton's fundraising slog took her off the campaign trail for days at a time. Sanders, like Obama before him, could focus his energies on engaging his base.

What if government made it easier for campaigns to thrive on small donations raised through engagement with voters? The Brennan Center has proposed a federal public financing system for presidential and congressional elections that encourages small contributions from regular people. Under this plan, modeled on New York City's successful system, small donations of up to $250 would be matched 5-1 by the government. In exchange, participating candidates would agree to reduce the maximum allowable contributions. This simple reform, which could be adapted to state elections too, could revolutionize the way campaigns raise money, making fundraising an integral part of civic engagement.

Another needed step is changing the law around money in politics to give reformers more latitude to regulate campaign finance — including resurgent spending by the biggest donors and the new phenomenon of unaccountable "dark money" — to preserve the integrity of our elections. Four Supreme Court Justices have signaled their interest in doing just that. Now that the current Court vacancy will be filled by the next president, progress here will remain just out of reach for the time being.

The Road Forward

Progressives will always face obstacles in advancing their issues in a political system that elevates the voice of the few at the expense of the many — a system which perversely awards victories to the candidate who wins fewer votes and which makes the process of voting feel meaningless. It is time to focus on renewing and modernizing our democracy to make it responsive to the people and not just to special interests.

A Strikingly Radical Inaugural

Michael Waldman

The new president's opening words startled with their dark vision and their failure to embrace constitutional traditions. The Brennan Center's president, a former chief White House speechwriter, gave his assessment.

Memorable inaugural addresses come during a time of crisis. President Trump brought his own crisis with him. Rather than calm the waters, he decided to stir them further.

Trump delivered the speech forcefully. He displayed less preening narcissism than we have come to expect (though there was no nod to humility, either). It was populist rather than conservative. We heard no rote denunciations of big government. He spoke with passion about building infrastructure, a genuine national goal. The writing was blunt and clean. Mostly it sounded like an amped-up stump speech.

"Liberty" and "democracy" did not appear. Nor did "the Constitution." No "all men are created equal."

Listeners felt no sense of the sweep of history, the humbling majesty of the moment. He offered no meaningful thank you to Barack Obama for his years of service. (Contrast that with, say, Bill Clinton's in 1993 — "On behalf of our Nation, I salute my predecessor, President Bush, for his half-century of service to America" — or Ronald Reagan's lengthy homage to Jimmy Carter, whom he had just defeated.)

Worryingly, Trump did not evoke the documents, deeds, or ideals of the founders — which serve as inspiration and guide for new presidents. "Liberty" and "democracy" did not appear. Nor did "the Constitution." No "all men are created equal."

New presidents get to decry the mess they inherit. Reagan did; so did Clinton and Obama. But none did it the way Trump did. The picture he painted was bleak, dystopian, a grimy sci-fi version of the country. The only truly vivid language came in a death-obsessed description of a hellish landscape, beset by gangs, with factories scattered "like tombstones." "This American carnage stops right here and stops right now." Yikes.

Many new presidents chide the insiders and the status quo. Obama quoted Scripture: "Let us put aside childish things." Trump, again, struck a far more denunciatory note. "The establishment protected itself, but not the citizens of our country." He went on at length along these lines. Of course, his own adopted party already controls Congress. Their applause seemed muffled.

Beyond the snarling tone, there were jarring and often radical policy notes.

Most striking: his stance toward the world. Every president since World War II has talked about the nation's role as the central international force, calling on our fellow citizens to accept the burdens of leadership. John F. Kennedy's famous address talked only about foreign policy. Reagan's first speech linked his attacks on big government at home with the fight for freedom abroad.

This op-ed originally appeared at *The Washington Post,* January 20, 2017.

Trump said, basically, we've been played for chumps, everyone is out to get us, and we are only going to watch out for our own from now on. American interests are not bolstered by a stable world order or rising global prosperity. Americans have never gained from our leadership, only lost. He explicitly disavowed the idea of extending American values around the world — a staple of every president of the past century. This is a vertiginous shift. Kennedy said we would "pay any price," but that led to Vietnam. George W. Bush mentioned "freedom" 27 times in his 2005 speech, but that was in service of the Iraq War. Trump has lurched just as unwisely in the other direction.

He didn't talk about making American workers winners amid global economic change. "We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs," he declared. "Protection will lead to great prosperity and strength." This was the first inaugural address to call for protectionism since long before the United States became a global economic leader.

Trump's address had the rhetoric of Charles Lindbergh and the economics of Smoot-Hawley. We must assume he did this deliberately. Neither ended well for the country.

His rhetoric embraced dark themes. "From this day forward, it's going to be only America first, America first." This is not just chest-thumping. This is, as he well knows, the name of the isolationist group — based, often, in the very Midwest where he squeaked out his Electoral College win — that fought against U.S. involvement in World War II. America First was discredited by its anti-Semitism and its appeasement of Adolf Hitler.

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Will any of this actually reflect the national agenda? Who knows. He urged infrastructure spending, for example. Democrats like that, but many Republicans recoil. But there was barely a reference to immigration, and none at all to the Republican Congress's priorities of repealing the Affordable Care Act or enacting tax cuts. He decried "radical Islamic terrorism" and vowed to eliminate it entirely from the face of the earth (whew!), but devoted only half a sentence to the topic. He decried the establishment. Did his Cabinet of billionaires and Wall Street executives (with a few generals sprinkled in) keep a straight face while applauding?

Trump won because he tapped into many voters' anger. But the job of a president always has been to alchemize public sentiment into something better. You reassure about "fear itself," you don't stoke it. The notion that any previous inaugural speaker would howl about "American carnage" is simply unthinkable.

An inaugural address that is hopeful, unifying, thoughtful — that appeals to Americans' "better angels" and offers our ideals to the world? Perhaps that might just be another tradition Trump has upended.

ELECTION 2016

The Secret Power Behind Local Elections

Chisun Lee and Lawrence Norden

According to a first-of-its-kind study, secret spending in state and local elections skyrocketed in recent years. This will likely yield significant corruption. Even if this "dark money" can't be eliminated, strong disclosure rules can help ensure that citizens know which special interests are trying to persuade them.

When the history of elections in 2016 is written, one of the central points is likely to be how little voters knew about the donors who influenced the contests. At the federal level, "dark money" groups — chiefly social welfare nonprofits and trade associations that aren't required to disclose their donors and, thanks to the Supreme Court's *Citizens United* ruling, can spend unlimited amounts on political advertising — have spent three times more in this election than they did at a comparable point in 2012.

Yet the rise of dark money may matter less in the race for president or Congress than for, say, the utilities commission in Arizona. Voters probably know much less about the candidates in contests like that, which get little news coverage but whose winner will have enormous power to affect energy company profits and what homeowners pay for electricity. For a relative pittance — less than $100,000 — corporations and others can use dark money to shape the outcome of a low-level race in which they have a direct stake.

Over the last year, the Brennan Center analyzed outside spending from before and after the 2010 *Citizens United* decision in six states — Alaska, Arizona, California, Colorado, Maine, and Massachusetts — with almost 20 percent of the nation's population. We also examined dozens of state and local elections where dark money could be linked to a particular interest.

We found that, on average, 38 times more dark money was spent in these states in 2014 than in 2006. That's an even greater increase than at the federal level, where dark money rose 34 times over the same period, according to the Center for Responsive Politics. Compounding the problem was the growth in "gray money," spent by organizations that are legally required to disclose their donors but receive their funding through multiple layers of PACs that obscure its origin.

The rise of dark money may matter less in the race for president or Congress than for, say, the utilities commission in Arizona.

In 2006, 76 percent of outside spending in these six states was fully transparent. In 2014, just 29 percent was, according to our analysis of data compiled by the National Institute on Money in State Politics.

This ability to dominate a race with high stakes at low cost and with no oversight can facilitate corruption.

A Utah legislative investigation found that as a candidate for state attorney general in 2012, John Swallow "hung a veritable 'for sale' sign on the office door" when his aide arranged for payday

This op-ed originally appeared in the "Sunday Review" section of *The New York Times,* June 25, 2016. It is adapted from the Brennan Center report, *Secret Spending in the States.*

loan companies to fund about $450,000 in dark money ads in exchange for his promise to shield them from consumer protection laws. With voters unaware of this, Mr. Swallow won; he resigned after less than a year in office. Mr. Swallow now faces trial on unrelated corruption charges.

In Wisconsin, an out-of-state company seeking mining business put $700,000 of dark money into ads attacking a legislator who had voted against speeding up environmental review of mine permits. Voters didn't know that the group paying for ads was funded by another group that got money from the company. The legislator lost her re-election campaign, and the company's role was only inadvertently disclosed in a later lawsuit.

In Mountain View, California, the folksy-sounding Neighborhood Empowerment Coalition spent more than $83,000 in a 2014 City Council election that hinged on land use and housing policy. This was more than half of what all nine candidates spent, combined. Only after the election did the public learn that the coalition was funded by a PAC tied to the nation's largest property owners association, bent on heading off rent control. "They did not identify who they were and did not identify the issue that led them to support those candidates," Councilman Lenny Siegel told us. The newly composed Council declined to pursue rent control.

Compounding the problem was the growth in "gray money," spent by organizations that are legally required to disclose their donors but receive their funding through multiple layers of PACs that obscure its origin.

The ultimate cost of elections overrun by hidden interests may be the loss of voters' faith in the political process and governing institutions.

In 2010, Arizona's utility commission adopted a program to encourage energy efficiency by consumers and limit the electricity generated by the state's utility companies. This followed incentives in place since 2006 that encouraged homeowners to use solar power panels.

Within a few years a half-million residents had joined the energy efficiency program, and at least 29,000 had solar panels. When two seats on the commission were at stake in the 2014 election, $3.2 million was spent on dark money ads. That was more than double the combined spending of all six candidates, and almost 50 times the $67,000 in dark money spent in the 2012 election, before the popularity of the solar program was clear.

News reports have indicated that a major source of the money was the state's largest utility, Arizona Public Service. The commission has shifted from backing solar energy to signaling openness to increasing solar's cost to consumers. "The public appears to look upon the commission with suspicion and mistrust because of your alleged campaign contributions," Commissioner Robert Burns wrote to Arizona Public Service.

Persuading the Supreme Court to overturn recent decisions such as *Citizens United*, which empowered donors to spend unlimited amounts via opaque business and nonprofit entities, would go a long way toward fixing the problem.

But until that happens, there is evidence that states, through strong disclosure laws and enforcement, can make it very difficult for spenders to conceal their identities from the public, even if they can't eliminate dark money.

Dark money has risen sharply in Arizona, where legislators had debated slashing disclosure rules since 2010, culminating in removal of state oversight over nonprofits' political spending this year.

But in California, where disclosure laws are tougher, there has been remarkably little increase in dark money over the cycles we studied, especially considering the high levels of outside spending there.

A major reason is the state's decades-long requirement that even nonprofits disclose donors for their election spending. In 2014 the state passed a law requiring any group spending

more than $50,000 a year or $100,000 over four years on politics to disclose all donors giving more than $1,000 whose funds were used for political purposes. While cases like the Mountain View election indicate that there is room for improvement — especially in ensuring information reaches voters before Election Day — it is only because of California's strong rules that we know what happened there at all.

California's success provides a model for much of what a strong disclosure regime should do: close nonprofit loopholes, require that election advertisements bear the names of top funders, make disclosure rules reasonable and proportional to enable compliance, and enforce the law. Americans of all stripes want more of this. A *New York Times*/CBS News poll last year showed three-quarters of self-identified Republicans and an equal percentage of Democrats supported more disclosure by outside spenders. Recent transparency measures passed in Delaware, Maine, and Montana show that voters can turn the tables on special interests by demanding tougher laws and supporting the candidates who will push for them. Without such laws, dark money will continue to skew the outcome of races that hit close to home.

Machines Rigged? No. Broken? Yes.

Lawrence Norden

Amid warnings that the nation's voting systems may be hacked, the Brennan Center testified before the U.S. House of Representatives that the real problem we face is our aging election infrastructure.

To address and combat potential threats to the integrity of our elections, we must honestly assess the risks and distinguish between what is probable, possible, and conceivable but highly unlikely. In recent weeks, various sources in the media and elsewhere have raised fears of widespread hacking and fraud that could change the outcome of this November's national election. These fears are generally supported by speculation and partial information.

Hyperbolic or inaccurate rhetoric undermines the hard work election officials are doing to ensure our elections run smoothly and shifts attention away from addressing the very real problems our election system faces.

This is harmful to our democracy, which critically depends on the confidence of the people. Hyperbolic or inaccurate rhetoric undermines the hard work election officials are doing to ensure our elections run smoothly and shifts attention away from addressing the very real problems our election system faces.

It can be especially harmful in the event of a close national election. Any attempt to attack our voting systems is far more likely to sow doubt about results than it is to change a large numbers of votes. At the same time, as equipment ages, malfunctions — such as calibration problems on touch screen machines, or freezes that result in machines being taken out of service — can become more common and further compound this mistrust.

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There are over 10,000 election jurisdictions in the United States. This means in a federal election, there are essentially more than 10,000 separate elections being run, with different voting machines, ballots, rules, and security measures. While there are security benefits and weaknesses associated with such a decentralized system, one clear benefit is that it is not possible to attack the nation's voting machines in one location, as might be possible with a statewide voter registration database or campaign email server. Similarly, because voting is not done on machines connected to the internet, remotely attacking these machines becomes difficult if not impossible.

Norden delivered this testimony before a House Oversight and Government Reform subcommittee hearing titled "Cybersecurity: Ensuring the Integrity of the Ballot Box," September 28, 2016.

Still, there is much more we should do to promote the security and accuracy of our voting systems**.** Computer scientists have demonstrated that older equipment, in particular, can be very insecure. It is also more difficult to maintain, and more likely to fail (even without interference from an attacker) on Election Day. While small-scale attacks or failures of individual machines might not have a widespread impact on national vote totals, they can severely damage voter confidence, and would be particularly troubling in very close contests.

In the short run, we should do everything we can to minimize the impact of such attacks or failures. In the long run, we must treat our election infrastructure with the importance it deserves, with regular investments and upgrades.

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Forty-two states will use voting machines that are at least 10 years old.

In our 2015 report, *America's Voting Machines at Risk*, the Brennan Center found that this November, 42 states will use voting machines that are at least 10 years old. This is perilously close to the end of most machines' projected lifespan, particularly machines designed and engineered in the late 1990s and early 2000s. Such machines make up the bulk of systems purchased in the years following the passage of the Help America Vote Act. Using aging voting equipment increases the risk of failures and crashes — which can lead to long lines and lost votes.

The vast majority of paperless, computerized voting machines were purchased at least a decade ago. In November 2016, some voters in 14 states will vote on these paperless machines. Such machines do not produce a record that can be reviewed by the voter, and do not allow election officials and the public to confirm electronic vote totals with a record that was produced independently of the software.

Aging voting systems also use outdated hardware and software. For this reason, replacement parts for older voting systems can be difficult, if not impossible, to find. Election officials reported to us that they struggle to find replacement parts for these systems (many of which are no longer manufactured) to keep them running. In several cases, officials have had to turn to eBay to find critical components like dot-matrix printer ribbons, decades old memory storage devices, and analog modems. Aging systems also frequently rely on unsupported software, like Windows XP and 2000, which does not receive regular security patches and is more vulnerable to the latest methods of cyberattack.

Finally, while nearly all of today's new voting machines go through a federal certification and testing program, many jurisdictions purchased voting machines before this process was in place. Older machines can have serious security flaws, including hacking vulnerabilities, which would be unacceptable by today's standards.

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Ultimately, securing our elections and inspiring confidence in the long term requires further investment in our election infrastructure. While the need for more up-to-date, accessible, secure, and reliable voting equipment is clear, funders at the state and federal level seem unconcerned about our aging voting infrastructure. In our interviews for *America's Voting Machines at Risk,* election officials in 31 states told us they would like to purchase and deploy new voting machines before the next presidential election in 2020. However, officials from 22 of those states said they do not know where they will get the money to pay for new machines. More recently, we surveyed over 250 local election officials about their need to replace aging equipment. While a clear majority said they hoped to replace their equipment before 2020, approximately 80 percent of them said they did not have the money or a plan to do so.

Older machines can have serious security flaws, including hacking vulnerabilities, which would be unacceptable by today's standards.

In too many states, legislatures have passed the buck to counties and towns. The frequent result, not surprisingly, is that counties with more resources and higher median incomes have replaced or have plans to replace antiquated equipment, while those with fewer resources, particularly poor or rural counties, are left to cope with equipment that should be replaced.

There are several steps we believe policymakers can take to ensure that our voting systems inspire confidence and are more secure and reliable over time:

Replace older equipment, particularly paperless, direct-recording electronic machines.

- Congress and state legislatures need to allocate the funds for new, reliable, and secure voting systems.

- Machines purchased with these funds should be auditable in accordance with the definition and requirements set by the Auditability Working Group convened by the National Institute of Standards and Technology (NIST) and reported to the U.S. Election Assistance Commission. Specifically, "[t]he transparency of a voting system with regards to the ability to verify that it has operated correctly in an election, and to identify the cause if it has not."

- The Auditability Working Group found that in order to satisfy these criteria a voting system must possess "Software Independence" or provide that an undetected change in the software cannot cause an undetectable error or change in the election outcome.

Require audits of election results, using paper ballots or voter-verifiable paper records, to confirm electronic totals.

- Today, only 26 states require that election officials conduct paper audits. Audits of paper records are an additional check on machine malfunction, and provide public verification of vote totals.

Create standards for internet voting.

- Currently 31 states allow military and overseas voters to cast ballots by fax, email, or internet portal. Alaska allows any qualified voter to request and return an absentee ballot via facsimile.
- Most security experts argue that internet voting presents an especially serious security risk.
- There are currently no federal standards for voting over the internet, via fax, or by email. Given all that's come out about Russian involvement in hacking to influence the 2016 election, requiring new federal standards for such voting is very important.

Provide grants to fund voting technology improvements to ensure more secure voting systems for decades to come.

There are at least three types of grants that could further these goals:

1. Implementation of voting systems that use non-proprietary open source software (defined as a voting system where the software license is made available under an open source license), as well as commercial or custom firmware and hardware could lead to more secure and reliable systems nationwide.

    - A key challenge in ensuring more secure and reliable voting systems is cost.
    - Many experts agree that the widespread use of open source systems using commercial-off-the-shelf hardware could dramatically decrease the cost of upgrading and replacing systems and parts.
    - Los Angeles County, California, and Travis County, Texas, are currently working to create such systems for their own voters. Grants to support the development of these programs, or start new ones, would increase the chance that this work could spread more quickly.

2. Grants to create a common data format allowing for voting-equipment device interoperability could increase reliability and security.

    - The National Institute of Standards and Technology is doing work to create a common data format for elections.
    - If NIST, or another organization, could create a common data format allowing for voting-equipment device interoperability, it could result in a huge saving on voting system costs (jurisdictions could mix and match equipment), making needed upgrades and replacements more viable.

3. Grants to the EAC or state election agencies for training to local election officials on machine security, maintenance, pre- and post-election testing, development of contingency plans in event of cyber-attack or failures, and poll worker training.

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For far too long, the integrity of our elections has been presented as antithetical to access to the ballot box. In fact, the two are inextricably linked. As the Brennan Center argues in a recent report, *Election Integrity: A Pro-Voter Agenda*, ensuring that all American citizens who want to participate in our electoral system can vote is not only critical for free and fair elections, it is also the best way to ensure integrity and confidence in our system. This is why the Brennan Center has opposed laws that limit access and the ability of eligible voters to cast ballots, but seem to have little actual security benefit. As detailed in a summary by the Brennan Center, 14 states will have new voting restrictions in 2016.

Our aging equipment provides a clear example of how access and integrity are interdependent. Researchers from the Massachusetts Institute of Technology and Harvard estimate that in 2012 between 500,000 and 700,000 eligible voters did not vote because of long lines. The longer we wait to replace antiquated machines, the more likely this problem will get worse.

This challenge impacts access for voters, of course, but also the integrity of our elections and public confidence in them. In a highly partisan age, where conspiracy theories can flourish on social media, and risks associated with foreign and domestic hacking are real if too often sensationalized, it is critical that we take necessary steps to ensure that the public can have confidence in election results, and that malfunctions or vulnerabilities do not lead fair-minded citizens to question the accuracy of election results.

For far too long, the integrity of our elections has been presented as antithetical to access to the ballot box. In fact, the two are inextricably linked.

Debunking the Voter Fraud Myth

Jennifer L. Clark

Throughout the campaign, Donald Trump increasingly insisted that voter fraud might "rig" the 2016 election. Such claims were absurd. There is no evidence of such widespread misconduct, certainly not enough to swing a race for president.

Studies Agree: Impersonation Fraud by Voters Very Rarely Happens

The Brennan Center's foundational report on this issue, *The Truth About Voter Fraud*, found that most reported incidents of voter fraud are actually traceable to other sources, such as clerical errors or bad data matching practices. The report reviewed elections that had been meticulously studied for voter fraud, and found incident rates between 0.00004 percent and 0.0009 percent. Given this tiny incident rate for voter impersonation fraud, it is more likely, the report noted, that an American "will be struck by lightning than that he will impersonate another voter at the polls."

A study published by a Columbia University political scientist tracked incidence rates for voter fraud for two years, and found that the rare fraud that was reported generally could be traced to "false claims by the loser of a close race, mischief and administrative or voter error."

A comprehensive 2014 study published in *The Washington Post* found 31 credible instances of impersonation fraud from 2000-2014, out of more than 1 billion ballots cast. Even this tiny number is likely inflated, as the study's author counted not just prosecutions or convictions, but any and all credible claims.

Two studies done at Arizona State University, one in 2012 and another in 2016, found similarly negligible rates of impersonation fraud. The project found 10 cases of voter impersonation fraud nationwide from 2000-2012. The follow-up study, which looked for fraud specifically in states where politicians have argued that fraud is a pernicious problem, found zero successful prosecutions for impersonation fraud in five states from 2012-2016.

Courts Agree: Fraud by Voters at the Polls is Nearly Non-Existent

The Fifth Circuit, in an opinion finding that Texas's strict photo ID law is racially discriminatory, noted that there were "only two convictions for in-person voter impersonation fraud out of 20 million votes cast in the decade" before Texas passed its law.

Debunking the Voter Fraud Myth is part of the Brennan Center's *Election 2016 Controversies* series, published September 1, 2016.

In its opinion striking down North Carolina's omnibus restrictive election law — which included a voter ID requirement — as purposefully racially discriminatory, the Fourth Circuit noted that the state "failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina."

A federal trial court in Wisconsin reviewing that state's strict photo ID law found "that impersonation fraud — the type of fraud that voter ID is designed to prevent — is extremely rare" and "a truly isolated phenomenon that has not posed a significant threat to the integrity of Wisconsin's elections."

Even the Supreme Court, in its opinion in *Crawford* upholding Indiana's voter ID law, noted that the record in the case "contains no evidence of any [in-person voter impersonation] fraud actually occurring in Indiana at any time in its history." Two of the jurists who weighed in on that case at the time — Republican-appointed former Supreme Court Justice John Paul Stevens and conservative appellate court Judge Richard Posner — have since announced they regret their votes in favor of the law, with Judge Posner noting that strict photo ID laws are "now widely regarded as a means of voter suppression rather than of fraud prevention."

Those Who Publicly Argue Voter Fraud is Rampant Have Found Scant Evidence When They Go Looking for It

Kansas Secretary of State Kris Kobach, a longtime proponent of voter suppression efforts, argued before state lawmakers that his office needed special power to prosecute voter fraud, because he knew of 100 such cases in his state. After being granted these powers, he has brought six such cases, of which only four have been successful. The secretary has also testified about his review of 84 million votes cast in 22 states, which yielded 14 instances of fraud referred for prosecution, which amounts to a 0.00000017 percent fraud rate.

Texas lawmakers purported to pass its strict photo ID law to protect against voter fraud. Yet the chief law enforcement official in the state responsible for such prosecutions knew of only one conviction and one guilty plea that involved in-person voter fraud in all Texas elections from 2002 through 2014.

A specialized United States Department of Justice unit formed with the goal of finding instances of federal election fraud examined the 2002 and 2004 federal elections, and were able to prove that 0.00000013 percent of ballots cast were fraudulent. There was no evidence that any of these incidents involved in-person impersonation fraud.

The verdict is in from every corner that voter fraud is sufficiently rare that it simply could not and does not happen at the rate even approaching that which would be required to "rig" an election. Electoral integrity is key to our democracy, and politicians who genuinely care about protecting our elections should focus not on phantom fraud concerns, but on those abuses that actually threaten election security.

As historians and election experts have catalogued, there is a long history in this country of racially suppressive voting measures — including poll taxes and all-white primaries — put in place under the guise of stopping voter fraud that wasn't actually occurring in the first place. The surest way toward voting that is truly free, fair, and accessible is to know the facts in the face of such rhetoric.

Clinton's Email and National Security

Elizabeth Goitein

One festering issue throughout the campaign: Hillary Clinton's use of a private email server during her time as secretary of state. The controversy revealed a deeper, much more pervasive problem: The government's classification structure is broken, with massive over-classification of even routine documents.

There are many pressing national security issues the presidential candidates should discuss in their debate on Sunday. As someone who has spent years studying the classification system, I don't believe Hillary Clinton's use of a private email server is one of them. Here's why.

In a properly functioning classification system, officials would classify information only if its disclosure would likely harm national security. Not one insider or expert, however, believes the classification system works as it should. Republicans and Democrats seem unable to agree on what day of the week it is, but they agree that far too much information is classified. Former national security officials estimate that 50 to 90 percent of classified documents could safely be released.

The reasons are clear. The 2,000-plus officials designated as "original classification authorities" have near total discretion to classify information — and ample incentive to overreach. The culture within intelligence agencies encourages and nurtures secrecy, and classifying by rote saves considerable time. Most officials see little downside. As a former FBI agent put it, "no one ever got in trouble for overclassifying."

Even when information is appropriately classified, its status does not announce itself. A prediction of national security harm is a highly subjective judgment call. Different agencies can, and frequently do, disagree. Accordingly, once an official decides to classify information, it must be marked and listed in agencies' "classification guides" (indexes of classification decisions) to make others aware of its status.

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Here, too, the system is broken. Audits show widespread disregard of marking requirements, and classification guides are often outdated. Moreover, with more than 1 million new secrets created this past decade, guides are too numerous and bulky — there are thousands, some hundreds of pages long — to expect their audience to master them. The system sets it users up for failure.

Now let's turn to Clinton. After months of review, the FBI found that 110 out of 30,000 emails contained information that someone had classified but that was not marked. Clinton's critics say she should have known the information was classified. How? People who handle classified information are no better at reading minds than the rest of us. Yes, if an email includes nuclear codes, one should assume that information is

This op-ed originally appeared at *U.S. News & World Report,* October 6, 2016.

classified. If it recites the local weather forecast, that can safely be considered unclassified. Most classified information exists in a gray area between those extremes.

FBI Director James Comey gravely informed Congress that information in eight email chains was classified at the highest level: "Top Secret." But at least some of this information consisted of references to the CIA's drone strike program — a program well-known to anyone with access to a newspaper, a television, or the internet. The fact that emails alluding to it are considered "Top Secret" is an indictment of the classification system, not of Clinton.

The FBI also found that three emails included the symbol "(C)," denoting the classification level "confidential," in certain paragraphs, although not the prominent announcement that should appear at the top of the email, or any of the other required indicators. This contradicted Clinton's claims that she never received emails bearing classification markings. Did she lie? Or is it possible that a busy official might miss something that appeared in one hundredth of 1 percent of her emails?

Some argue that the FBI's decision not to prosecute Clinton reflects a double standard. The Obama administration has indeed prosecuted multiple low-level officials for mishandling classified information after they disclosed information that embarrassed the government. Preferential treatment is the norm, however, for high-level officials who carelessly mishandle or strategically leak classified information, including Richard Armitage, Alberto Gonzales, Leon Panetta, and John Brennan. David Petraeus's slap on the wrist was the rare exception.

There are, to be sure, valid criticisms and concerns surrounding Clinton's email practices. Her use of a private server went against agency guidelines, and made it more difficult for members of the public to obtain information under the Freedom of Information Act. These are not trivial matters. But they are not matters of national security, either.

The fiction that all classified information is clearly sensitive gets in the way of solutions by denying the problem.

Dysfunctional as it is, the classification system is sacrosanct to some officials, who believe strict compliance is the only alternative to a dangerous free-for-all. Others respond that the bloated and burdensome system forces officials to cut corners in order to do their jobs. The dilemma they face is real. The fiction that all classified information is clearly sensitive gets in the way of solutions by denying the problem.

That fiction is also distracting us from the national security issues we should be discussing. We owe it to ourselves to move on. Otherwise, we may come to regret the months spent pressing Clinton to justify her email practices instead of pressing the candidates for more details on their plans to defeat the Islamic State group.

The Limits of Bernie Sanders's Fundraising Juggernaut

Walter Shapiro

Vermont Sen. Bernie Sanders came close to winning the Democratic nomination for president — an astounding feat for a 75-year-old socialist who had not even been a member of the party until shortly before. Sanders financed his campaign through small donors, pointing out to raucous rallies that the average gift was $27. But such a small dollar path is not one many future candidates can follow.

The curtain is fast falling on Bernie Sanders's presidential campaign with the candidate reluctant to leave the stage but devoid of any persuasive reason to stay. Whatever happens with the platform at the Philadelphia convention, Sanders has nudged the Democratic Party to the left and removed the word "socialist" as a career-destroying epithet in American politics.

The Vermont senator's biggest accomplishment, though, has been to preside over the greatest small donor fundraising machine in American political history. Beginning as a lonely protest candidate against the seemingly inevitable nomination of Hillary Clinton, Sanders raised $212 million (through April) with none of the super PAC trappings and big-giver dinners that have become a hallmark of modern politics.

Putting the Bernie Bucks in perspective, his 2.4 million donors (many of them contributing multiple times) are the numerical equivalent of the entire population of New Mexico with the city of St. Louis thrown in for good measure. An innovative *Los Angeles Times* analysis of Sanders's small-dollar contributors found that the largest subsets of them were retired, unemployed, or worked in healthcare, education, technology, and the arts.

While Sanders's imprint on the Democratic Party may be lasting (no new trade deals if Clinton is elected in November), the odds suggest that his fundraising prowess may prove surprisingly ephemeral.

Ever since Howard Dean unleashed the power of online fundraising with a primitive baseball bat graphic in the summer of 2003, the hope has endured that ordinary citizens armed with credit cards could collectively equal the power of big money in presidential and congressional races.

The Vermont senator's biggest accomplishment has been to preside over the greatest small donor fundraising machine in American political history.

Small-donor financing has been at the center of campaign reform since the post-Watergate legislation in 1974. A federal matching funds program (but only for presidential primaries) aided underdog candidates for three decades. But this laudable attempt at partial public financing fell apart when the accompanying state-by-state spending limits proved too much of a straitjacket for serious 21st century White House contenders.

With Dean, technology seemed poised to ride to the rescue. Instead of expensive direct mail, now candidates could prospect for donations over the web with minimal cost.

This article appeared on the Brennan Center's website, June 21, 2016.

And, as soon turned out, limited success. There were, of course, a few exceptions with names like Barack Obama and Elizabeth Warren. But for the most part, little-known candidates (whether running for president or Congress) remained little known on the internet.

That is why Bernie's Bonanza seemed so bracing, no matter what you think of the Vermont iconoclast's politics. Against the backdrop of *Citizens United* and the microscopic prospects for campaign reform in Washington, online fundraising again offered the tantalizing possibility of a free-market alternative to super PACs.

But as Martin O'Malley (remember him?) discovered, small-donor financing only works for an unusual type of candidate.

Hillary Clinton served as the perfect foil to Sanders with her ties to Wall Street and her comfort with big-donor financing. Despite her denials, the former first lady, senator, and secretary of state personified the Establishment. In addition, many Democratic and independent voters (especially younger ones) felt they were being asked to ratify a nomination that had been predetermined without their consent.

With his emphasis on big government spending (Medicare for all and tuition-free public colleges) and his strident attacks on Wall Street, Sanders aroused the left wing of the Democratic Party that had often felt neglected and ignored. Before Sanders (who wasn't really a Democrat), no major figure in the party had consistently dissented from trade deals.

Another factor powering Sanders was his lack of hypocrisy about money in politics. Unlike Obama in 2008 or Hillary Clinton both then and now, the Vermont socialist wasn't trying to hedge his bets by also appealing to the financial titans of the Democratic Party. With Sanders, it wasn't small donors on Monday, an affiliated super PAC on Tuesday, and a Park Avenue fundraiser on Wednesday.

Finally, although Sanders received a small fraction of the television coverage of Donald Trump, he was running for the highest office in the land. A 2016 Senate candidate with similar views — and a similar grumpy grandpa persona — would probably be relegated to the online equivalent of bake sales.

The one element that suggests that the Bernie Bonanza may end up aiding future Democrats is that the Sanders campaign farmed out most of its online fundraising to a digital nonprofit called ActBlue. As a result, ActBlue has added more than 2 million new credit card accounts to its internal database. In the future, these liberal donors could return to the ActBlue website and — with one click — send money to a favored congressional or state candidate.

Against the backdrop of Citizens United *and the microscopic prospects for campaign reform in Washington, online fundraising again offered the tantalizing possibility of a free-market alternative to super PACs.*

But history suggests that donor lists atrophy fast. Most Sanders supporters probably will not be regularly trolling the ActBlue website looking for congenial candidates for lesser offices. From George McGovern's 1972 fundraising list to Barack Obama's renamed Organizing for America in 2008, cause-driven campaigns have had scant success in passing the torch to new candidates and causes.

Still, it remains a stirring monument to citizen politics that a backbench senator from a small state could raise more money for a presidential campaign than he could spend effectively. That $212 million figure represents a shimmering beacon pointing to a road beyond super PACs. The only problem is that the road is steep — and few candidates can find their way there.

Money and Politics in the Age of Trump

Daniel I. Weiner

Donald Trump's campaign depended less than some on big money. But dominance of our political system by wealthy elites helped to fuel deep frustration that he tapped so effectively.

In November, millions of Americans woke up with the political hangover of a lifetime. After one of the most vitriolic campaigns in political history, and despite losing the popular vote, the bombastic billionaire Donald J. Trump had ridden a wave of anger at the political establishment to be elected the 45th president of the United States.

Trump's victory has profound implications for a whole host of issues. Not the least of these is the structure of our democracy, including the role of money in politics. While the issue of voter suppression rightly got the most attention in the lead-up to November 8, Trump's win — and with it the chance to appoint the next Supreme Court Justice (and maybe more) — also looks like a big setback for those who want more robust campaign finance laws. Even before Election Day, moreover, the success of Trump's media-driven campaign was fueling the idea that political spending just doesn't matter that much.

Big money politics may not have enabled Trump's rise in the conventional sense, but it still plays a pivotal role in American elections, especially in down-ballot races.

On both counts, campaign finance reformers definitely have some soul-searching to do. But the story isn't so simple. Big money politics may not have enabled Trump's rise in the conventional sense, but it still plays a pivotal role in American elections, especially in down-ballot races. And it is the dominance of our political system by wealthy elites that helped to fuel the deep well of frustration that Trump harnessed so effectively to power his campaign

We will be studying what happened for years to come, but let's start with the obvious: Trump may be a (self-described) billionaire, but he won despite having less campaign money — a lot less. While we won't know the complete fundraising totals until next January, it appears Hillary Clinton's campaign and supportive outside groups outraised Trump and his groups by almost 2-1. The fundraising discrepancy between Trump and his primary opponents was even greater. A lot of that anti-Trump money paid for high-priced attack ads of questionable value. This shows that, especially at the presidential level, the money race is not always outcome-determinative. It matters not just how much you raise, but how you spend it. And media coverage can allow even a relatively under-funded candidate to maintain a high profile.

Of course, even Trump benefited from hundreds of millions of dollars in spending — so money wasn't irrelevant. More importantly, the presidency is not the only office in the land.

This op-ed originally appeared at The Huffington Post, November 11, 2016.

In fact, given their scale and level of media saturation, modern presidential campaigns are strikingly different from most down-ballot races. There is reams of evidence indicating that *Citizens United* and related court cases allowing unlimited campaign spending have actually had the most direct impact on electoral and policy outcomes at the state and local level, in races that get far less attention, where even a comparatively small infusion of cash (say $100,000 rather than $1 million) can make a big difference. Trump's surprise victory does nothing to detract from that reality.

Overwhelming majorities, including 80 percent of Republicans, say there is "too much money in politics." And with money comes influence — more than ordinary Americans think they can ever hope to wield.

Still, you might ask, does any of this really matter? At a time when so much is at stake, focusing on the ins and outs of campaign finance regulation may feel like the definition of losing the forest for the trees.

The problem with this critique is that it ignores perhaps the single most powerful dynamic at play in the 2016 campaign, namely the disdain so many Americans of all ideological stripes feel toward an economic and political system that isn't working for them. Those feelings animated not only Trump's supporters, but also those of Clinton's primary opponent, Bernie Sanders. It's likely they also had a hand in the decision of millions of eligible voters not to vote.

This widespread disenchantment feeds off a sense that politics is a game for the wealthy and connected, who direct government policy to further their own interests. Overwhelming majorities, including 80 percent of Republicans, say there is "too much money in politics." And with money comes influence — more than ordinary Americans think they can ever hope to wield.

This is why on Tuesday, campaign finance reform initiatives passed not only in blue coastal enclaves, but also deep-red places like South Dakota. Trump himself has made statements critical of *Citizens United* (even if his intent to follow through on them is at best questionable).

None of this lets reform advocates off the hook, however. The 2016 election result came as a surprise to many, and it calls for some honest reflection. When it comes to money in politics, here are a few questions we ought to be asking:

First, how can we do more to channel campaign resources toward institutions that can actually foster the better governance Americans plainly want? One idea is to pass measures that help to both strengthen and, critically, democratize political parties. Party organizations used to be the primary engines of grassroots citizen mobilization. As the organizing force behind broad political coalitions, they also fostered the sort of flexibility and openness to compromise necessary to governing. But in recent decades, the parties, while still possessing potent brand names, have been eclipsed by individual candidates and, more recently, super PACs and other outside groups who can raise unlimited funds under *Citizens United*. Stringent campaign finance laws focused on rooting out party-related corruption have arguably exacerbated that trend. Completely deregulating party fundraising is not the answer, but there are a variety of other reforms that could bolster the parties' ability to bring citizens into the political process while moderating the most extreme tendencies of both voters and officeholders. These include small donor public financing, which can boost participation and improve the quality of government by bringing more diverse voices into the political process, as it has in New York City.

Second, has the single-minded focus on "corruption" been counter-productive? Preventing corruption and its appearance are the only justifications the Supreme Court has ever recognized for most campaign finance limits. Even advocates who disagree with the Court's jurisprudence have tended to follow its lead by

The most powerful dynamic at play in the 2016 campaign: Americans of all ideological stripes feel disdain toward an economic and political system that isn't working for them.

adopting the narrow corruption frame in making their case to the public. But the notion that American politics is pervasively corrupt — that, as Trump repeated so often on the campaign trail, "the system is rigged" — may exacerbate the very public cynicism and anger that has made actual governing so difficult. Corruption is certainly a real problem, but advocates should consider making the case for their proposals more in terms of the positive democratic ideals they further rather than the negative effects they prevent.

Finally, we should also be asking how campaign finance reform relates to the broader constellation of proposals to create a democracy that works for everyone. So many aspects of the 2016 election are deeply troubling, including documented voter suppression, the ongoing effects of partisan gerrymandering, and — at least for some — the fact that the winner of the popular vote lost the Electoral College for the second time in under two decades. They call for solutions rooted in the same values of fairness, accountability, and inclusion that animate the strongest campaign finance reform ideas. It would be a great mistake to silo the latter from the broader push for a more just and equitable political system.

These are just a few of the many questions worth pondering in the wake of the 2016 election. The road ahead is not one that many of us expected, and it will not be easy. But it is the one we are on, and the stakes could not be higher.

Election Integrity: A Pro-Voter Agenda

Myrna Pérez

The clamor over restrictive voting laws, and President Trump's false claims of fraud, should not obscure a fundamental shared truth: American elections should be secure and free of misconduct. This paper outlines a six-part agenda to target fraud risks as they actually exist — without unduly disenfranchising eligible citizens.

In the weeks before the 2016 election there were charges of election rigging, attacks on state voter registration databases, and concerns of manipulation of our election results by Russian hackers. Even months after the election, and despite his attorneys' claims to the contrary, President Donald Trump has claimed that millions of people voted illegally. On January 25, 2017, he stated that he would request a "major investigation" into voter fraud. Trump's remarks follow on the heels of many pitched battles in the states in recent years over the right to vote. Since the 2010 election, about half of the states have passed new laws making it harder for voters to access the ballot box, with proponents asserting these laws were justified because of the need to combat voter fraud.

Election integrity need not be a euphemism for voter exclusion.

To no surprise, many of these allegations, and policies supposedly justified by them, have met vigorous, and vocal opposition. Opponents, including the Brennan Center, argue that many of these laws are unnecessary and harmful, placing burdensome obstacles in the path of law-abiding citizens who want to exercise their franchise.

The clamor should not obscure a fundamental shared truth: Our elections should be secure and free of misconduct. Throughout American history, political actors have tried to bend the rules and tilt the outcomes. The dangers come not so much from *voter fraud* committed by stray individuals, but from other forms of *election fraud* engineered by candidates, parties, or their supporters. Fraud, when it exists, has in many cases been orchestrated by political insiders, not individual voters. Even worse, insider fraud has all too frequently been designed to lock out the votes and voices of communities of voters, including poor and minority voters.

Election integrity need not be a euphemism for voter exclusion. Those who care about securing the right to vote and enhancing democracy in America care deeply about ensuring the honesty of elections and avoiding misconduct. All who are eligible to vote should be able to do so in free and fair elections — but only those eligible to do so. It is vital that we protect voters from the

Excerpted from the Brennan Center report, *Election Integrity: A Pro-Voter Agenda,* February 1, 2017.

real threats to the integrity of elections. Fortunately, it is possible to protect election integrity without disenfranchising eligible voters. This report proposes solutions that vary in approach. All target fraud risks as they actually exist. None will unduly disenfranchise those who have the right to vote.

A History of Misconduct by Political Actors

American history has been marked by misconduct and abuse from political insiders. From the beginning, the Framers warned that America's electoral machinery was vulnerable to political "factions." During the Constitutional Convention, James Madison warned:

> "It was impossible to foresee all the abuses that might be made of the discretionary power [by state officials]. Whether the electors should vote by ballot or [by voice], should assemble at this place or that place; should be divided into districts or all meet at one place, [should] all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures, and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to [mold] their regulations as to favor the candidates they wished to succeed."

Madison's concerns over corruption accompanied the raw contests for power that marked much of the development of American democracy.

For example, Boss Tweed's infamous Tammany Hall Democratic machine in 19th century New York City was famed for physically dragging challengers and poll watchers out of the polls, asking groups of voters to vote in multiple locations, and controlling the counters who reported election results. The Martin Scorsese film *Gangs of New York* accurately portrays one practice: Tammany Hall operatives would send men to vote multiple times, donning different looks each time — once fully bearded, once after shaving the sides, once with a mustache, and once more as a clean-shaven voter.

Beyond colorful examples of fraud and ballot box stuffing, American history is replete with even more consequential examples of election misconduct that directly blocked citizens from voting. In the post-Reconstruction South, white Southern terrorist groups like the "White Liners," and other armed ex-Confederates, would patrol polling places, and intimidate and even murder black voters. Black voters who pledged to support Democrats received "certificates of loyalty," protecting them and their families from violence and loss of employment. Stuffing the ballot box to ensure Democratic victories became a "national scandal." Once these sorts of tactics resulted in control of Southern state legislatures, Democrats would call for constitutional conventions to cement legal suffrage restrictions such as poll taxes, literacy tests, and property requirements. At the 1890 Mississippi convention, a leading Democratic delegate conceded, "it is no secret that there has not been a full vote and a fair count in Mississippi since 1875."

The 20th century saw its own share of vivid insider improprieties. For example, in 1948, Lyndon Johnson overcame a 20,000-vote deficit to win the Democratic primary by 87 votes after supporters "found" a box of votes — alphabetized and containing the same handwriting, with the same ink — all cast for him. Additionally, several jurisdictions reported "corrections" to their returns. Court records revealed election counters provided Johnson with extra votes by rounding out the "7" in "765" into a "9" to give Johnson 965 votes instead. Rumors of misconduct long lingered. It is widely believed that John F. Kennedy's 1960 presidential victory was due to theft, notwithstanding numerous investigations finding no widespread fraud that would have changed the result.

In fact, American elections grew cleaner over time. The professionalization of election administration, the decline of political machines, stronger penalties, the universal use of the secret ballot, and other

factors have succeeded in greatly minimizing the incidence of many of the most notorious practices.

Elections will never be truly free, fair, and accessible if precious resources are spent protecting against phantom threats.

Yet pockets of misconduct remain. The examples cited most heatedly by proponents of new voting restrictions often refer to absentee ballot fraud or other schemes orchestrated by insiders. The most dramatic recent example of such fraud came in the 1997 Miami mayoral election. Incumbent Joe Carollo won 51 percent of the votes at polling places, but 61 percent of absentee ballots were marked for the challenger, Xavier Suarez. That was enough to deny Carollo a majority vote and force a runoff nine days later that Suarez won. Carollo sued, claiming fraud. Citing "a pattern of fraudulent, intentional and criminal conduct" regarding absentee ballots, the first judge to hear the case threw out the results and called for a new election. An appellate court voided all the absentee ballots and declared Carollo the winner. In all, 36 people, including a member of the city's code enforcement board and a chamber of commerce president, would be charged with absentee ballot fraud to benefit several candidates in the race. The head of the local prosecutor's public corruption unit called it "a well-orchestrated conspiracy to steal the election."

It is important to note what is not happening: widespread in-person voter impersonation. Admittedly, in 2016, numerous press outlets noted that two voters — a woman in Iowa and a man in Texas — attempted to vote for Donald Trump twice, but neither report indicated that these people were trying to impersonate another voter. In fact, a comprehensive search of federal and state records and news accounts by News21, an investigative reporting program headquartered at the Walter Cronkite School of Journalism at Arizona State University, found only 10 cases of voter impersonation fraud nationwide from 2000 to 2012. Overall, the group found 2,068 individual cases of alleged voter fraud, but these also included "a dozen different kinds of election illegalities and irregularities." An analysis of U.S. Department of Justice records showed that between 2002 and 2005 no more than two dozen people were convicted of, or pleaded guilty to, illegal voting. Many of them may have voted by mistake (as when individuals who are temporarily barred from voting due to a felony conviction wrongly believe their rights have been restored). As one Wisconsin federal judge noted, given the high penalties for casting even a single improper vote, a citizen would have to be "insane" to commit that crime. Statistically, an individual is more likely to be killed by lightning than to commit in-person voter fraud.

Toward Election Integrity

This history strongly suggests two overarching principles that should guide any further efforts to secure election integrity. Such efforts should have two key elements:

- First, they should target abuses that actually threaten election security.
- Second, they should curb fraud or impropriety without unduly discouraging or disenfranchising eligible voters.

Efforts that do not include these elements will just result in burdens to voters with little payoff.

The Brennan Center has conducted extensive research and published numerous analyses, legal briefs, case studies, and reports on the topic of fraud and security risks in election administration for over a decade. This report not only benefits from those experiences, but includes an extensive literature search to incorporate the latest research on election integrity. Additional information and confirmation of the reforms proposed here came from more than a dozen experts across an array of fields consulted for this report.

We are unwavering in our belief that the integrity of elections can be improved while protecting democracy for all. It is a false choice to say that secure elections must come at the price of voter exclusion. The solutions proposed in this report vary in their approach. Some use technology, some use enforcement, and some use common sense. But they all target fraud *risks as they actually exist*. Elections will never be truly free, fair, and accessible if precious resources are spent protecting against phantom threats. In part, the purpose of this report is to move beyond all the shopworn arguments about election integrity. Instead, it offers an election integrity reform agenda that truly protects democracy without disenfranchising legitimate voters.

GOVERNMENT & THE COURTS

The Supreme Court and Political Money

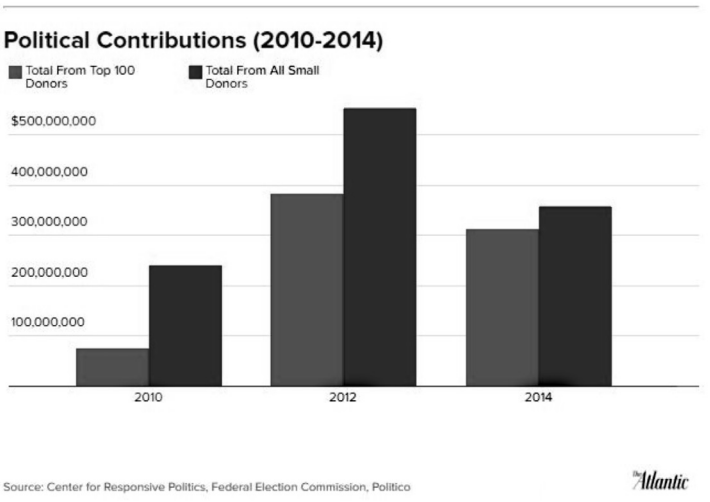
Lawrence Norden

The dystopian world of political money did not just happen. It was a product of a series of 5-4 decisions from a divided Supreme Court. An issue that was barely mentioned as the campaign hung in the balance.

For the last 10 years, the Supreme Court has engaged in a systematic effort to transform American democracy. Steered by Chief Justice John Roberts, the Court loosened restrictions on political advertising by corporations and unions, gutted a key provision of the Voting Rights Act, upheld the rights of states to enact restrictive voting laws, and, in the words of Justice Stephen Breyer, "eviscerate[d] our Nation's campaign-finance laws." This year, the Court will decide a voting and redistricting case that could change the lines of virtually every state legislative district in the country. There is no area of the law the Roberts Court has more thoroughly transformed.

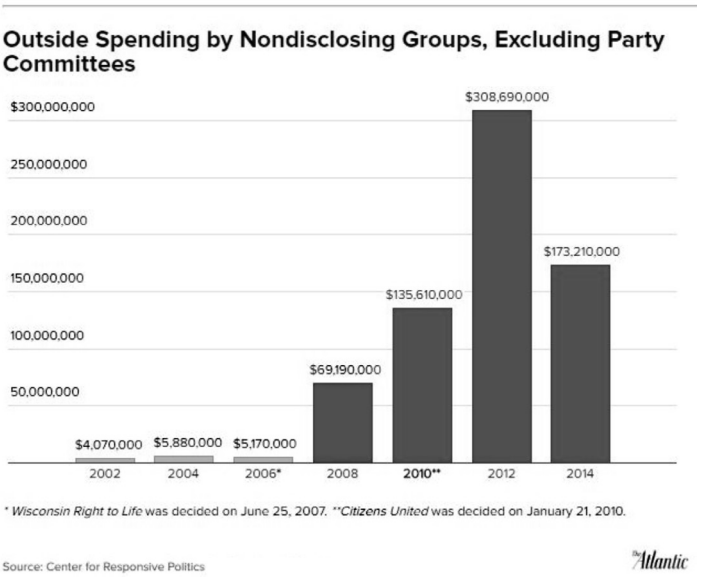
Almost all of the Court's major election cases were decided by a 5-4 vote. Of course, on the Court, the majority rules. But it would not take a constitutional amendment or a revolution in legal scholarship to bring this string of decisions to an end. It is extremely likely that the next president will have the opportunity to replace at least one (and very likely more than one) Supreme Court Justice, as the previous five presidents have done. One new Justice on the Court might be enough to push the law in the opposite direction.

Today, super PACs enable the very wealthiest to spend unlimited amounts on campaigns. It's hard to remember that they didn't even exist before 2010. That year, the top 100 donors spent less than one-third as much as the total contributions of all small donors to federal candidates. By 2014, that drastically changed. The top 100 super PAC donors spent almost as much as the combined total contributed to candidates by all small donors.



This op-ed originally appeared at *The Atlantic*, January 13, 2016.

Worse, outside groups seized on this bright-line rule to avoid disclosure. They argued, with the support of half the FEC, that provided they were not spending extensively on express advocacy, they did not need to register as political committees. Yet status as a political committee triggers most campaign-finance disclosure obligations. While there are also some disclosure requirements for each communication, FEC rules have made those exceptionally simple to evade as well. As a result, money contributed to outside groups is easily concealed and the "prompt disclosure" imagined by the Roberts Court in theory is often illusory in practice. In 2008, the first election after *Wisconsin Right to Life*, federal dark money spending increased from almost nothing to about $70 million. It continued to rise quickly, reaching almost $310 million in 2012.



Combined with *Citizens United*'s allowance for unlimited "independent" spending, and a Congress that appears unwilling to pass legislation that would reimpose more disclosure, these decisions have enabled secret spending to influence politics on a scale not seen since the Gilded Age.

Citizens United is perhaps best known for declaring that corporations (and, by extension, labor unions) have a First Amendment right to spend unlimited money on elections. Corporate political spending is often difficult to track, but IRS data shows that in 2012, corporations gave at least $173 million to nonprofit groups that spend in elections. Such groups are frequently used to obscure the source of political spending.

While corporations and unions certainly spent in elections prior to *Wisconsin Right to Life* and *Citizens United*, there were strict limits on their spending. Congress first regulated corporate spending in 1907 with the Tillman Act, preventing corporations from making any "money contribution in connection with any election to any political office." Almost 100 years later, the Bipartisan Campaign Reform Act barred corporations and unions from using funds from their general treasuries to buy broadcast ads that targeted specific candidates. These rules prevented corporations or unions from spending huge sums on federal elections.

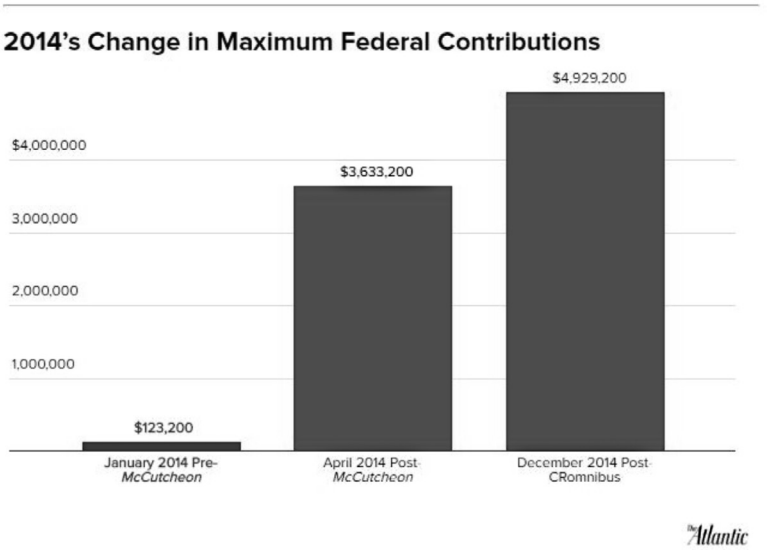
The four dissenters in *Citizens United* tried to explain "why corporate electioneering is not only

more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms." To impose restrictions on corporate and union spending in elections would take only a return to a status quo that prevailed before *Citizens United*.

In last year's 5-4 ruling in *McCutcheon v. FEC*, the majority gave its clearest expression yet of its attitude on money and politics. Campaign finance limits, the Court said, may only be used to protect against quid pro quo corruption, "a direct exchange of an official act for money." The Court did away with a limit that capped combined contributions in a single election cycle to all federal candidates and parties at about $123,000.

Though *McCutcheon* was decided only seven months before the 2014 election, nearly 700 donors managed to exceed the old limits, contributing more to candidates and political parties than was previously allowed. Both the number of these mega-donors and the size of their contributions are likely to grow substantially in 2016.

In practice, however, these mega-donors do not write small checks to hundreds of federal candidate, state, and local party committees. Instead, they write a small number of huge checks to joint fundraising committees that distribute the money. Congress further encouraged this practice in 2014 when it tucked a provision into must-pass legislation creating new party accounts that could accept contributions of more than $100,000. As the chart below shows, in just one year the maximum amount an individual could contribute to federal candidates and political parties increased from $123,200 to nearly $5 million.



In his *McCutcheon* dissent, Justice Breyer argued that the Court had substituted its understanding of the political process for that of Congress, and failed to appreciate that undue influence itself is a form of corruption that can, and should, be addressed by campaign finance regulation. By returning to a broader definition of "corruption," one that reflects the range of threats posed by big money in politics, the Court could reduce the influence of mega-donors on elections.

Citizen-funded elections, which provide public funds to candidates who agree to abide by strict fundraising and spending limits, aim to ensure that ordinary Americans — not just the wealthy and well connected — can run credible campaigns

for elected office. Perhaps more importantly, they aim to ensure that successful candidates need not depend on wealthy donors to support their campaigns. These programs exist in various forms in dozens of states and cities across the country.

But in *Arizona Free Enterprise* in 2011, the Supreme Court struck down a key element of many of these programs. In another 5-4 decision, it rejected the "trigger matching fund" provision of Arizona's public financing law, which provided extra money to candidates using the program when privately supported candidates exceeded a certain spending threshold. The purpose of the provision was to ensure that publicly financed candidates could still get their message out in the face of massive private spending.

The notion of any sort of government-funded attempt to strike a rough parity between candidates is anathema to Roberts and his allies. In the majority opinion, Roberts wrote, "We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech."

The impact of the Court's ruling was immediate. Eighteen Arizona candidates who had used public funding before switched to private funding in the first election after the ruling. In 2010, before the decision, both major-party gubernatorial candidates used public financing. Four years later, neither did. Likewise, candidates in other states with public financing programs, such as Maine and North Carolina, also abandoned them in large numbers.

Participation in Arizona's Public-Financing Programs

Year	Primary-Election Participation by All Candidates	General-Election Participation by All Candidates
2006	60%	60%
2008	62%	66%
2010*	45%	49%
2012	38%	37%
2014	32%	28%

* Trigger funds were first suspended in June 2010 while *Arizona Free Enterprise* was pending.

The Atlantic

Participation in Maine Clean Elections

Year	General-Election Participation by Legislative Candidates
2006	81%
2008	81%
2010	77%
2012*	63%
2014	51%

* 2012 was the first election in Maine without trigger funds.

The Atlantic

The Arizona decision did not kill all public financing systems. Programs in New York City and Connecticut that do not rely on trigger funds continue to thrive. In 2013, New York City's program saw a 92 percent participation rate during the primary and 72 percent during the general election. One year earlier Connecticut saw record participation in its program.

It is possible to craft public financing systems that do not run afoul of *Arizona Free Enterprise*. Yet the decision constrains the types of public financing systems that can be enacted, and makes it hard for publicly financed candidates to compete. As Justice Elena Kagan, quoting *Citizens United*, put it in the dissent, "By enabling participating candidates to respond to their opponents' expression, the statute expands public debate, in adherence to 'our tradition that more speech, not less, is the governing rule.'"

There are few issues in the last decade on which the Court has been so consistently and bitterly divided as it has over campaign finance law.

There are few issues in the last decade on which the Court has been so consistently and bitterly divided as it has over campaign finance law. Justice Ruth Bader Ginsburg recently decried "what has happened to elections in the United States and the huge amount of money it takes to run for office." She argued that eventually, "sensible restrictions" on campaign financing will again be in place because "the true symbol of the United States is not the eagle, it's the pendulum — when it swings too far in one direction, it will swing back."

Still, it is no exaggeration to say that the next appointments to the Supreme Court will have a profound impact on political power in the United States. The appointment of one or more Justices who agree with the five-member majority might solidify the current system for decades to come.

On the Court, that swing back only requires one new or existing Justice to adopt the approach of four current members. A shift in the Court could permit reasonable regulation of big money in politics. To be sure, state and federal legislators would need to pass new laws to regain the ground that has been lost, and mere reversal of campaign finance decisions of the last decade would not solve all of the problems of excessive influence. Because of older Supreme Court decisions, for example, new laws still could not limit the total amount of spending in any election.

Still, it is no exaggeration to say that the next appointments to the Supreme Court will have a profound impact on political power in the United States. The appointment of one or more Justices who agree with the five-member majority might solidify the current system for decades to come. By contrast, appointment of one or more Justices who share the vision of the Court's four-member minority could bring substantial power over elections and the political process back to ordinary Americans.

Restore to Congress and the States Power to Set Campaign Limits

Hon. John Paul Stevens

The retired Supreme Court Justice wrote the powerful dissent in Citizens United. *He thinks the solution for the campaign finance conundrum is the bold measure of a constitutional amendment. Such a change would restore the status quo before the Supreme Court's misguided jurisprudence, allowing legislatures to set "reasonable limits" on what candidates and their supporters can spend on campaigns.*

For many decades, the Supreme Court assumed that it was constitutional to impose restrictions on corporate participation in elections that were different from those imposed on individuals.

Patience is a virtue. That is the most important lesson that I learned in the interval between October 8, 1929, when I sat behind home plate in Wrigley Field and watched the Cubs strike out during the first game of the World Series, and the early morning of November 3, 2016, when, after an agonizing 17-minute rain delay, the Cubs finally won the World Series in Cleveland. That lesson persuades me that the fact that the six amendments to the Constitution that I have proposed will not be adopted in the next few months should not preclude consideration of their merits. I plan to say a few words about one of those proposals — my proposal that we add this provision to the Constitution:

> Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns.

Even before I first saw the Cubs in the World Series, President Theodore Roosevelt had delivered his 1905 annual message to Congress. In it he urged the Congress to forbid all corporate contributions to political committees and candidates. Two years later, Congress heeded his call to action. For many decades, the Supreme Court assumed that it was constitutional to impose restrictions on corporate participation in elections that were different from those imposed on individuals. But in the latter half of the century, the Court limited the power of the legislature to restrict political funding. Of course, the culmination of this approach was the Court's 5-4 decision in *Citizens United,* affording the same constitutional protection to election-related expenditures by corporations as to speech by individual voters.

A key error in the Court's jurisprudence occurred with the 1976 decision *Buckley v. Valeo.* *Buckley* was decided shortly after I was sworn in as a Justice

Justice Stevens submitted this letter to a Brennan Center convening of scholars and lawyers reviewing the Supreme Court's money in politics jurisprudence.

in 1975. Although I did not participate in the decision of the case or the deliberations that preceded it, I felt obligated to review what my colleagues were writing and debating. The opinions resolving the case totaled 294 pages, and the seemingly endless hours I spent studying them shaped some of my views about the area. In the *Buckley* case, the Court reached its conclusion about campaign expenditures over the dissent of Justice White, and in disagreement with the majority of the judges on the Court of Appeals for the District of Columbia as well as the majority of the members of both houses of Congress and the president who signed the 1974 amendment to the Federal Election Campaign Act of 1971.

While the First Amendment may protect the right of corporations and other nonvoters to express their views on various issues, it surely does not give them an equivalent right to influence the outcome of elections.

The Supreme Court held that statutory limitations on campaign expenditures violated the First Amendment because they restricted the quantity of campaign speech by individuals, groups, and candidates. The Court's opinion explained why the governmental interest in preventing corruption and the appearance of corruption was inadequate to justify a statutory ceiling on independent campaign expenditures. It also added a separate paragraph discussing what it described as "ancillary interest" in equalizing the relative financial resources of candidates competing for elective office.

In my opinion the interest in providing competing candidates for elective offices with an equal opportunity to persuade voters to support them is not just an "ancillary interest;" it is just as important as the interest in a fair trial that every litigant has. While the *Buckley* majority famously asserted that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," every trial judge and every appellate court has imposed precisely that restriction on speech whenever it enforced rules limiting the adversaries' time for oral arguments or the number of pages in their briefs. Limitations on the quantity of speech, which are the product of campaign expenditure limits, are no more "foreign to the First Amendment" than court rules limiting the number of pages in an appellate brief or rules limiting the length of presidential debates and of each candidate's answers.

Moreover, while the First Amendment may protect the right of corporations and other nonvoters to express their views on various issues, it surely does not give them an equivalent right to influence the outcome of elections. Justice Powell made precisely this point in a sometimes overlooked footnote to his groundbreaking opinion [*First National Bank of Boston v. Bellotti*] holding that the First Amendment protects some speech by corporations. He noted that "our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for public office." And more recently, the Supreme Court summarily and unanimously affirmed Circuit Judge Brett Kavanaugh's opinion for the District of Columbia Circuit upholding the statutory prohibition against noncitizens' expenditures of their own money to support the election of candidates for federal and state offices. (*Bluman v. FEC*)

Those cases provide support for the view that the law already recognizes a distinction between the rights of voters and the rights of nonvoters to spend money to influence the outcome of elections to public office. Yet the Court's other decisions, namely *Buckley* and *Citizens United,* have demonstrated the Court's unfortunate disapproval of all statutory limits on election-related expenditures. Rather than urge the Court to overrule those precedents, I submit that the time has arrived for organizing support for a constitutional amendment unambiguously authorizing such legislation. Instead of trying to mount additional support for a judicial decision overruling *Citizens United*, I am persuaded that those who favor that result — as I most assuredly do — should agree on the text of a constitutional amendment accomplishing that result and begin the process of making it part of our law. Patience will be required before the process is completed, but a favorable outcome will surely arrive more promptly than the Cubs' recent victory in the World Series.

When Redistricting Goes Unchecked

Michael Li and Thomas Wolf

In December 2016, the U.S. Supreme Court heard oral argument in McCrory v. Harris, *a racial gerrymandering case from North Carolina. At issue was whether race predominated when the legislature drew two congressional districts. One key factor at the heart of the case: the Tar Heel State's political safeguards against racial discrimination had broken down — undermining full and fair representation.*

For decades, North Carolina has played a central role in defining law around the intersection of race and elections. The Supreme Court will hear arguments in early December in a potentially pivotal case from the Tar Heel State: *McCrory v. Harris.* It centers on whether Republican lawmakers unconstitutionally packed African Americans into two congressional districts when redrawing North Carolina's map in 2011, severely limiting African-American voters' influence in selecting the state's congressional delegation.

At the crux of this case is the breakdown of normal political checks and balances that prevent the worst kinds of redistricting abuses. That context is the key to understanding why the Court must step in here, and in other cases with evidence of biased district drawing, to ensure voters across the country have a full and fair opportunity to elect representatives that truly represent them.

North Carolina's current governor, Pat McCrory, has defended the map, arguing that the Voting Rights Act required lawmakers to pack African Americans into one of the districts and that, in the case of the other district, Republicans simply drew district boundaries to ensure their party a political advantage. The lower court rejected this defense, ruling that the districts had been drawn predominately on the basis of race.

Deciding whether race or other motivations drove redistricting choices is a question that courts, including the U.S. Supreme Court, have long found challenging. But the Justices, like the lower court, should be skeptical of North Carolina's map. That's particularly clear looking at the state's political environment at the time the legislature redrew the state's districts.

North Carolina's political dynamics were ripe for foul play. Unlike in other parts of the South, power in North Carolina passed back and forth between the major political parties frequently, often on razor-thin margins. In 2008, Barack Obama won a narrow victory in the presidential election, and Democrat Beverly Perdue took the governorship. In 2010, however, the Republican Party claimed majorities in both houses of the state's general assembly for the first time since Reconstruction. This shift in power changed the structure of redistricting in North Carolina. With a single party controlling the legislature, normal political checks on redistricting abuses were nowhere to be found.

African-American voters' strong identification with Democrats, combined with their decisive

This op-ed was originally published at *U.S. News and World Report,* December 1, 2016. The Brennan Center and its counsel, Wilmer Cutler Pickering Hale and Dorr LLP, submitted an amicus brief in *McCrory.* The Center's brief argued that the broader political and legislative context for North Carolina's 2011 congressional redistricting demonstrated that racial considerations played a predominant — and therefore highly constitutionally suspect — role in the drawing of the state's map.

role in swinging elections in North Carolina, made them targets for Republican map-drawers who could use race as a proxy for identifying reliable Democrats. And that's exactly what the map-drawers did, packing African-American voters into two congressional districts and locking in a 10-3 congressional advantage for Republicans. When they were finally allowed to see draft maps late in the process, African-American lawmakers and their allies voiced objections, but their concerns were ignored.

Deciding whether race or other motivations drove redistricting choices is a question that courts, including the U.S. Supreme Court, have long found challenging.

Other contemporaneous events should also raise red flags that race was improperly driving the political process. The same legislature that passed the challenged congressional plan also passed maps for state legislative seats that were struck down as racial gerrymanders. And the early years of this decade saw a slew of racially discriminatory laws from the North Carolina General Assembly, the most infamous being the state's 2013 "omnibus" voting law, which a federal appeals court recently struck down in substantial part for "target[ing] African Americans with almost surgical precision." In short, with single-party control and political power at stake, the normal political checks eroded, clearing the way for a torrent of abuses as legislators attempted to advance their partisan goals.

The courts have long had faith in the so-called pull, haul, and trade of politics to provide balance and prevent excess. But, as North Carolina's experience suggests, electoral politics aren't a cure-all — particularly when political power itself is at stake. The state's problem, in other words, isn't just its race relations. It is a breakdown of what courts have assumed is the normal give and take of healthy politics, one that in this case had a severe racial impact.

North Carolina isn't the only place where checks and balances have collapsed at the expense of fair districting. Sometimes, racial discrimination rears its head. Other times — like the map for Wisconsin's state assembly districts, or the map North Carolina's General Assembly drew in 2016 to replace its racially gerrymandered map — discrimination on partisan lines occurs. In each of these cases, politicians who aren't subject to the normal checks abuse the redistricting process to create unfair maps that suppress opposing and minority viewpoints. That ultimately results in legislatures that are less representative of, and less accountable to, the people they are supposed to represent.

Courts can rightly play an important role when political breakdowns occur, stepping in to restore checks on legislative overreach that the political process should provide but isn't. With a steady stream of gerrymandering cases from states across the country set to pass through the Supreme Court in upcoming years, and a new redistricting cycle just a few years away, this is a lesson that can't be internalized soon enough.

Behind the Merrick Garland Blockade

Victoria Bassetti

To replace Antonin Scalia, President Barack Obama nominated Merrick Garland, the widely respected federal judge. A bruising confirmation battle loomed. Then, nothing happened. The Republican Senate majority simply refused even to hold a hearing, an unprecedented blockade. Why take this step? Many point to social issues. In fact, something far deeper is at work. Powerful economic interests have come to rely on the Supreme Court.

How much is a business-friendly Supreme Court worth? As much as $835 million for at least one company. That's the amount Dow Chemical agreed to pay in a class action settlement rather than continue an appeal to a Supreme Court in ideological flux after Justice Antonin Scalia's death.

"With the untimely, unfortunate death of Justice Scalia, it leaves in question the current structure of the court," Dow spokeswoman Rachelle Schikorra told *The Wall Street Journal*. "With this changing landscape, the unknowns, we just decided to put this behind us."

For those wondering how the fight over Scalia's replacement went to constitutional DEFCON 1, look no further. At least since 1971, business interests have sought to have their way with the American court system. The current standoff over the Merrick Garland nomination is the latest, ugliest chapter in that story.

Within hours of Scalia's death, Senate Majority Leader Mitch McConnell (R-Ky.) announced that the Senate would not consider a replacement until after the presidential election. His move was startlingly confrontational, even in these times. McConnell was quickly backed by almost the entire Republican caucus.

More than a few observers questioned why Republicans followed such a precipitous path. What puzzled them was that savvy politicians (which McConnell certainly is) could have easily accomplished their goal (depriving President Obama his nominee) without such incendiary actions. Time was on their side: drag out the meetings, the vetting, the hearings, the follow-up questions; find problems with the nominee; get to late summer and then just say with the election so close, the nominee will have to wait. It's "an unforced error…that will be difficult to mop up" *The Washington Post*'s Chris Cillizza argued.

At least since 1971, business interests have sought to have their way with the American court system.

The Republican caucus' decision seemed to be a misfire. McConnell's pronouncement riled up the Democratic base and the pundit class. It added fuel to public disgust at Congress not doing its job. Polls have shown growing public support for hearings and a vote on the nominee this year, even among Republican voters. And worst of all, it played poorly in swing states where vulnerable Republican Senators are up for re-election. McConnell appeared to have acted impulsively, handing Democrats another issue to help them retake control of the Senate.

But there is another viewpoint. The Garland nomination is one of the few bright spots for the fractured Republican Party. It unites social conservatives with business. Even better, it's an issue big-dollar donors care about. For some

This article appeared on the Brennan Center's website, May 5, 2016.

of these groups, maintaining control of the Supreme Court is more important than keeping the majority in the Senate. And they can force vulnerable Republican senators to walk the plank for them.

The Garland nomination is one of the few bright spots for the fractured Republican Party. It unites social conservatives with business. Even better, it's an issue big-dollar donors care about.

A vivid example is the hotly contested New Hampshire Senate race between freshman GOP incumbent Kelly Ayotte and Democratic Gov. Maggie Hassan. On the same weekend Scalia died, Ayotte issued a statement opposing any replacement until after the presidential election. Ayotte was likely already jittery about her standing with the donor class. Just the day before Scalia's death, one of the major Koch brothers' political advocacy groups, Americans for Prosperity, had announced it would not support her re-election.

So it must have come as a relief that less than a week after signing on to McConnell's plan, the Judicial Crisis Network (JCN), one of the main groups pushing for a conservative judiciary, announced a multi-million dollar ad campaign to support Ayotte and other senators who back the blockade. (In fact, JCN says it has spent about $4 million so far.)

Ayotte knows what it's like to be on the opposite side of JCN. Six years ago, during her primary battle, Ayotte committed the sin of answering a hypothetical question about Supreme Court Justice Sonia Sotomayor: Ayotte said she would have voted for Sotomayor had she been a senator. JCN pounced with a radio spot attacking her. The ad was credited with nearly costing Ayotte the Republican primary.

This time around, Ayotte has navigated the politics and money more deftly. Right off the bat, she took JCN's hard line. Then, faced with in-state disapproval for her part in the Garland boycott, she decided to meet with the nominee. But she messaged the courtesy call very carefully, releasing a statement immediately after the meeting reiterating her commitment to inaction. JCN praised her "great courage" in standing up to the president.

[Editor's Note: Despite Ayotte's efforts to walk a tightrope, she lost the election to Hassan by 1,000 votes.]

Ayotte knew to tread carefully. Other Republican senators who wavered were harshly disciplined. When Kansas GOP Sen. Jerry Moran hinted that perhaps Garland should get a hearing, a local Tea Party group threatened to mount a primary challenge. Its threat was shored up by JCN, which reportedly was preparing an ad campaign against him. FreedomWorks, another dark money group that funds Tea Party activities, unleashed on Moran as well. "We're going to make him our example," the group's communications director warned. Within a week, Moran completely reversed course.

The Judicial Crisis Network is part of a mysterious cluster of dark money groups concentrating on the judiciary. It is also one of the leading spenders in state judicial elections. In one extraordinary race in Michigan in 2012, JCN spent $2 million failing to elect two candidates to the Oakland County (suburban Detroit) trial court. This level of spending in such races is simply unprecedented.

JCN was founded in 2005 during the second George W. Bush administration with a few large donations from conservative benefactors. Only then it was named the Judicial Confirmation Network, and its goal was getting Bush's nominees confirmed. After Obama's election, the "confirmation" network became a "crisis" network. And its scope expanded as JCN started playing in state judicial elections.

Compared with the vast sums spent in federal elections, JCN's largesse is relatively small. But their spending is the tip of the iceberg. Other major spenders like Heritage Action and the

National Federation of Independent Business have entered the Garland fray. So have the National Rifle Association and the pro-life group the Susan B. Anthony Fund. All told, the anti-Garland groups have spent twice as much as the pro-Garland groups to date.

Studies have shown that the Roberts Court is "much friendlier" to business than either the Burger or Rehnquist Courts.

These groups, and others like the U.S. Chamber of Commerce and National Association of Manufacturers, have largely succeeded in creating the Supreme Court they wanted. They have used a wide range of tactics: grassroots activism, primary challenges, independent campaign spending, lobbying, scholarship, high impact litigation. Studies have shown that the Roberts Court is "much friendlier" to business than either the Burger or Rehnquist Courts. The U.S. Chamber files briefs before the Court far more often than it did in the past and wins in those cases more than two-thirds of the time.

Despite early cracks in the Republican front immediately after the Garland nomination, the roadblock seems to have solidified. With the Senate in recess for the first two weeks in May, swing state advertising is cranking up again. But no one expects anything other than a hardening of positions. Forty years of work reshaping the Court are at stake. No one is going to budge until after the election.

Values for Judicial Selection in the 21st Century

John F. Kowal

Most judges work in states, and most are chosen by elections. The United States is the only democracy that picks its judiciary that way. How did that happen? And what values does that serve? As state court races become politicized, partisan, and drenched in money, it's time to examine first principles and ask what values are at risk.

One hundred years ago, most states chose their judges via partisan elections. Over the course of the past century, that changed. A number of states switched to nonpartisan elections, which have not necessarily ended the problems they set out to cure. An even larger number of states embraced merit selection for some or all of their judges, retaining a popular check on judges through retention elections. Amazingly, after a century of various reform efforts spurred by concerns over the practice of electing judges, 87 percent of state court judges still face elections of one sort or another.

If judicial elections were the answer to a particular set of problems in the 19th century, and merit selection performed the same function in the 20th century, why should we expect either to meet the needs of the current century? Has history stopped?

Those concerned about judicial elections have followed two different paths. Some have doubled down on pressing for merit selection in the belief that it can overcome its recent inertia and generate new interest. Others, who conclude that electing judges is ingrained in democracy (for better or worse), have decided to focus their efforts on the more achievable goal of "improving judicial selection" (or as Prof. Charles Geyh describes it, "mak[ing] a bad system better in the interim"). But neither approach has done much to arrest the increasing politicization of judicial races.

Why can't there be a third path? Why can't people worried about the trends in state judicial selection work together to devise an ambitious — not merely incremental — reform that offers a way forward? If judicial elections were the answer to a particular set of problems in the 19th century, and merit selection performed the same function in the 20th century, why should we expect either to meet the needs of the current century? Has history stopped?

Among the values the Brennan Center urges people to consider when examining proposals for reform are the following:

1. Safeguarding judicial independence.
2. Ensuring accountability in the absence of elections.
3. Recruiting high-quality judges.
4. Delivering a diverse judiciary.
5. Maintaining public trust and confidence in the courts.

Excerpted from the Brennan Center report, *Judicial Selection for the 21st Century,* June 6, 2016.

The Integrity of the Courts

Alicia Bannon

Since the 1800s, the United States has elected its judges. In recent years, these elections have been distorted by something new and dangerous: big money.

When most people think of the courts — or talk about judicial selection — they focus on the federal courts, particularly the U.S. Supreme Court. But while federal courts get the most attention, Americans are far more likely to find themselves before state court judges. Ninety-five percent of all cases are filed in state court, with more than 100 million cases coming before nearly 30,000 state court judges each year. In recent years, state supreme courts have struck down tort reform legislation, ordered state legislatures to equalize funding for public schools, and declared a state's death penalty unconstitutional.

Recent efforts at reform have focused on either mitigating the role of money in elections through public financing and stronger recusal rules (which govern when judges must step aside from cases), or moving away from contested elections altogether.

Because state courts have a profound impact on the country's legal and policy landscape, choosing state court judges is a consequential decision. And, in recent decades, judicial selection has become increasingly politicized, polarized, and dominated by special interests — particularly but not exclusively in the 39 states that use elections to choose at least some of their judges. Growing evidence suggests that these dynamics impact who is reaching the bench and how judges are deciding cases.

Pennsylvania's 2015 supreme court election for three open seats exemplifies many of the problems with judicial selection today. The election, which set a new spending record for state supreme courts, was largely funded by business interests, labor unions, and plaintiffs' lawyers — all groups that are regularly involved in cases before the court. Millions of dollars went into negative ads that characterized candidates as issuing "lenient sentences" and "failing to protect women and children" — amid growing evidence that such attacks make judges more likely to rule against criminal defendants. And, in a state where people of color make up more than 20 percent of the population, none of the 2015 candidates in the general election was a racial or ethnic minority, and the Pennsylvania supreme court remains all-white.

Having monitored judicial elections and other state court issues for almost two decades, the Brennan Center has chronicled numerous threats to the fairness and integrity of state courts that are closely tied to how states choose their judges:

Excerpted from the Brennan Center report, *Rethinking Judicial Selection in State Courts,* June 6, 2016.

- **Outsized role of money in judicial elections:** A flood of special interest spending in judicial elections is undermining the fairness of state courts. Judges regularly hear cases involving campaign supporters, and, in one survey of state court judges, nearly half said they thought campaign contributions affected judges' decision-making.

- **Politicization of campaigns:** Judicial campaigns have also become more overtly political, regularly including partisan language and statements on contested political issues such as gun rights or religious liberty. For neutral arbiters, this heightened political temperature risks exacerbating pressures to decide cases based on political loyalty or expediency, rather than on their understanding of the law.

- **Lack of judicial diversity:** Neither elective *nor* appointive systems of choosing judges have led to a bench that represents the diversity of the legal profession or of the communities that courts serve. Research suggests that diverse candidates face numerous challenges in reaching the bench, from fundraising difficulties, to inadequate pipelines for recruitment, to bias, both explicit and implicit. The resulting lack of diversity undermines public confidence in the courts and creates a jurisprudence uninformed by a broad range of experience.

- **Job security concerns affect outcomes:** A growing empirical literature suggests that in both elective and appointive systems, concerns about job security are affecting how judges rule in certain high-salience cases, putting judicial impartiality at risk. Numerous studies have found, for example, that when judges come closer to re-election, they impose longer sentences on criminal defendants and are more likely to affirm death sentences. "Reselection" pressures impact judges across the country: In 47 states, judges must be elected or reappointed in order to hold onto their seats.

In the face of growing threats to state courts' legitimacy and to the promise of equal justice for all, we need to rethink how we choose state court judges.

Recent efforts at reform have focused on either mitigating the role of money in elections through public financing and stronger recusal rules (which govern when judges must step aside from cases), or moving away from contested elections altogether, typically to a "merit selection" system in which a nominating commission vets potential candidates, who are then appointed by the governor and later stand for periodic yes-or-no retention elections. But these reforms have failed to either gain traction or to adequately address the challenges facing courts today. …

Identifying the problems facing state courts is only the first step. Any alternative system of choosing judges will have its own advantages and disadvantages, and may advance or impede important values related to the selection of judges — including judicial independence, accountability and democratic legitimacy, judicial quality, public confidence in the courts, and diversity on the bench. Rethinking judicial selection therefore raises important empirical questions about the likely impact of different systems on these values. It also raises normative questions about how to balance these values when they come into tension.

Secret Money Floods Judicial Elections

Dorothy Samuels and Alicia Bannon

Dark money is playing a greater role in state supreme court elections, threatening the fairness of the courts.

John Paul Stevens called it right. Dissenting in 2010 from the Supreme Court's notorious *Citizens United* ruling to overturn limits on big spending in campaigns, the now-retired Supreme Court Justice warned that the decision's toxic implications would extend beyond ordinary political contests to the elections that fill powerful state supreme court seats.

Discomfiting figures from the latest round of state judicial races bear out that grim forecast. Of the 39 states that hold judicial elections, 27 feature supreme court races this November, and the money is flowing freely.

The same seamy money game that defines races for political office post-*Citizens United* — unlimited spending by special interests and barrels of secret money — has also invaded contests for the courthouse. It is an alarming development. And it is getting steadily worse.

So far in 2016, seven states — Arkansas, Idaho, North Carolina, Ohio, Texas, Wisconsin, and West Virginia — have held a state supreme court race in which at least one television ad was broadcast. (Some were primaries and some were early general election contests.) Increasingly, those judicial races are dominated by distorting attack ads and underwritten by influence-seeking groups, according to an analysis by our group, the Brennan Center for Justice.

The upshot: a deepening threat to judicial integrity and to the nation's core principle of fair and impartial courts.

*The same seamy money game that defines races for political office post-*Citizens United *— unlimited spending by special interests and barrels of secret money — has also invaded contests for the courthouse.*

Even before *Citizens United* and its progeny, wealthy interests with business before the courts were pushing judicial campaigns over the top. Since the 2010 ruling, however, outside groups have become central players, while the role of candidates in defining the tone and content of their own campaigns has shrunk. New loopholes allow big spenders to get around caps on direct contributions to judicial candidates and disclosure requirements. Broad secrecy has made the money trail a lot harder, if not impossible, to follow, and in many cases, the purported separation between "independent" groups and the candidates they back seems like little more than a convenient fiction.

A whopping 70 percent of outside television spending in completed state supreme court races so far this year came from so-called dark

This op-ed originally appeared at *The American Prospect,* September 28, 2016.

The upshot: a deepening threat to judicial integrity and to the nation's core principle of fair and impartial courts.

money outfits, which do not disclose their donors. Secret money is particularly problematic in judicial races because it not only skews voters' choices, but also obscures significant conflicts of interest in legal cases involving big donors who helped elect a judge hearing the case.

In all, judicial candidates were responsible for only 35 percent of television spending in this year's early state court contests, compared to 42 percent overall in the 2013-14 election cycle.

The resulting conflicts of interest pose a vexing challenge. All the secrecy makes it hard to identify conflicts to begin with. And even when donations are publicly disclosed, lax state recusal rules mean judges often preside over cases involving major campaign supporters, raising real doubts about their impartiality. For instance, a key aspect of *The Guardian*'s recent disclosures involving the so-called John Doe investigation into alleged campaign finance violations committed during Wisconsin Gov. Scott Walker's 2012 recall election is the role played by state supreme court justices in the case.

The state supreme court rejected allegations that secretive tax-exempt groups had illegally coordinated with Walker's campaign committee. Yet some of those same nonprofits had also helped elect justices on the Wisconsin supreme court majority that not only shut down the Walker investigation, but also ordered the destruction of all documents in the case. Two justices declined a special prosecutor's request that they recuse themselves, giving rise to an appeal to the U.S. Supreme Court. The Court will decide shortly whether to take up this judicial ethics (and campaign finance) travesty. (The Brennan Center filed an amicus brief calling for the Court to take the case.)

The big money now pouring into state supreme court contests in 2016 sets the stage for more potential post-election conflicts of interest like the ones seen in Wisconsin. Court rulings could be affected. The danger is that judges and judicial candidates now campaigning in Kansas, Montana, North Carolina, Ohio, Washington State, and elsewhere will feel debts of gratitude to their financial supporters or hesitate to issue rulings that may make them targets in future elections.

The Supreme Court's erroneous campaign financing jurisprudence has negatively affected the nation's politics as a whole. But it's also undermining the appearance and reality of honest, even-handed decision-making at the state court level, where 95 percent of the nation's legal cases are filed. Whatever reconfigured Supreme Court emerges after the November election must make overhauling this corruptive campaign financing gauntlet a priority. And states must rethink whether elections flooded with influence seekers' money and ugly attack ads are really the best way to choose judges.

There Is No Constitutional Bar to Further Gun Laws

Eric M. Ruben

After every mass shooting, such as the one in Orlando last June, Second Amendment advocates proclaim that sensible gun regulation is unconstitutional. Yet a careful reading of recent Supreme Court opinions shows there is room for safety laws.

Predictably, another tragic mass shooting is followed by invocations of the Second Amendment to remind us why we can't have sensible gun regulation. But the reality is that the Second Amendment is rarely an obstacle to the kinds of gun restrictions reformers propose.

True, in 2008 in *District of Columbia v. Heller*, the Supreme Court struck down a ban on handguns in the home, recognizing for the first time an individual Second Amendment right to keep and bear arms for self-defense. Two years later, in *McDonald v. City of Chicago*, the court applied *Heller* to strike down a similar ban in Chicago.

But the *Heller* opinion, written by none other than Justice Antonin Scalia, went to great pains to limit the scope of its ruling. The court emphasized that the need for self-defense is "most acute" in the home, leaving open the possibility for a different standard in public. It also characterized handguns as the "quintessential self-defense weapon," suggesting other guns might be regulated differently. Moreover, Scalia cautioned that "nothing in our opinion should be taken to cast doubt" on certain "presumptively lawful regulatory measures." He listed a few, including prohibitions on the possession of firearms by felons and the mentally ill, and in "sensitive places." Even the court's relatively expansive list, Scalia explained, did "not purport to be exhaustive." In *McDonald*, the court repeated *Heller*'s explicit limitations.

Since *Heller*, with few exceptions, lower courts have upheld restrictions that stopped short of handgun bans. To take one highly relevant example, judges — liberal and conservative alike — have agreed that assault weapon bans are constitutional, upholding them in the District of Columbia, New York, Connecticut, and Highland Park, Illinois. Judges also generally agree that it is lawful to restrict concealed carry permits to only those people who can show some heightened need for armed self-defense in public. Just last week, an 11-judge panel upheld such a restriction in California. And assault weapon bans and restrictions on concealed carry are only the most contentious Second Amendment issues. Judges also have held that background checks, safe storage requirements, age limitations, and other regulations are constitutional.

The Second Amendment, even after Heller, *simply does not present as tall a barrier to gun regulation as some would have us believe. The bigger barrier is the political disagreement about how to protect the public from gun violence.*

Of course, these cases entail spirited briefing on both sides. Some gun rights advocates, such as the National Rifle Association, have even claimed that the judicial consensus about the Second

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Amendment reflects resistance to *Heller*. But that critique has become increasingly strained as the Supreme Court has declined to disrupt lower court rulings in more than 60 cases upholding gun regulations, stepping in to correct a Second Amendment decision only once since *McDonald*.

The Second Amendment, even after *Heller*, simply does not present as tall a barrier to gun regulation as some would have us believe. The bigger barrier is the political disagreement about how to protect the public from gun violence. If our democratic debate results in new gun regulations, the Second Amendment most likely will not stand in the way.

The 'Different Planets' of Gun Policy

Hon. Chris Murphy

In April, the Brennan Center co-sponsored a day-long discussion on how Second Amendment doctrine can be interpreted for the 21st century. Connecticut's junior senator delivered the keynote. The month after he was first elected, 20 6- and 7-year-olds were killed in a mass shooting at an elementary school in Newtown, Conn. Murphy is now one of the Senate's leading voices on curbing gun violence.

I want to talk to you today about the politics surrounding this debate. It's interesting to analyze why we are at such an irreconcilable impasse on gun control, a question that enjoys 80 to 90 percent support amongst the American public. There's really nothing else like it right now, in the American political theater. Consistently, 80 to 90 percent of Americans will tell you that they want expanded background checks for people who are trying to buy guns. Yet, we can't even have a debate in the Judiciary Committee, or a hearing on the subject. We can't even begin a legislative conversation about that in Washington. Democracy is not supposed to allow for that to happen, so why is that?

The left and the right, Democrats and Republicans, we aren't just having different conversations about guns, we are on different planets.

I want to explore that with you, because I think about it a lot. I think about how to change that reality. I'd argue that it's rooted in the fact that the left and the right, Democrats and Republicans, we aren't just having different conversations about guns, we are on different planets.

For Democrats, we are mainly talking about the mechanics of how you regulate guns, how you regulate people who would buy guns. We are down in the weeds of a discussion over what policies will lead to more gun deaths and what policies will lead to less gun deaths. That's what we're talking about. That's a pretty familiar conversation because that's how much of what's debated in Washington happens. Talking about policies and the implications of those policies.

Republicans are in a fundamentally different place when it comes to the issue of guns. They are in a space that is totally foreign to the space that Democrats are in. Instead of trying to persuade you why the space that the left is in is the right place, I want to try to talk to you about why I think Republicans are unable to come to where we are and have a discussion about how to change things, in a manner that's consistent with the vast majority of Americans. I think the story of why Republicans are unable to enter into this

Murphy delivered these remarks at *The Second Generation of Second Amendment Law and Policy* symposium hosted by the Brennan Center, April 8, 2016.

conversation is rooted in the modern reality of the rhetoric surrounding the anti-government impulses of the party, and the modern reality of the firearms industry.

On that first question, for a variety of reasons, Republicans have decided that their political play is going to be to run against government. Not to run against inefficient government, not to run against stupid government, not to run against over-reaching government. To run against government. Republicans, in some way, shape, or form, have become a neo-anarchist party in that they don't accept that there is much legitimacy at all to the existence of public functions. You can see why that's a fairly easy place to be. In a world of enormous economic anxiety, there is always a pressure to find an explanation as to why you are hurting. Republicans have decided that it is government that is going to be the explanation as to why your economic situation isn't what it should be. That, for them, is much more comfortable than placing the blame on private sector participants or players. They place the blame squarely on government. In a very difficult economic atmosphere for a lot of people, they're willing to listen to that argument.

Republicans have decided that their political play is going to be to run against government.

Second, the way that politics is covered today makes the argument that government is evil pretty easy. The media has figured out that if you cover politics like sport, or like soap opera, and you accentuate the dysfunction, as any good soap opera does, then you're going to get ratings, you're going to sell ads. There's a ready-made narrative in the media about how terrible government is. Republicans feed into it. That has become a pretty fundamental building block of the modern Republican Party. An all-out, no-holds-barred assault on government, in a way that we've never seen before in the history of the modern Republican Party.

That leads to their positioning on guns in this way. To win a Republican primary, you have to trip over yourself to become more anti-government than the next candidate. Then you are going to logically find yourself in the most radical place you could possibly be, which is in alignment with, essentially, a revolutionary theory of government. We all learned in elementary school that there was nobody more anti-government than the Founding Fathers. They were so anti-government that they took up arms against it. They were so anti-government that they wrote an amendment into the Constitution that guaranteed the right of their children and grandchildren to be able to arm themselves against potential oppressors.

Now whether or not that's the right construction and history of the Constitution, for Republicans, if you really want to be as far out in the flank as you can possibly be in contesting the legitimacy of government, then making the case that the Second Amendment is all about the right of the people to be able to bear arms against the government is pretty safe territory. The modern Republican Party pushes itself into an interpretation of the Second Amendment that is absolutist. That's become an essential element of that party's narrative.

To the Founding Fathers, the First Amendment was more important when it came to protections against tyranny, but to the modern Republican party… the Second Amendment has become sacred because it's the best way for them to express how furious Republicans are at government. They are willing to defend the right of individuals to take up arms against it. There's no way to get further right or anti-government rhetoric than that.

The second reality is the change in the composition of the modern firearms economy. In the 1970s, half of American households owned firearms. You could create a market for the weapons manufacturers were producing by making sure that there was a chicken in every pot. Today, less than one-third of Americans own firearms. That number is decreasing; the percentage of households that own firearms. The model now is dependent on a smaller number of Americans buying a larger number of weapons. If that's the new economic model, then you've got to create, as an industry, a justification for that small set of people to arm themselves. Plays right back into what I was speaking about before. The firearms industry now is dependent upon a narrative that suggests the government is coming after you. That the black helicopters are going to descend and spirit you away. Thus the need to arm yourselves for that potential future rebellion.

The Second Amendment has become sacred because it's the best way for them to express how furious Republicans are at government. They are willing to defend the right of individuals to take up arms against it. There's no way to get further right or anti-government rhetoric than that.

Now, they may not spell it out in those terms, but there's really no other way to explain the change in the National Rifle Association's (NRA) position on gun laws. This is the main lobbying organization in Washington. In the wake of Columbine, they were leading the charge to close the gun show loophole, to pass expanded background checks. Fast forward to today and their positioning is in a 180-degree different place. I would argue the reason for that is the industry's model has changed. They now have to create paranoia about government that helps feed gun sales. By sitting down and negotiating with the government about stricter gun laws, it runs contrary to that narrative about the government coming to get you, which prompts increasing gun sales.

Democratic leaders should do a better job of calling out the industry. Calling out the fact that the industry is radically different today. That these organizations, like the NRA, which claim to speak on behalf of gun owners, are simply captives of the gun industry. All you have to do is chart, in a much more public way, the flow of money from the gun industry and from net gun sales to these lobbying organizations. Member dues make up a portion of the NRA's funding, but increasingly, it's direct contributions from the industry and contributions that come from sellers, who agree to give the NRA a percentage of every sale that they make. Which is a big way that the NRA makes money. Thus, the NRA is not really speaking for its members any longer; they're speaking for the industry. We've got to do a better job of telling that story, as a way of making gun owners rethink whether the NRA is really the best vehicle for them to express their views in Washington and in state capitols.

Democrats also need to be willing to move as well. The left side of this debate needs to understand that we are on different planets. As much as

Republicans need to come down from the clouds in this conversation that they're having about rights and liberty, we need to come out from our conversation as well. I'd suggest a way to begin is this: We have to start thinking about ways in which Republicans can prove their anti-government bona fides other than their fealty to the NRA.

I think we have to concede that, for the time being, that Republicans, in order to win primaries, are going to have to continue to trip over themselves, getting further to the right, in the way they talk about how much they hate government. I'm not saying that we're going to pay for consultants to help them do this, but I think we have to admit that we are probably not going to convince them on the merits. We then have to give them a different outlet, in order to talk about things like freedom and liberty, other than this question of guns. That's difficult to do, but I think it would be an important admission on our part that we are maybe not just going to drag them over to our side, that we have to help them solve their own problem, when it comes to the way in which they talk about their values.

If we do that, and if the public continues to be united in their sense that things have to change, they will. I fundamentally don't think that democracy allows for 90 percent of the American public to think one thing and Congress to think another for a very long time. I think, ultimately, that debate gets right-sized.

JUSTICE

How Many Americans Are Unnecessarily Incarcerated?

Lauren-Brooke Eisen and Inimai M. Chettiar

Three years ago, the Brennan Center began to research an important question: How many Americans could be released from prison yet still protect public safety? A team of lawyers, criminologists, and statistical researchers undertook a comprehensive analysis of criminal codes, convictions, sentences, and recidivism rates. The result was the Brennan Center's headline-making report. Their research found that 39 percent of the nation's prison population, or 576,000 people, do not belong behind bars. Releasing these inmates would save a staggering $20 billion annually.

For the past year, President-elect Donald Trump campaigned on "law and order," stating at the Republican National Convention that under a Trump presidency, "safety would be restored." His administration, with Sen. Jeff Sessions as attorney general, is likely to be unfriendly on criminal justice. However, Trump and his ilk are outliers. There is strong transpartisan agreement, among politicians, law enforcement, advocates, and researchers that there are simply too many people in prison.

With 2.2 million people in prison, mass incarceration is the greatest moral and racial injustice of our time. We need bold solutions, but few systemic solutions exist.

Crime exploded in the 1980s and '90s. Officials responded with harsh sentencing laws that had little impact and ironically may have made things worse. Now that crime is down, we need to change our approach. Instead of doubling down on the failed draconian policies of the past, based on vengeance, we have an opportunity to rethink how America punishes people who break the law and ground those decisions in what we know works.

With 2.2 million people in prison, mass incarceration is the greatest moral and racial injustice of our time. We need bold solutions to solve this crisis, but few systemic solutions exist.

For the past three years, we led a team of criminologists, lawyers, and statistical researchers to analyze criminal codes, convictions, and sentences to help pave a way forward. This week, we released our findings in a new report, *How Many Americans Are Unnecessarily Incarcerated?*

We found that approximately 39 percent of the nationwide prison population (576,000 people) is behind bars with little public safety rationale. And they can be released, significantly and safely cutting our prison population.

How did we get to this number? First, many people who are in prison shouldn't have been sent there in the first place. For example, we found that 25 percent of prisoners (364,000 people), almost all nonviolent, lower-level offenders, would be better served by alternatives to incarceration such as treatment, community service, or probation. Second, another 14 percent (212,000 prisoners) have already served long sentences for more serious crimes and can be safely set free.

This op-ed originally appeared at *Time*, December 9, 2016.

Releasing these inmates would save $20 billion annually, enough to employ 270,000 new police officers, 360,000 probation officers, or 327,000 school teachers.

Republicans and Democrats agree that America's experiment in mass incarceration has failed. Our research-driven recommendations aim to help rethink sentencing to make our justice system better by decreasing crime and recidivism, reducing the disproportionate impact on communities of color, and preserving the hard-won declines in crime over the last 20 years.

How We Got Here

There was a period in America where crime dominated the headlines. In 1968, Republican presidential candidate Richard Nixon ran a campaign commercial where a series of still photos of angry protesters and burning buildings appeared over a soundtrack of a snare drum and dissonant piano chords. "Let us recognize that the first civil right of every American is to be free from domestic violence," Nixon intoned. "So I pledge to you, we shall have order in the United States." To a large extent, what average Americans saw on their television screens squared with their own experiences. From 1960 to 1980, violent crime soared 270 percent, peaking at 758 violent offenses per 100,000 people in 1991. African-American and Latino communities bore the brunt of this crime rise. By the late 1970s, people of color were crime victims at a rate 24 percent higher than white Americans.

States and the federal government responded by enacting a series of laws that dramatically lengthened sentences for many crimes, and also created entirely new ones. Increased policing of lower-level offenses and drug violations swept more individuals into the system. Punitive policies such as mandatory minimum sentencing, the abolishment of parole, and a slew of new criminal laws caused the prison population to explode.

The nation experienced a prison boom. Average lengths of time behind bars increased by 33 percent in state prisons between 1993 and 2009, and doubled in the federal system.

As America became the world's number one jailer, crime plummeted dramatically. Today, the overall crime rate is half of what it was at its peak in 1991. Violent crime is about where it was in 1970. Property crime is at 1967 levels.

We found that approximately 39 percent of the nationwide prison population (576,000 people) is behind bars with little public safety rationale. And they can be released, significantly and safely cutting our prison population.

Many may assume that this decrease in crime was caused by the increase in incarceration. But research shows incarceration had a limited impact on the massive drop in crime.

"When the incarceration rate is high, the marginal crime reduction gains from further increases tend to be lower, because the offender on the margin between incarceration and an alternative sanction tends to be less serious," according to the Brookings Institute's Hamilton Project. "In other words, the crime fighting benefits of incarceration diminish with the scale of the prison population." A 2015 Brennan Center study came to the same conclusion.

Although there is some relationship between increased incarceration and lower crime, at a certain point, locking up additional people is not an effective crime control method, especially when imprisoning one person costs $31,000 a year.

Building on State Successes

The current sentencing regime was largely a knee-jerk reaction to crime, not grounded in any scientific rationale. While it may have seemed like a reasonable approach to protect the public, a comprehensive examination of the data proves it is ineffective at that task. Worse yet, it is also inequitable, placing a disproportionate burden on communities of color. Whether viewed through a lens of justice, fairness, public safety, cost, or victims' rights, the U.S. prison system unnecessarily warehouses millions of people.

There are some state models for success. Over the last decade, a majority of states reduced their prison populations while cutting crime. From 1999 to 2012, New Jersey and New York reduced their prison populations by about 30 percent, while crime fell faster than it did nationally. Texas decreased imprisonment and crime by more than 20 percent during the same period. California cut its prison population by 27 percent, and violence in the state also fell more than the national average. These state reforms are excellent steps in the right direction. They provided modest fixes and short term relief. Although these reforms are heartening, we need more wholesale systemic changes to strike a blow to mass incarceration.

A problem of such epic proportions needs a bold solution.

Who's Unnecessarily Behind Bars

Our team discovered these 576,000 people by rethinking who really needs to be behind bars and whether an alternative to prison could be a more effective sentence. Our current sentencing regime is largely based on outdated ideas about what is necessary to keep the nation safe, which we know don't work.

Public safety should be the number one reason we incarcerate. But penalties should be the most effective, proportional, and cost-efficient sanction to achieve that goal. This would create more uniform sentences and reduce disparities, while preserving judicial discretion when needed.

To arrive at our findings, we considered four major factors.

The first factor is seriousness. Murder, for instance, should be treated as a far graver crime than writing a bad check. The second is victim impact. If a person has been harmed in the commission of a crime, especially physically, the punishment should weigh toward a more serious sentence. The third factor is intent. If a person knowingly and deliberately violated the law, a more severe sanction may be appropriate. The fourth factor is recidivism. Those more likely to reoffend may need more intervention.

We first applied this analysis to people convicted of lower-level offenses. We found that for an estimated 364,000 lower-level offenders (25 percent of the nationwide prison population), alternatives to prison are likely more effective.

We then applied these factors to prisoners who were serving serious crimes. They may warrant prison, but do they really need such lengthy sentences?

Research shows long sentences aren't very effective. A 2007 National Bureau of Economic Research study found that prison stays longer than 20 months had "close to no effect" on reducing commission of certain crimes upon release. Other studies show prison often has a "criminogenic" effect, meaning that imprisonment can actually lead people to commit more crimes after release.

With that in mind, we took the 58 percent of prisoners serving time for six major crimes — aggravated assault, murder, nonviolent weapons crimes, robbery, serious burglary, and serious drug trafficking — and tested several methods for cutting sentences, ultimately landing on a 25 percent reduction. This approach would ensure that sanctions for serious crimes involve significant prison time, but that the sentences are better calibrated to deter recidivism and protect public safety.

This approach would shave a little over a year from prison sentences for these crimes. Applied retroactively, it means 212,000 prisoners (14 percent of the total prison population) have already served sufficiently long prison terms and could be released within the next year with little risk to public safety.

Rethinking Sentencing in America

Our findings are not isolated. A prominent coalition comprised of groups such as the ACLU, Beyond the Dream, #Cut50, Ella Baker Center, #FreeAmerica, and JustLeadershipUSA is calling for the prison population to be cut by 50 percent. Other criminologists have recommended we go back to the sentencing

regime of the 1970s and 1990s, which would require us to cut average prison stays by almost 40 percent.

Our recommendations are more conservative and err on the side of public safety. We recommend that state legislatures and Congress make two major changes to sentencing laws: (1) eliminate prison for lower-level crimes altogether, barring exceptional circumstances; (2) and reduce current sentence lengths to be more proportional to the crimes committed, starting with considering a 25 percent cut to the six crimes we tested. We also recommend that they allow current prisoners to petition for application of these news laws, and that prosecutors use their discretion to seek sentences in line with this report.

Judges should have discretion to depart from these guidelines in special circumstances. And, we can't simply swing open the prison doors — prisoners need proper support upon reentry into society to ensure they get back on their feet and do not recidivate.

Sentences should be based on what works to prevent crime, not vengeance. On social science research, not conjecture from 30 years ago on what we mistakenly assumed worked. And sentences should be proportional to the crime committed.

What Now?

Donald Trump campaigned on a message that Washington is broken. Our bloated, wasteful, ineffective, and unnecessarily harsh criminal justice system is a prime example of that. Republicans like House Speaker Paul Ryan, Sens. Mike Lee and John Cornyn, and even Vice President-elect Mike Pence and Newt Gingrich have strongly backed criminal justice reform. In fact, many efforts in the states were championed by conservative lawmakers.

Republicans should not walk away from the cause now that Trump is in the White House. Their voices will be crucial in explaining to the next administration why America's experiment in mass incarceration has failed, and needs to be fixed. Not only does using prison as a one-size-fits-all punishment for crime devastate families and communities, but many of today's overly punitive prison sentences produce little public safety benefits.

Our findings and recommendations are intended to offer a practical and effective approach to end mass incarceration while preserving public safety. Our goal with this report is to jump-start a conversation about how the United States can implement specific reforms that are audacious enough to truly end mass incarceration.

No Projected Crime Increase in 2016

Matthew Friedman, Ames C. Grawert, and James Cullen

Amid cries of a nationwide crime surge, in September the Brennan Center analyzed the available crime data from the 30 largest cities and made a projection for 2016. The numbers show that overall crime is expected to rise a negligible 1.3 percent in 2016. And to the extent certain categories may show increases, such as murder, much of the rise can be attributable to just a few cities, not an overall trend.

Earlier this year, the Brennan Center analyzed crime data from the 30 largest cities in 2015, finding that crime overall remained the same as in 2014. It also found that murder increased by 14 percent, with just three cities — Baltimore, Chicago, and Washington, D.C. — responsible for half that increase. All told, 2015's murder rate was still near historic lows. The authors concluded that reports of a national crime wave were premature and unfounded, and that "the average person in a large urban area is safer walking on the street today than he or she would have been at almost any time in the past 30 years."

This report updates those findings. It collects midyear data from police departments to project overall crime, violent crime, and murder for all of 2016. Its principal findings are:

- **Crime:** The overall crime rate in 2016 is projected to remain the same as in 2015, rising by 1.3 percent. Twelve cities are expected to see drops in crime. These decreases are offset by Chicago (rising 9.1 percent) and Charlotte (17.5 percent). Nationally, crime remains at an all-time low.

- **Violence:** The violent crime rate is projected to rise slightly, by 5.5 percent, with half the increase driven by Los Angeles (up 13.3 percent) and Chicago (up 16.2 percent). Even so, violent crime remains near the bottom of the nation's 30-year downward trend.

- **Murder:** The murder rate is projected to rise by 13.1 percent this year, with nearly half of this increase attributable to Chicago alone (234 of 496 murders). Significantly, other cities that drove the national murder increase in 2015 are projected to see significant decreases in 2016. Those cities include Baltimore (down 9.7 percent) and Washington, D.C. (down 12.7 percent). New York remains one of the safest large cities, even with the murder rate projected to rise 1.2 percent this year.

Excerpted from *Crime in 2016: A Preliminary Analysis,* published on the Brennan Center's website, September 19, 2016.

Nationally, the murder rate is projected to increase 31.5 percent from 2014 to 2016 — with *half* of additional murders attributable to Baltimore, Chicago, and Houston. Since homicide rates remain low nationwide, percentage increases may overstate relatively small increases. In San Jose, for example, just 21 new murders translated to a 66.7 percent increase in the city's murder rate. Based on this data, the authors conclude there is no evidence of a national murder wave, yet increases in these select cities are indeed a serious problem.

- **Chicago Is an Outlier:** Crime rose significantly in Chicago this year and last. No other large city is expected to see a comparable increase in violence. The causes are still unclear, but some theories include higher concentrations of poverty, increased gang activity, and fewer police officers.

- **Explanations for Overall Trends:** Very few cities are projected to see crime rise uniformly this year, and only Chicago will see significant, back-to-back increases in both violent crime and murder. The authors attempted to investigate causes of these spikes, but ultimately were unable to draw conclusions due to lack of data. Based on their research, however, the authors believe cities with long-term socioeconomic problems (high poverty, unemployment, and racial segregation) are more prone to short-term spikes in crime. Because the pattern across cities is not uniform, the authors believe these spikes are created by as-of-yet unidentified local factors, rather than any sort of national characteristic. Further, it is normal for crime to fluctuate from year-to-year. The increases and decreases in most cities' murder rates in 2015 and 2016, for example, are within the range of previous two-year fluctuations, meaning they may be normal short-term variations.

These findings undercut media reports referring to crime as "out of control," or heralding a new nationwide crime wave. But the data do call attention to specific cities, especially Chicago, and an urgent need to address violence there. Notably, this analysis focuses on major cities, where increases in crime and murder were highest in preliminary Uniform Crime Reporting data for 2015, so this report likely overestimates any national rise in crime. It also represents a projection based on data available through early September 2016.

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Are Democrats Missing in Action on Mass Incarceration?

Inimai M. Chettiar and Ames C. Grawert

For decades, crime was the archetypal "wedge issue" — used by conservatives to push back against liberals. Democrats had muscle memory of the "Willie Horton ads" that were so potent in the 1988 election. More recently, though, polarities have shifted. Conservatives and progressives now work together on reform. And surprisingly, it's often Republicans who show more courage.

Even though it now looks like Americans will be deprived the drama of a contested Republican convention, the gathering in Cleveland could hold at least one surprise.

The Republicans are set to vote on an RNC resolution to reduce mass incarceration. The measure asks for "reforms for nonviolent offenders at the state and federal level" and urges "state legislators and Congress to…provide substance abuse treatment to addicts, emphasize work and education, and implement policies that cut costs while obtaining better outcomes."

Finally, Democrats may say, Republicans have woken up to mass incarceration as a 21st century civil rights struggle, joining what has for years been a progressive fight.

Not so fast. If the Republican Party makes criminal justice reform a priority, they'll be the first major party to do so, ever. Democrats need to catch up. Adding ending mass incarceration to their own platform would mark a significant step, boldly breaking with their past politics.

So what have the Democrats said about criminal justice?

Recent Democratic platforms haven't merely been silent; they have actually called for policies creating more imprisonment, and then applauded the result. Mentions of progressive alternatives are hard to find.

So what have the Democrats said about criminal justice?

In 1992, Democrats supported alternatives to incarceration, such as "community service and boot camps for first-time offenders." But four years later the platform went in the opposite direction. It praised mandatory "three-strikes-you're-out" laws, truth-in-sentencing provisions that limited earned early release, and "$8 billion in new funding to help states build new prison cells."

At the turn of the century, the party still championed "tougher punishments" as a way to fix "an overburdened justice system that lets thugs off easy," and applauded federal funding for "new prison cells" as a major success story (a clear nod to the 1994 Crime Bill, which paid states to increase imprisonment).

More recently, in 2008 and 2012, the DNC approved language supporting "local prison-to-work programs" aimed at "making citizens safer and saving the taxpayers money," and noting the importance of "fight[ing] inequalities in our criminal justice system." But neither platform

This op-ed originally appeared at *The Nation,* May 31, 2016.

made any mention of sentencing reform, or reducing the number of criminal laws, even as the U.S. incarceration rate topped the world and some states reversed course on their "tough-on-crime" policies.

This year's Democratic presidential candidates have broken with this legacy. Both Hillary Clinton and Bernie Sanders have prominently featured prison reform in their campaigns and vocally noted that the 1994 Crime Bill, which they both supported, went too far.

Yet Democrats still lag behind. Today's movement to end mass incarceration has largely been led by Republicans.

If the federal Sentencing Reform and Corrections Act passes Congress, advocates will have Republican Sens. Mike Lee (Utah) and John Cornyn (Texas) to thank for courting support for the bill and hammering out compromises with the party's most conservative members. At the state level, Republican Govs. Rick Perry in Texas and Nathan Deal in Georgia fought for and signed laws that led to sharp reductions in the prison population. In Ohio, Gov. John Kasich championed and signed legislation in 2011 to expand the use of treatment in lieu of prison.

Today's movement to end mass incarceration has largely been led by Republicans.

In announcing the Republican National Committee resolution to end mass incarceration, RNC member Tom Mechler claimed that "Republicans are the ones that have taken the lead on this."

That's no idle boast — he's right. So where are the Democrats?

A few Democrats have stepped up to champion the cause, such as Sens. Dick Durbin, Cory Booker, and Patrick Leahy. But the senior party leadership — Sen. Harry Reid, Rep. Nancy Pelosi, and DNC chair Debbie Wasserman Schultz — have largely been mum. Other influential party voices, including Elizabeth Warren and Chuck Schumer, have done the same.

To be sure, Democrats may still be haunted by the ghost of Willie Horton and the fear of being branded as "soft on crime." And some may believe that stoutly maintaining a belief in "law and order" will secure votes.

But times have changed. Now Democrats can point to Republicans such as Lee, Cornyn, Perry, and Kasich. Even law enforcement supports reform. These conservative voices now give Democrats cover to come out strongly on the issue. And, in the wake of national protests to reform policing, Clinton and Sanders have energized parts of the Democratic electorate — African-American communities and white liberals alike — on the issue.

The consensus to reduce unnecessary imprisonment has arrived. But we will never see true reform until Democrats provide a solid left flank, so that compromise lands at the center, instead of to the right.

It is time for Democrats to officially commit themselves to the fight to revamp criminal justice. When they meet in Philadelphia one week after the Republicans, their platform should express unequivocal support for ending the era of mass incarceration. The Democrats should openly back trimming mandatory minimum sentences, reducing prison for nonviolent crimes, and improving community-police relations. And after all the space that previous Democratic platforms have devoted to using federal funds to build prison cells, the 2016 document should call for federal funding to decrease prison space — a "reverse Crime Bill"of sorts.

Criminal justice reform should be a simple step for a party that believes in progress, equality, and inclusion. It was the Democrats who fought for civil rights in the last century. If the Democrats do not raise their voice, history will record that it was the Republicans who led the civil rights struggle in this one.

The U.S. Is Not Experiencing a Terrible New Crime Wave

Mark Holden and Ronal Serpas

Despite recent claims, Americans are still experiencing historically low crime rates. Two conservatives, a Koch Industries executive and a former police chief, set the record straight.

There has been a surge of assertions about rising crime recently. At the Republican convention in July, GOP nominee Donald Trump said, "Decades of progress made in bringing down crime are now being reversed by this administration's rollback of criminal enforcement." The Manhattan Institute's Heather Mac Donald echoed these concerns, noting that homicides increased by nearly 17 percent in the 56 largest U.S. cities last year and citing sharp rises in Baltimore, Chicago, and Washington, D.C.. In an op-ed in last Sunday's *Post*, Sean Kennedy and Parker Abt made the same case.

As two strong conservatives, let us set the record straight. These statements on rising murders are highly misleading. The truth is that Americans are still experiencing hard-won historic lows in crime.

When examining statistics on crime, researchers evaluate several factors: overall crime, violent crime, homicide, and property crime.

By 2014, violent crime had fallen by half from its 1991 peak. Property crime was down 49 percent. Crime overall was 66 percent lower in major cities. No one disputes this decades-long trend.

Moving on to 2015, crime data collected directly from police departments in the 30 largest cities show that crime overall was the about same as in 2014 (in fact, it was down 0.1 percent). Violent crime was up by 3 percent, and murder by 13 percent. This is reasonably consistent with the FBI's June 2015 midyear report, which showed violence up 1.7 percent and murder up 6 percent nationally, and the oft-cited Justice Department study by criminologist Richard Rosenfeld that found murder to be up 17 percent in major cities in 2015.

These statements on rising murders are highly misleading. The truth is Americans are still experiencing hard-won historic lows in crime.

These numbers put the 2015 murder rate near 2012 levels — still very near to all-time lows.

This rise in homicide is alarming on its face. But half of 2015's murder increase occurred in Baltimore, Chicago, and Washington, D.C. — the very cities that those pushing the crime panic repeatedly use as examples. While we must work to address the issues driving this unacceptable localized violence, it is not the norm. These cities are outliers. As for violent crime overall, half of 2015's increase came from a spike in aggravated assaults in Los Angeles.

Mark Holden is general counsel and senior vice president at Koch Industries. Ronal Serpas is a former superintendent of the New Orleans and Nashville police departments and the chairman of Law Enforcement Leaders to Reduce Crime and Incarceration, a project of the Brennan Center. This op-ed originally appeared at *The Washington Post*, August 11, 2016.

Turning to 2016, data from the Major Cities Chiefs Association show homicides rising 15 percent at midyear. But, again, Chicago caused nearly one-third of that increase. Additionally, the MCCA study relies on self-reporting and therefore does not include cities such as New York, where homicide decreased. And its focus on cities, where murder rates are usually higher, likewise must be taken into account. The report shows a partial slice of the picture, making it difficult to draw conclusions about 2016.

Two more cautionary notes. First, some yearly variation is normal. For example, 2005, 2006, and 2012 all saw rises in violent crime. Each time, crime rates flattened or dropped soon thereafter, and the downward trend continued. The same may be happening now. In 2015, New York's murder rate rose, but it decreased in 2016, reversing the 2015 increase. Even in Baltimore, where murders rose sharply last year, homicide has fallen by 9 percent this year.

Second, with the murder rate at such historic lows, increases measured in percentages may be misleading. Context is important. Portland, Oregon, for example, experienced a 19 percent increase in murders in 2015 as a result of just five additional killings. Politicized voices often omit these important caveats.

The bottom line: Some cities are seeing a rise in homicides. But the country is not experiencing a national murder wave or a reversal in the long trend of decreasing crime.

We all want our families, children, and police to be safe. And we all want to live in safe neighborhoods. But stoking false fear about crime will not bring or preserve "law and order." That's why the nation's most prominent police and prosecutor groups, representing 30,000 law enforcement officials, wrote to Trump and Democratic nominee Hillary Clinton on the eve of the conventions to urge them to take a data-driven, modern approach to crime — one that targets violent crime while reducing the unnecessary incarceration of low-level offenders. States that have employed these practices have seen crime and incarceration fall together, which preserves resources for law enforcement.

Law enforcement isn't the only entity that's changed its stance on crime policy after decades of seeing what has and hasn't worked. Many conservative leaders, including House Speaker Paul D. Ryan (R-Wis.), New Jersey Gov. Chris Christie (R) and Newt Gingrich, agree. The Republican Party platform has also adopted a similar approach.

To be sure, as Kennedy and Abt note in their op-ed, Americans do believe that crime is rising. An April 2016 Gallup poll found that 53 percent of Americans worry "a great deal" about crime. It's important that our country's leaders keep the public's concerns in mind. But stoking fear with twisted data and dangerous rhetoric doesn't help, nor is it the best way to support our police.

If we care about law and order and changing the dire conditions in cities where violent crime is a perpetuating cycle, we need to rely on facts, not fear.

Increasing Incarceration Does Not Reduce Crime

Hon. Jason Furman

In April, the Brennan Center partnered with the White House and the American Enterprise Institute to discuss the economic consequences of the criminal justice system. Below are excerpts from remarks by the chair of the White House Council of Economic Advisers about a recent Council report on the economics of incarceration.

The research on this is really clear. It's really consistent. It goes across party lines. The changes we've seen in policy over the last decades that led to the mass incarceration that led to the increasing difficulty of reincorporating people into the workforce wasn't because of some set of studies or researcher analysis done by economists, lawyers, or criminologists. It was for other reasons.

Using that evidence, research can help us point in a better direction. Now, we don't have all the answers on this topic, like many other topics. We do have a lot of them. The issue is to put them in place at the federal level, and also encouraging a conversation at the state and local level. We put out a 79-page report. I'm going to take you through some of the highlights of it very quickly.

The incarceration rate grew more than 220 percent between 1980 and 2014.

Begin with the fact, as we've heard many times before, that the incarceration rate grew more than 220 percent between 1980 and 2014. It grew at the federal, state, and local level. Total spending on incarceration is over $80 billion. In fact, there are 11 states that spent more on corrections than on higher education.

The United States is second in the world today in incarceration rate, second to the Seychelles. Every medium and large country in the world has a lower incarceration rate, on average, one-quarter what the incarceration rate is in United States. This big increase in incarceration has happened despite a substantial decline in the crime rates, with the violent crime rate falling 39 percent and the property crime rate falling 52 percent. One of the exercises we go through in the report is we say: What if criminal justice policies had remained the same, they hadn't changed and you just saw this evolution in

Jason Furman was the chair of President Obama's Council of Economic Advisers. These remarks were given at *Criminal Justice as an Economic Issue*, an event hosted by the White House, the Brennan Center, and the American Enterprise Institute, April 25, 2016. Other speakers included Valerie Jarrett, Arthur C. Brooks, Michael Waldman, Peter Orszag, Douglas Holtz-Eakin, Daniel Loeb, Inimai Chettiar, Todd Cox, and David Rennie.

crime rates? What would have happened to the incarceration rate? The answer at the state level is that the incarceration rate would have actually fallen by 7 percent; instead it rose by 125 percent. At the federal level, incarceration also rose much faster than you would have predicted given the decline in crime.

The question is what happened? Just in immediately accounting for the incarceration, not delving into the actual causes, but just the pure accounting exercises, it's not that there is more crime; it's that there is greater severity of sentencing and increased enforcement.

Between 1984 and 2004, nearly all crimes experienced a substantial increase in times served. Times served for drug offenses in federal prisons more than doubled over the last two decades. At the same time, arrests have come down with the decline in crime but they haven't come down as much. The arrest rate has risen. That has also contributed to this increase in incarceration. Once again, drugs have played a big role. Drug arrest rates increased by over 90 percent over this period. The question then is what causes this decline in crime? There is lots of debate among economists about exactly what it was.

The one thing that pretty much all the evidence agrees on is what it wasn't. That is the increase in incarceration. First of all, the evidence is that, like so much in economics, there is declining benefits to additional incarceration. You're getting increasingly less violent, less dangerous people as you expand incarceration, so that has less of an impact on crime. You're keeping people in prison for longer after the ages when they're more likely to commit further crimes.

When you look at studies, they find that longer sentence lengths, which is a big cause of the increase in incarceration, has little deterrent effect on offenders. One recent paper found that a 10 percent increase in sentence length corresponds to somewhere between 0 and 0.5 percent decrease in juvenile arrest rates. In fact, incarceration can have the opposite effect, which is that longer spells of incarceration can lead to an average increase in future offending of 4 to 7 percent, according to one study. As I said, there isn't a single agreed upon cause of the reduction in crime, but demographic changes, improving economic conditions, and changes in policing tactics are three of the theories people have.

The impact of mass incarceration is not spread evenly across the population. Although blacks and Hispanics represent approximately 30 percent of the population, they comprise over 50 percent of the incarcerated population. Incarceration for blacks dwarfed the rate of other groups, 3.5 times larger than that for whites. A large body of research has tried to look carefully at the causal role that race plays in this and finds that for similar offenses, blacks and Hispanics are more likely to be stopped and searched, arrested, convicted, and sentenced to harsher penalties.

For example, even controlling for arrest, defense, and defendant characteristics, prosecutors are 75 percent more likely to charge black defendants with offenses that carry mandatory minimums. Interactions with the criminal justice system are also disproportionally concentrated among poor individuals and individuals with high rates of mental illness and substance abuse.

One piece of evidence is the interview callback rate for people with criminal records is lower than people without criminal records. It's much lower for blacks with criminal records than it is whites with criminal records. Criminal sanctions can also have negative consequences for a range of factors like health, death, transportation, housing, and food security. The probability that a family will fall into poverty increases by nearly 40 percent while a father is incarcerated.

The fact that tens of millions of Americans have a record means this is applying to a larger and larger fraction of our population over time and playing a role in a range of the economic challenges we face, including the long-term decline in the labor force participation rate. It's important to understand that

Economists trying to estimate the social costs to crime have a range of estimates. A reasonable estimate of the mean or the median is about $300 billion a year.

it's not just the criminal justice system that has a cost, crime also has a very substantial cost. It produces direct damages to property, medical costs, pain, suffering, fear, reduced quality and loss of life. It affects some of our poorest communities disproportionately.

Economists trying to estimate the social costs to crime have a range of estimates. A reasonable estimate of the mean or the median is about $300 billion a year. This is something that's serious and important. The question though is, what are we going to do to reduce this? What's the most cost-effective? What's the most absolutely effective way to do it? A range of studies that we surveyed, and we tried to look at high-quality studies, most of these peer-reviewed in economics or other journals, find that a minority of studies have found that greater incarceration and greater sentencing passes the cost-benefit test. That is in some of these studies, just looking at how much does it cost to put someone in jail, does reduce the likelihood of crime through deterrence or keeping them in prison.

In some cases, the studies go further and actually factor in all the collateral damage, the increase in poverty for their family, the impact that that has on society from crime. In contrast, measures of strength in our communities like education have uniformly been found to pass the cost-benefit test. An important part of the strategy to reduce crime is strengthening our economy and raising wages.

We may not, everyone on the panel, agree on the strategy to raise wages, but let's look at one that this administration supports and just use it to contrast incarceration. Based on estimates in the literature, if you increase spending on incarceration by $10 billion, that's 12 percent a year, so a huge increase. That would reduce the crime rate by 1 to 4 percent. If you take into the account the cost of it versus the benefits, the net societal benefit would be between -$8 billion and +$1 billion. That itself is probably a generous estimate because it doesn't factor in all the collateral consequences of that incarceration. Incarceration is likely to both have a smaller effect on crime and a larger net societal cost than what's shown here.

Contrast that to raising the minimum wage to $12 an hour in 2020, that, for the sake of this example, assumes no employment effects, that would have an even larger impact on crime than that incarceration change. It would have a net societal benefit just from the crime reduction. That would be true even if you include employment elasticities from the range of the economic literature.

The Real Cost of Mass Incarceration

Arthur C. Brooks

At a White House conversation about the economic toll of the United States imprisoning 5 percent of the world's population, the president of the American Enterprise Institute urged the audience to move beyond the numbers to consider the lives we are "throwing away."

My colleagues at the American Enterprise Institute and I are really dedicated to two basic values: human dignity and human potential.

There are relatively few subjects that scream out for these values more than what's on hand here today. There are going to be a lot of facts that you're going to be hearing from our panel. I'll ask you to consider three.

The first is that only one-third of America's incarcerated have any access to vocational or educational programs while in prison. Thus, leaving them almost entirely unprepared for life after prison. The second fact is that about half of the incarcerated are functionally illiterate.The third follows from the first two facts which is that 60 to 70 percent of all parolees end up back in prison within the first three years after being released.

As Jason Furman and Doug Holtz-Eakin pointed out in their op-ed in *The New York Times* last week, our society pays an enormous material price for this. It creates an enormous amount of economic efficiency.

Now, as much as it pains me as an economist to admit it, however, this really isn't about the money. This is about the lives that we are throwing away. I want to take a few minutes here at the outset to remind myself and all of us that the economic case for reform is really just a proxy for something that's much deeper that we're talking about here today. My colleagues and I at AEI are working with the best nonprofits in the country that have a visionary notion of how to use human lives; how to integrate our society better along all different strata of where people are; whether they're incarcerated or free; whether they're educated or not.

We've been working lately with a group in New York City, which specializes in men who have really all the strikes against them. They're homeless, they've been incarcerated mostly. They've been addicted to substances, and they've abandoned their families. They're not working. What does the group do with these guys? It helps them put their lives back together by helping them

These remarks were given at *Criminal Justice as an Economic Issue,* an event hosted by the White House, the Brennan Center, and the American Enterprise Institute, April 25, 2016.

understand that our society needs them and needs their work. This is a subversive and radical concept.

The first time I met men from this organization, I was in New York City, and I met a man by the name of Richard who had been in prison for 22 years, since he was 18 years old. He was working for the first time. About a year after being released, he was working for a low wage, a job that some people here in Washington, D.C., might call a dead-end job. He wouldn't have considered it such. He was working for an exterminator agency.

I asked him how his life was going and he demonstrated how it was going by showing me an email on his iPhone. He took out his iPhone, the first one he had ever owned. He said, "Read this email. It's from my boss." It says, "Emergency bed bug job, East 65th Street. I need you now." I said so? He said, "Read it again. It says, 'I need you now.'" ...

When we hear today about the economic cost of mass incarceration, remember that that's a proxy for not needing people. What do we need to do? Not throw away money? No. We need to not throw away people.

When we hear today about the economic cost of mass incarceration, remember that that's a proxy for not needing people. What do we need to do? Not throw away money? No. We need to not throw away people. That's really what we're all about. What can we do to need even the people who commit crimes and who were in prison? That's a question we're dedicated to answering at the American Enterprise Institute as we work on inmate education and reentry programs. That's a question that I hope we will begin to answer today.

I think that many of us are looking for a way to bring ideological opponents together in this country. There is a deep problem with political polarization that's troubling probably every single person in this room. What better way to bring people together than to look at those at the periphery of our society and say, "What can we do together to need them?" This today can be the beginning of needing every citizen in our society, including those who have been imprisoned and to bring ourselves together as a result of it no matter where we sit on the political spectrum. Thank you for the opportunity to change the debate in this country, for your hard work, for your interest in this topic. It's an honor to be a part of this effort.

Mass Incarceration's Historic Roots

Cornell William Brooks

What role does race — and racism — play in the creation of today's criminal justice system? Many might prefer to talk in more antiseptic terms. But we will not move toward a more rational, effective system without acknowledging the harsh and historically rooted imbalances today.

In 1963, the March on Washington marked a turning point in the long fight for civil rights for African Americans. A century after President Lincoln issued the Emancipation Proclamation, hundreds of thousands converged at his memorial to celebrate a century of liberation and to protest what Rev. Dr. Martin Luther King, Jr. called "the manacles of segregation and the chains of discrimination." In the intervening 50 years, we have come a remarkable distance, but the shackles of systemic racism continue to bind communities of color.

People of color bear the brunt of our criminal justice system in disproportionate and devastating numbers.

We stand on the frontlines in the fight to build a society free from racial discrimination. In 2015, we honored the sacrifices of our forbearers and galvanized international attention to systemic discrimination with a "Journey for Justice" from Selma, Alabama, to Washington, D.C. While national support for this effort provides hope the tide may be turning, it also belies a sad truth: Many of the grave inequalities we fought decades ago still persist, more than 50 years after the Civil Rights Act. The single greatest injustice that threatens our safety and hinders our progress? Mass incarceration. People of color bear the brunt of our criminal justice system in disproportionate and devastating numbers. This is in part because racial disparities exist at all stages of the system, which relies on corrosive practices that harm people of color. Our communities have already suffered from historic and systemic economic injustice and racially targeted criminal justice policies. These wounds have not healed and have been aggravated by the staggering number of people trapped in prisons over the past 40 years. Today, an estimated 2.2 million people are locked inside jails and prisons. African Americans make up roughly 13 percent of the U.S. population but 37 percent of the nation's prisoners. People with dreams and aspirations suffer in airtight cells of prison and poverty. But the injustice does not end there. More than half of formerly incarcerated Americans are unemployed a year after release. Communities of color are over-policed, over-prosecuted, over-incarcerated, and yet underemployed.

Brooks is president and CEO of the NAACP. He wrote this foreword for the Brennan Center report *How Many Americans Are Unnecessarily Incarcerated?*, published December 9, 2016.

If we do not take steps now, Americans of color will forever be relegated to a penal and permanent underclass, and mass incarceration will continue to cage the economic growth of our communities. We have reached a crisis point, and we need solutions. This groundbreaking report from the Brennan Center for Justice offers a pathway to reduce our prison population and its tragic racial disparities. It documents the number of people behind bars without rationale, and reveals the unnecessary trauma this causes. It recommends real solutions that can help end over-incarceration. I urge lawmakers to give deep consideration and deeper commitment to this report's findings and recommendations.

This nation must continue to march forward, toward a day when all people are treated based not on the color of their skin but on the content of their character, uncolored and unstigmatized by a criminal record. It is time that we end the plague of mass incarceration.

If we do not take steps now, Americans of color will forever be relegated to a penal and permanent underclass, and mass incarceration will continue to cage the economic growth of our communities.

LIBERTY & NATIONAL SECURITY

The Government's Addiction to 'Secret Law'

Elizabeth Goitein

A Brennan Center study uncovered an entire body of classified rules, regulations, and court decisions hidden from the public, including more than 40 percent of binding agreements between the U.S. and other countries. We pay a high price for this system. Secret law denies us the ability to shape the rules that govern official conduct through the democratic process. And it prevents us from holding the government accountable.

The Central Intelligence Agency's torture of detainees, and the National Security Agency's warrantless wiretapping of Americans' international communications, were two of the most controversial programs our government implemented after September 11. Both are now widely considered to have been illegal, even though both were authorized by official legal analyses that were withheld from the public — a phenomenon known as "secret law."

The notion of secret law is as counterintuitive as it is unsettling.

The notion of secret law is as counterintuitive as it is unsettling. When most of us think of law, we think of statutes passed by Congress, and we take for granted that they are public.

Statutes, however, are only one kind of law. When the secret surveillance panel known as the Foreign Intelligence Surveillance Court, or FISA court, construed the Patriot Act to allow bulk collection of Americans' phone records, that interpretation became part of the statute's meaning. When President Obama issued procedures and standards for using lethal force against suspected terrorists overseas, agency officials were bound to follow them.

In the realm of national security, where Congress tends to tread lightly, other sources of law predominate — and a new study by the Brennan Center shows that they are frequently withheld from the public. Intelligence agencies routinely issue rules and regulations without publishing them in the Federal Register, exploiting what are intended to be narrow exceptions to the publication requirement. Most presidential directives addressing national security policy are not made public. Documents released by the State Department in litigation reveal that 42 percent of binding agreements between the United States and other countries are unpublished.

Secret law persists even in areas where we thought the secrecy had ended. Although President Obama is often credited for releasing controversial memos written by the Justice Department's Office of Legal Counsel under the Bush administration — such as the infamous "torture memos" — new data show that at least 74 OLC opinions from 2002 to 2009 on national security issues, including intelligence gathering and the detention and interrogation of suspected terrorists, remain classified. Similarly, despite the disclosure of many FISA court opinions following Edward Snowden's revelations, new information from the Justice Department indicates that about 30 significant opinions remain secret.

This op-ed originally appeared at *The New York Times,* October 18, 2016.

We pay a high price for this system. Secret law denies us the ability to shape the rules that govern official conduct through the democratic process. It prevents us from holding the government accountable for violations, rendering such violations more likely. It weakens checks and balances, as both legislative and judicial oversight operate less effectively under the constraints imposed by secrecy.

Secret law is also bad law: When rules are developed by small groups of officials without the input of outside experts or stakeholders, their quality suffers. Indeed, an inherent conflict of interest exists when the executive branch enacts laws out of the public eye to govern its own actions. This can result in policies that are ineffective, ill advised, or even contrary to statutes or the Constitution.

Documents released by the State Department in litigation reveal that 42 percent of binding agreements between the United States and other countries are unpublished.

In theory, congressional oversight should stand in for public scrutiny. But the system breaks down in practice. Executive officials sometimes refuse to provide legal interpretations to oversight committees. Even when they have access, lawmakers often fail to push back against interpretations that go too far. After all, they have little incentive to take on the national security establishment when their constituents are not even aware that a problem exists.

The costs imposed by secret law are for the most part unjustified. National security frequently requires secrecy in the details of intelligence or military operations. Rules and regulations, however, establish general standards for conduct; they do not normally include details like dates, times, targets, or sources. As for opinions that apply the law in specific cases, if their authors anticipated disclosure, they could write in a manner that minimized the entanglement of law and fact. The sensitive information could then be redacted without obscuring the legal analysis.

There have been recent notable steps to rein in secret law. In 2015, Congress passed a law requiring more transparency in FISA court opinions, and the office of the director of national intelligence has published all of its "Intelligence Community Directives" online. These changes are proof of concept, as the law in these areas has become far more accessible without harm to national security.

We should now build on this progress. Decisions about what can be kept secret should be made by an interagency group rather than a single official. The standard for secrecy should be more specific and more demanding than the current, vague yardstick of potential harm to national security. Agencies should maintain public indexes, including certain basic information about each secret law, to enable challenges and an assessment of how the system is working. And there should be a firm limit on how long any law may remain secret. The president should order these changes, with Congress conducting public oversight to ensure their faithful implementation.

These reforms might not end secret law altogether. But they would help ensure that secret law was the exception, not the expectation, in national security matters. In this election year, as we honor our right to govern ourselves, those in power and those seeking it should affirm that a regime of secret law has no place in a democracy.

Policing and Accountability in the Digital Age

Hon. William J. Bratton

In September, the Brennan Center held a day-long symposium on how technology affects policing. Below are excerpts from the keynote address by New York City Police Commissioner William Bratton, who was in his final full day running the nation's largest police department. Among other subjects, he discussed the transformative effect of providing each officer with a specially designed smartphone.

The world of technology in 2016 is very different than the world of technology in policing in 1970 when, at the age of 23, I joined the Boston Police Department. My comments today are informed by 46 years of policing, and looking at most of you in this room, my time in policing outdates your time on earth. I think I have a larger frame of reference. Frame of reference: 1970, as a Boston police officer, the equipment on my belt consisted of a six-shot revolver, six spare rounds and loops, set of handcuffs, 12-inch club, a ticket book, a badge. During my first year, we were also issued mace, pepper spray, we call it now.

The technology of the time in the average Boston police car was a basic Ford or Chevrolet, six-cylinder standard shift vehicle. It had on its roof a blinking blue light facing front about six inches in diameter, and a blinking red light about two inches in diameter facing to the rear. The siren in the vehicle could only be activated with your finger on the button. You took your finger off and the siren stopped. The vehicle was a standard shift. The radio had four channels; you receive your calls on one channel and then you create your calls on another channel.

That was it. That was the technology in that vehicle. It's very interesting going to an emergency call, standard shift vehicle, finger on the button on the siren and trying to answer the radio. In those days, before we went to two-officer vehicles with one officer in the car, it was very interesting. Also, the standard equipment in the car at that time was a Hood wooden milk crate, Hood Company was the major creamery in Boston. Why the milk crate as standard equipment in any police vehicle? You see people get in the car and they rock back and forth, and eventually, within about six months, the seats are always broken. You could never get them fixed, so you had a milk crate behind you to basically hold the seat in place as you responded to your calls.

Bratton delivered these remarks at *Policing and Accountability in the Digital Age,* a symposium hosted at NYU School of Law by the Brennan Center and the Policing Project, September 15, 2016.

The walkie-talkie that came into use in the 1970s when I first went out on the beat, the walking beat, the admonition from the desk sergeant was as you went out the door after a roll call, "Watch the lights, boys. Watch the lights." What he was talking about were call boxes that run about every third block on your walking beat. If they wanted you, they have a blinking red light on the top of the box to let you know to come and get your call. "Mrs. Jones has called from such and such about an issue, go visit Mrs. Jones." You would visit her, come back, and then you put your head inside the call box. The phone system was from the 1920s that had an ear piece and it had a mouth piece. You hoped like hell that nobody was going to slam the door on your head while you were leaning into the call box, receiving your messages.

Today, in the palm of every one of our police officers' hands is a custom designed smartphone unlike anything that you carry, smartphones that you have. It gives that officer in the field access to just about every piece of information we have at the department, allows reports to come in from the field, allows for the officer responding to a 911 call to get the history of everything that's gone on at that location in previous days so he knows what he's going to. He can retrieve every warrant that's outstanding in that building. His vehicle is equipped with a GPS device so we know where every vehicle in the city is at any given time. We know who's assigned to that vehicle.

We have the Real Time Crime Center created by my predecessor, Ray Kelly, back in the early stages of the 21st century, which is a Center, a headquarters that's continually sweeping crime information. As my detectives were responding to a crime scene, instead of waiting until they got there to get essential information about the scene, the Real Time Crime Center could give it to them. We have evolved that so that in 2016 every officer with a smartphone in their hand can get that same information, so we have essentially expanded that capability beyond a Center to every one of my 36,000 cops.

The presence of a camera alone will not halt police abuses.

Facial recognition systems have been rapidly expanding, finding suspect photos and other information on Facebook and Twitter. LMSI, the Lower Manhattan Security Initiative created after 9/11, and our Domain Awareness System, are also essential elements of dealing with the issue of technology. LMSI is involved in the almost 8,000 cameras that we coordinate, principally in lower Manhattan, but now spreading throughout the city. It is also our Domain Awareness System, which is a combination of those camera systems, the license plate scanning systems that we currently have throughout the city on many of our vehicles. It is also the radiation detection system, chemical detection systems throughout the city, to determine very quickly if there is some type of attack or unfortunate accident occurring.

The Domain Awareness System, there's nothing like it anywhere in the world, and nothing like it in any other American system. The combination of the technologies of cameras, high-definition cameras, of the sensors

for our ShotSpotters, our acoustic system for identifying quickly when shots are occurring, the license plate scanners. A myriad of uses of technology to try and protect this city. And now, our mobile digital platform that every police officer carries in their hands.

These devices and the technology they possess fundamentally change how we police your city by distributing information quickly and comprehensively to cops in the field, including wanted posters, missing children, warrants, rap sheets. We have effectively turned every cop into a walking Real Time Crime Center. We also allow our cops to stay out in the field where they're needed instead of performing administrative tasks at the station house. Instead of having them go back into the precinct station to make out a report, they make it out in the field and send it electronically to the sergeant, who reviews it, authorizes it, and enters it into the system. I literally have, on an hourly basis, a picture of what's going on in the city, real time crime analysis.

With direct access to intelligence briefings, we go from having 1,000 counterterror cops to now having 35,000 who are equipped to deal with concerns of counterterrorism. Cops are now able to conduct universal database searches. This doesn't mean expanded databases with new information, it means taking the systems and the data we already possess which are constantly being updated, innovated, and improved, and allowing cops to use them while working in the field. This also improves safety for cops and citizens alike. Officers with these smartphones have real-time data from 911 calls, including the radio run history of locations they're responding to. Built in GPS systems that have reference, specifically AVL, automatic vehicle locators, help keep our officers safe. Not only do supervisors know where their cops are, but the cops know where their fellow officers are, also, if an officer radios in that he's in trouble. They know how far away backup is, and they're able to make tactical decisions and coordinate with other sector cars or units.

It's not just patrol. Tablets and smartphones help investigators make crime scene diagrams or take digital photos and videos. Detectives are able to create mugshot arrays, get fingerprints, record written statements, investigate alibis, and they do all of that in the field. We also gave all of our cops email addresses. Wow, how revolutionary is that? But, until a year ago, we didn't have that. The FBI, until about three years ago, didn't have that. Yes, it's amazing to think that by 2014, not all of them already had one of these. This simple contact point will go a long way to making our officers more accessible to the people they serve, the citizens of New York. Something as simple as having an officer's name and contact information when you need to make a follow-up on a report, makes a huge difference in the way we treat the people we serve. We are able to give a victim of a crime a report number in the field so they have the ability, increasingly through their computers, to retrieve that insurance report, to receive that report that they have just filed.

No police department in America has invested as much as we have in these last couple years, and we believe that we are the leading department in this country, if not the world, in our embrace of, our creativity, and our use of technology. We are very mindful of all the responsibilities that come with that, and we clearly see that every day. We talk about responsibilities as the idea of hacking and the idea of all the things that can go wrong with technology. We have to use technology lawfully, constitutionally, so we're not breaking the law to enforce the law.

Former FBI Agent: Our Terrorism Strategy Isn't Working

Michael German

Both the Orlando shooter and the Boston Marathon bombers came under FBI scrutiny, but the investigations were eventually closed. By expanding the information the FBI can collect and lowering the threshold for opening investigations, the Bureau is spending inordinate time chasing false leads. A Brennan Center fellow, who spent 16 years as a special agent, explains why.

After a horrible tragedy like the recent attack on Orlando's Pulse nightclub, it's natural to wonder what more the Federal Bureau of Investigation could have been done to prevent it. The immediate reaction of the national security establishment to such events is often to argue it needs more power and resources to fulfill its terrorism prevention mandate. But when what you're doing isn't working, doing more isn't the answer.

Omar Mateen, the shooter in Orlando, had been flagged for the FBI before. He was investigated — and cleared — twice, a process that started because of a troubling tip from his co-workers. The Bureau is inundated with similar calls every day. The sheer volume of information means valuable resources are spent chasing down false leads, instead of honing in on viable intel about people set to cause real harm.

When what you're doing isn't working, doing more isn't the answer.

Repeatedly since the 9/11 attacks, calls for more surveillance have been too quickly answered by politicians eager to show they are doing something, without regard for whether it actually helps or harms our security efforts. The fact is: Opening the intelligence collection spigot has left the FBI and other intelligence agencies drowning in irrelevant information. One federal review of the FBI's pre-attack investigation of Ft. Hood shooter Nidal Hasan, for example, argued this "data explosion" contributed to the investigators' inability to identify all of Hasan's relevant communications sitting in FBI databases.

But the increasing data collection is only half the problem. Since 9/11, the Justice Department has repeatedly expanded the FBI's authorities, making it easier to initiate investigations with less evidence. These lowered standards, combined with ill-conceived "see something, say something" campaigns and "no leads go uncovered" policies, vastly increase the agent workload and divert investigative resources to cases with the least evidence indicating a criminal or terrorist threat.

Attorney General Michael Mukasey made the latest and most significant changes to the FBI's authorities in December 2008. He created a new type of investigation, called an "assessment," which could be opened for an "authorized purpose," but without requiring any particular factual predicate suggesting wrongdoing. The next level of inquiry, a "preliminary investigation," requires only "information or an allegation" to open renewable six-month investigations. Opening full investigations requires an "articulable factual basis" that "reasonably indicates" someone is planning criminal acts, a standard "substantially lower" than the probable cause necessary for obtaining search warrants or wiretaps.

This op-ed originally appeared at *Time,* July 5, 2016.

The FBI opened more than 82,000 "assessments" of individuals and groups in the first two years it had this authority, in addition to thousands of predicated investigations into more than 200 federal crimes. Recognizing the FBI has only 14,000 FBI agents across the country and around the world provides perspective on the increased workload these changes create. When the FBI conducted an assessment of Boston Marathon bomber Tamerlan Tsarnaev based on a warning from Russian intelligence that he planned to join Chechen terrorist groups, it was only one of 1,000 assessments the Boston FBI conducted that year.

It's time to rethink how the FBI does its job.

Increasing FBI resources to conduct more assessments, or examine subjects more closely or for longer periods of time, might seem a positive step. But the data show the vast majority of assessments are false alarms. Of the 82,325 assessments conducted in the two years after this authority was created, only 3,315 discovered information or allegations that justified further investigation. Roughly 96 percent were dry holes. And only a small percentage of full investigations ever result in charges.

Leaving aside privacy and civil liberties concerns, with FBI agents scrutinizing so many people with so little justification, these false alarms inflict a two-fold cost to security. First is the diversion of resources from investigations based on reasonably objective evidence of criminal or terrorist activity. The second is the dulling effect false alarms have on our counterterrorism response.

The Tsarnaev case is prime example. The Justice Department inspector general criticized shortcomings concerning the FBI's assessment of Tsarnaev, most significantly the failure to ask about his travel plans to Russia or his knowledge of Chechen terrorist groups. Both the FBI and CIA placed Tsarnaev on watchlists, and though they "pinged" to alert authorities when he bought airline tickets, traveled to, and returned from Russia, he was not re-investigated or screened as requested at the airport because there were too many other watchlisted people of higher priority traveling that day.

These cases show an overloaded system unable to adequately track and capture the real terrorist threats in this country. Which is why it's time to rethink how the FBI does its job.

Giving FBI agents more resources might be helpful, but only if the FBI's investigative guidelines are tightened up to ensure they are focusing on real threats rather than chasing false alarms. Restoring standards requiring a reasonable factual indication of wrongdoing before conducting intrusive, resource intensive investigations will make the FBI more efficient — and more effective.

As an FBI undercover agent in the 1990s, I infiltrated neo-Nazi and anti-government militia groups. The investigations were initiated based on a reasonable indication that people were engaging in precursor crimes, such as trafficking in illegal firearms and manufacturing explosives. This evidentiary standard forced me to focus on the people I had a reasonable basis to believe were engaging in criminal activity — rather than the thousands who were saying things I didn't like. Those cases successfully prevented terrorism by focusing on those most likely to commit it.

Think of the fire department. More than 3,000 Americans die in fires each year. We try to reduce these losses, with fire codes, smoke alarms, sprinklers, and well-equipped fire departments. But we don't have a "smell something, say something" program. Instead, it is a crime to pull a fire alarm when there is no emergency, because we know false alarms dull response times.

Similarly, forcing FBI agents to chase thousands of specious leads is demoralizing and undermines effectiveness.

FBI agents and intelligence analysts have a tough job trying to protect us. Requiring them to do more, instead of better, won't help.

A Dangerous Leap on the NSA's Data Collection

Elizabeth Goitein

Should the National Security Agency be allowed to collect communications between foreign targets and Americans without case-by-case judicial authorization or review?

Technological advances have revolutionized communications. People are communicating at a scale unimaginable just a few years ago. International phone calls, once difficult and expensive, are now as simple as flipping a light switch, and the internet provides countless additional means of international communication. Globalization makes such exchanges as necessary as they are easy. As a result of these changes, the amount of information about Americans that the NSA intercepts, even when targeting foreigners overseas, has exploded.

The amount of information about Americans that the NSA intercepts, even when targeting foreigners overseas, has exploded.

But instead of increasing safeguards for Americans' privacy as technology advances, the law has evolved in the opposite direction since 9/11, increasingly leaving Americans' information outside its protective shield. Section 702 is perhaps the most striking example.

Before 2007, if the NSA, operating domestically, sought to collect a foreign target's communications with an American inside the U.S., it had to show probable cause to the Foreign Intelligence Surveillance Court (FISA Court) that the target was a foreign power — such as a foreign government or terrorist group — or its agent. The Protect America Act of 2007 and the FISA Amendments Act of 2008 (which created Section 702 of FISA) eliminated the requirement of an individualized court order. Domestic surveillance of communications between foreign targets and Americans now takes place through massive collection programs that involve no case-by-case judicial review.

In addition, the pool of permissible targets is no longer limited to foreign powers or their agents. Under Section 702, the government may target for foreign intelligence purposes any person or group reasonably believed to be foreign and located overseas. The person or group need not pose any threat to the United States, have any information about such threats, or be suspected of any wrongdoing. This change not only renders innocent

Goitein delivered this testimony at a Senate Judiciary Committee hearing titled, "Oversight and Reauthorization of the FISA Amendments Act: The Balance Between National Security, Privacy, and Civil Liberties," May 10, 2016.

private citizens of other nations vulnerable to NSA surveillance; it also greatly increases the number of communications involving Americans that are subject to acquisition — as well as the likelihood that those Americans are ordinary, law-abiding individuals.

Further expanding the available universe of communications, the government and the FISA Court have interpreted Section 702 to allow the collection of any communications to, from, *or about* the target. The inclusion of "about" in this formulation is a dangerous leap that finds no basis in the statutory text and little support in the legislative history. In practice, it has been applied to collect communications between non-targets that include the "selectors" associated with the target (e.g., the target's email address or phone number). In theory, it could be applied even more broadly to collect any communications that even mention ISIS or a wide array of foreign leaders and public figures who are common topics of conversation. Although the NSA is prohibited from intentionally acquiring purely domestic communications, such acquisition is an inevitable result of "about" collection.

Other than the foreignness and location criteria (and certain requirements designed to reinforce them), the only limitation on collection imposed by the statute is that the government must certify that acquiring foreign intelligence is a significant purpose of the collection. FISA's definition of foreign intelligence, however, is not limited to information about potential threats to the U.S. or its interests. Instead, it includes information "that relates to . . . the national defense or the security of the United States; or . . . the conduct of the foreign affairs of the United States." This could encompass everyday conversations about current events. A conversation between friends or colleagues about the merits of the Trans-Pacific Partnership Agreement, for instance, "relates to the conduct of foreign affairs." Moreover, while a significant purpose of the program must be the acquisition of foreign intelligence, the primary purpose may be something else altogether. Finally, the statute requires the FISA Court to accept the government's certifications under Section 702 as long as they contain the required elements.

The government uses Section 702 to engage in two types of surveillance. The first is "upstream collection," whereby a huge proportion of communications flowing into and out of the United States is scanned for selectors associated with designated foreigners. Although the data are first filtered in an attempt to weed out purely domestic communications, the process is imperfect and domestic communications are inevitably acquired. The second type of Section 702 surveillance is "PRISM collection," under which the government provides selectors, such as email addresses, to U.S.-based electronic communications service providers, who must turn over any communications to or from the selector. Using both approaches, the government collected more than 250 million internet transactions a year as of 2011.

Due to the changes wrought by Section 702, it can no longer be said that FISA is targeted at foreign threats. To describe surveillance that acquires 250 million internet communications a year as "targeted" is to elevate form over substance. And on its face, the statute does not require that the targets of surveillance pose any threat, or that the purpose of the program be the collection of threat information.

It is certainly possible that the government is choosing to focus its surveillance more narrowly than Section 702 requires. The certifications that the government provides to the FISA Court — which include the foreign intelligence categories at which surveillance is aimed, and could therefore shed some light on this question — have not been publicly disclosed by the government. Even if actual practices stop short of what the law allows, however, the available statistics suggest a scope of surveillance that is difficult to reconcile with claims of narrow targeting. Moreover, one certification, listing the foreign nations and factions about which foreign intelligence could be

sought, was leaked; it included most of the countries in the world, ranging from U.S. allies to small countries that play little role on the world stage.

More important, Americans' privacy should never depend on any given administration's voluntary self-restraint. Nor should it depend on additional requirements layered on by the FISA Court, given that the court's membership changes regularly and its judges generally are not bound by others' decisions. Section 702 establishes the boundaries of permissible surveillance, and it clearly allows collection of communications between Americans and foreigners who pose no threat to the U.S. or its interests. That creates an enormous opening for unjustified surveillance.

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Within constitutional bounds set by our nation's courts, it is up to the American people — speaking through their representatives in Congress — to decide how much surveillance is too much. But they cannot do this without sufficient information.

While a significant amount of information about Section 702 has been declassified in recent years, critical information remains unavailable. For instance, the certifications setting forth the categories of foreign intelligence the government seeks to collect — but not the individual targets — have not been released, even in redacted form. Unlike the NSA and the CIA, the FBI does not track or report how many times it uses U.S. person identifiers to query databases containing Section 702 data. The list of crimes for which Section 702 data may be used as evidence has not been disclosed. Nor have the policies governing when evidence used in legal proceedings is considered to be "derived from" Section 702 surveillance. The length of time that the FBI may retain data that has been reviewed but whose value has not been determined remains secret.

Perhaps most strikingly, despite multiple requests from lawmakers dating back several years, the NSA has yet to disclose an estimate of how many Americans' communications are collected under Section 702. The NSA has previously stated that generating an estimate would itself violate Americans' privacy, ostensibly because it might involve reviewing communications that would otherwise not be reviewed. In October of last year, a coalition of more than 30 advocacy groups — including many of the nation's most prominent privacy organizations — sent a letter to the director of national intelligence urging that the NSA go forward with producing an estimate. The letter noted that, as long as proper safeguards were in place, the result would be a net gain for privacy. Recently, a bipartisan group of 14 House Judiciary Committee members sent the DNI a letter making the same request.

This basic information is necessary for Americans to evaluate the impact of Section 702 on their privacy. It is also necessary because most Americans are not lawyers, and when they hear that a surveillance program is "targeted" only at foreigners overseas and that any acquisition of Americans' communications is "incidental," they may reasonably assume that there is very little collection of their own calls and emails. An estimate of how many communications involving Americans are collected would help to pierce the legalese and give Americans a truer sense of what the program entails.

In short, Section 702 is a public statute that is subject to the democratic process, and the democratic process cannot work when Americans and lawmakers lack critical information. More transparency is urgently needed so that the country can begin an informed public debate about the future of foreign intelligence surveillance.

‘Radical Islam’ Is Not the Problem

Michael German

‘Radical Islam,’ as a term in the national security context, lacks any objective meaning, German argues, and only serves to stoke fear, xenophobia, and anti-Muslim bigotry.

Thank you for inviting me to testify about deficiencies in the rhetoric surrounding the United States government’s counterterrorism efforts. Almost 15 years after declaring the prevention of terrorism our government’s highest priority, it is necessary and appropriate for us to carefully examine whether the methods we are using are working.

In testimony before the Senate Intelligence Committee earlier this month, CIA Director John Brennan said that the significant battlefield successes resulting from our $7 billion effort to defeat ISIS in Iraq and Syria “have not reduced the group’s terrorism capability and global reach.” In Afghanistan, the Taliban is resurgent, and reportedly holds more territory than at any point since 2001. And a December 2015 Gallup poll indicates that Americans’ fear of terrorism is the highest it has been in 10 years. Clearly, our counterterrorism policies are not as effective as they need to be to reduce political violence abroad and build public resiliency to terrorism at home.

This is not political correctness, it is factual correctness.

I respectfully disagree, however, with the notion that the Obama administration’s reluctance to identify “radical Islam” as the focus of our counterterrorism effort is part of the problem. It is a term that lacks objective meaning and only serves to stoke public fear, xenophobia, and anti-Muslim bigotry. I agree with President Obama that the use of this rhetoric offends American values of equality, religious liberty, and free expression, and undermines the national unity and international cooperation necessary to effectively counter terrorist violence at home and abroad. This is not political correctness, it is factual correctness. “Radical Islam” is no more accurate or appropriate a descriptor of the source of terrorist violence committed by Muslims than the label “radical Christianity” would be to describe the violence perpetrated by Ku Klux Klan, the Army of God, or the Lord’s Resistance Army. No one scoured Christian theological texts for the fatal defects that could explain the bloodletting between Catholics and Protestants in Northern Ireland in the 1970s, or the war crimes Christian Serbs inflicted on their Bosnian Muslim neighbors in the 1990s.

German delivered this testimony at a Senate Judiciary subcommittee hearing titled, “Willful Blindness: Consequences of Agency Efforts To Deemphasize Radical Islam in Combating Terrorism,” June 28, 2016.

But a number of policymakers, supported by a cadre of self-styled terrorism experts and expressly anti-Muslim organizations, have ensured that "radical Islam" has remained a predominant part of the public debate regarding terrorism since the 9/11 attacks, despite President Obama's reluctance to use the term. In 2011, the Center for American Progress documented what it called an "Islamophobic Network" that funneled more than $40 million dollars to organizations promoting the idea that "radical Islam" poses an existential threat to the U.S. A more recent study put the number at $205 million. Biased and factually flawed counterterrorism training materials produced by the FBI and the Departments of Justice, Defense, and Homeland Security vividly demonstrate these anti-Muslim groups had a substantial influence on the instruction our law enforcement and intelligence agencies received over many years.

In addition, Congress has held more than a dozen hearings focused on Muslim radicalization before this one. These hearings brought a lot of heat to the debate, but little light that could show the way to more effective solutions. They contributed to a counterterrorism discourse in the U.S. that has consistently been ill-informed, highly politicized, and divisive. As was the case during national security emergencies in our past, we err in thinking that we can improve our collective national security by undermining the security and liberty of some subset of fellow Americans.

The problem is not that there has been too little talk of "radical Islam," but too much.

The problem is not that there has been too little talk of "radical Islam," but too much. And I would argue that substituting the term "violent extremism" does little to assuage the problem when counterterrorism programs disproportionally target Muslim communities. The skewed focus on terrorism committed by Muslims has clearly impacted priorities, policies, and practices of both federal and local law enforcement agencies, which have disproportionally and indiscriminately targeted American Muslim communities with surveillance and infiltration by agents provocateurs, often to the exclusion of other violent threats. In foreign policy, our inordinate focus on extremist ideology as the primary lens through which we evaluate an array of civil wars and insurgencies around the world blinds us to the true nature of these political conflicts, and limits the possible solutions we can consider, putting us on a path to perpetual war, with all of the predictable consequences for civil liberties, human rights, and the rule of law.

Today, most Americans know little about ISIS except to be deathly afraid of it, which is exactly what ISIS wants. One need not search the dark web for ISIS propaganda wildly exaggerating its capabilities and reach. Sensationalized coverage in the mainstream news supported by hyperbolic statements by U.S. counterterrorism officials accomplish this for them. The flawed narrative that likens "radical Islam" to an ideological virus spreading unseen through "vulnerable" American Muslim communities is generating mutual distrust and animosity, leading to more strident calls for discriminatory policies, and increasing anti-Muslim violence. It is also self-defeating, as many radicalization theories identify alienation

and the experience of discrimination as the conditions that lead to greater radicalization. If the goal of terrorism is to spread fear and divide American communities against ourselves, our current counterterrorism discourse is only helping them.

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We have invested $1.7 trillion to defeat terrorism since 9/11, and the men and women of our military, intelligence, and law enforcement agencies have labored above and beyond the call to duty. But the caustic public debate about terrorism has divided us as a nation, making us less safe and less resilient. A counterterrorism discourse that pits Americans against one another will not improve our national security. We need to develop more effective security strategies derived from objective, nonpartisan, evidence-based evaluations of our counterterrorism policies and practices to identify what has worked and what has not over the last 15 years. Americans have accepted intrusions into their private lives, and the inconvenience of burdensome security measures, but we need to know whether these tradeoffs were justified or necessary.

Today, most Americans know little about ISIS except to be deathly afraid of it, which is exactly what ISIS wants.

More effective counterterrorism strategies would be designed to build national unity and assuage public fear by providing objective information about the nature and scope of the many threats we face, and the efficacy of the measures we are taking to address them. Programs that have not shown clear results, such as the domestic communications metadata collection program and the Transportation Security Administration's behavioral detection program, which are both expensive and unnecessarily invasive to Americans' privacy and civil rights, should be scrapped so the resources can be devoted to criminal investigations based on reasonably objective evidence of wrongdoing. The framers of our Constitution believed that a nation founded on principles of limited government and inalienable individual liberties would be the strongest nation on earth. We should model our policies with the confidence that jealously protecting these hard-won American values and commitment to the rule of law is what will ensure our lasting security.

IDEAS

The Fight to Vote

Michael Waldman

Although the election's sharp rhetoric about democracy may have seemed unprecedented, raucous debates about who should have a stake are as old as the republic. In fact, outsiders crash the political system every half-century or so, spurred forward by anger over inequality of wealth and power.

Has there ever been an election like this one? The 2016 race is ferocious, rude, ugly, with parties and coalitions fracturing before our eyes. It's also the first contest in years where public anger is trained on how government works and not just what it does. The state of democracy is on the ballot.

Bernie Sanders denounces the "billionaire class" and demands campaign finance reform. Donald Trump snarls, "Washington is broken" and brags that as a self-funder, he cannot be bought. Hillary Clinton, more muted, rolls out detailed plans for campaign finance changes and automatic voter registration. To add to the intensity, the looming Supreme Court nomination fight will tap public anger over *Citizens United*, the Court's most reviled recent decision. All just two years after an election in which voter turnout plunged to its lowest level in seven decades.

It might seem strange that the state of democracy itself might loom large as an election issue. But today's arguments are not new. In fact, raucous debates over who should vote and how have always stood at the center of American politics. Intense focus on how Americans can improve their democracy seems to happen every half-century or so. Outsiders find a way to crash the political system, often through key elections, with inequality of wealth or power spurring a sharp move forward.

These battles have always been about more than formal rules. Voting laws have been seen as entwined with issues of the power of money in elections, gerrymandering, and other ways the system distorts decisions. For more than two centuries it's been a raw and often rowdy struggle for power. Some of the heroes would have been more at home in *House of Cards* than in Selma. At times the breakthroughs came when sharp-eyed operatives realized that greater participation was in their enlightened self-interest. The fight for the vote has always been deeply, properly political.

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Numerous issues divided the Founders from the start. (See "*Cabinet battles #1 and #2*" in *Hamilton*.) Among them: the rules for choosing the new government. Arguments first focused on the role of wealth in elections. At the time, only white men who owned property could vote. In 1776 John Adams shuddered at the idea of extending voting rights beyond that. "There will be no end of it," he warned. "New claims will arise. Women will demand a vote. Lads from 12 to 21 will think their rights not enough attended to, and every man, who has not a farthing, will demand an equal voice with any other in all acts of state."

James Madison was queasy, too — but only behind the closed doors of the Constitutional

This op-ed originally appeared at The Daily Beast, February 29, 2016. It is adapted from Waldman's book, *The Fight to Vote,* published by Simon & Schuster.

Convention. "In future times," he worried, "a great majority of the people will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation; in which case, the rights of property and the public liberty will not be secure in their hands: or which is more probable, they will become the tools of opulence and ambition, in which case there will be equal danger on another side." (Sanders and Trump?) Benjamin Franklin angrily put a stop to any talk of a wealth test for voting. "Some of the greatest rogues he was ever acquainted with, were the richest rogues," he told the delegates. Madison offered a different spin when arguing for the Constitution to the public. In fact, he mouthed Franklin's democratic credo. "Who are to be the electors of the federal representatives?" he asked in the Federalist Papers. "Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States."

Very quickly, the real world of American politics began to chip away at the certainties of the founding generation. Madison himself — who had denounced "faction" in the Federalist Papers — began to organize a political party, the Democratic-Republicans. Just four years after writing the Federalist Papers, he renounced his views and pronounced a new "candid state of parties." It turns out, he now wrote, "Parties are unavoidable." Meanwhile, the doomed Federalists, fearing the outcome of the 1800 election as John Adams ran for re-election, changed the voting rules in more than half the states. Massachusetts and New Hampshire even repealed the right to vote for president.

The fight to vote became a defining election issue in the early decades of the new country. By the 1820s, working-class white men demanded and won the vote. Much of the shift was engineered by politicians on the make, such as suave, elusive Martin Van Buren of upstate Kinderhook, New York. A colleague once bet he could force "the Little Magician" to give a definitive answer to a simple question. He asked Van Buren whether the sun rose in the East. "As I invariably slept until after sunrise, I could not speak from my own knowledge," he replied.

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In 1821, New York State held a heated constitutional convention to decide whether to expand voting rights. Van Buren marshalled an aspirational coalition of what he called "this class of men, composed of mechanics, professional men, and small landholders and constituting the bone, pith, and muscle of the population of the state." A leading law professor, Chancellor James Kent, opposed him. "The tendency of universal suffrage," Kent intoned, "is to jeopardize the rights of property, and the principles of liberty." He warned of government by factory workers, retail clerks, and "the motley and undefinable population of crowded ports."

Van Buren and his colleagues turned the Democrats into the world's first mass political party. Its ranks were now filled with working men and small farmers, organized in a boisterous drive to win the White House. They backed the former general, Andrew Jackson. Modern Americans recoil from Jackson's repugnant racial views and atrocities toward Native Americans. At the time, he was also seen as a tribune of democracy. He called the Bank of the United States "the Monster," and denounced "special privilege" and government that helped the "rich grow richer." Democracy became a fad. In 1824, turnout among white men was 27 percent; when Jackson was elected in 1828 it more than doubled, to 57 percent.

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A century later, the health of American democracy was on the ballot again. In the wake of the country's roaring rise to global power, the growth

of cities, and massive concentration of wealth, citizens felt that their institutions were under siege, inadequate to the changing economy. There was, as Theodore Roosevelt described it, a "fierce discontent" among educated city dwellers as well as beaten-down farmers. More than is commonly recognized, the Progressive Era focused on political reform. As Boston's "People's Lawyer," Louis D. Brandeis, put it, "We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can't have both."

By 1912 the 17th Amendment giving citizens the right to vote for U.S. senator was headed to the states for ratification. Backers saw it as a form of campaign finance reform, designed to stanch the corruption that came from state legislatures choosing U.S. senators. Congress also enacted a law banning corporate spending in elections.

A century later, the health of American democracy was on the ballot again. In the wake of the country's roaring rise to global power, the growth of cities, and massive concentration of wealth, citizens felt that their institutions were under siege, inadequate to the changing economy.

After four years out of office, Roosevelt decided to run again for president; he sought the Republican nomination but was blocked by party mandarins. So he bolted and ran as the candidate of the Progressive Party. "To destroy this invisible government, to dissolve the unholy alliance between corrupt business and corrupt politics is the first task of the statesmanship of the day," thundered the party platform, adopted in Chicago. At that convention Roosevelt bellowed to the activists, "We stand at Armageddon and we battle for the Lord!" He urged an array of reforms, from direct democracy such as referenda and ballot initiatives to term limits for Supreme Court Justices. Historian Sidney Milkis concludes, "TR's crusade made universal use of the direct primary a celebrated cause, assaulted traditional partisan loyalties, took advantage of the centrality of the newly emergent mass media, and convened an energetic but uneasy coalition of self-styled public advocacy groups. All these features of the Progressive Party campaign make the election of 1912 look more like that of 2008 than that of 1908." Roosevelt wasn't even the most radical candidate in the four-way contest. That was Socialist Eugene V. Debs. "I like the Fourth of July," Debs explained. "It breathes the spirit of revolution. On this day we affirm the ultimate triumph of Socialism."

Roosevelt backed women's suffrage. The Republicans and Socialists did as well. But Democrat Woodrow Wilson reflected his segregationist party's ambivalence about voting. Voting, he explained, was a matter of states' rights.

The day before his inauguration the next year, Wilson stepped off the train in Washington. Some Princeton students belted out a greeting song, but there were few other supporters in evidence. *The New York Times* consolingly wrote, "'Small but vociferous' and 'made up in noise what they lacked in numbers' are the conventional terms that might be applied." An aide asked, "Where are all the people?" Wilson's greeters admitted that most were lining Pennsylvania Avenue, site of an unprecedented march for women's suffrage, organized by a brilliant young feminist, Alice Paul.

Five thousand women, many in costume, were led by a young lawyer on a dazzling white horse, Inez Milholland. She wore the costume of a Greek goddess. A throng of perhaps 100,000 men lined the street, many inebriated after inaugural festivities. They heckled, spat, threw objects, and eventually broke through the meager police lines. One newspaper reported that the women "practically fought their way by foot up Pennsylvania Avenue." More than 100 women were hospitalized. The fracas drew huge national attention. Washington, D.C.'s police chief resigned. Just as at Selma a half-century later, the violence tipped public support toward supporting voting rights. But Wilson still would not budge.

The issue loomed large when Wilson ran for re-election. He spoke at the leading suffrage group's convention and managed to win applause

without actually embracing its position. Young women, in turn, disrupted his State of the Union address, unfurling a banner from the House of Representatives balcony before being hustled off. Republican nominee Charles Evans Hughes backed a suffrage amendment. In the 12 states where women could vote for president, a new National Women's Party opposed the incumbent. But Wilson still resisted.

Inez Milholland had become a celebrated crusader, tirelessly speaking out for suffrage. At a speech in California, she cried out, "Mr. President, how long must women wait for liberty?" She then collapsed at the podium, and was dead within a month. Her funeral was held in Statuary Hall in the Capitol. When Wilson angrily stalked out of a meeting with mourners the next day, pickets began to stand outside the White House for two years. Finally, his hand was forced by the incongruity of arguing for democracy in the Great War while blocking it at home. In September 1918, shortly before the midterm elections, he motored to Capitol Hill with only a half-hour notice, and strode into the U.S. Senate. "This is a people's war," he told the senators, "and the people's thinking constitutes its atmosphere and morale." (He also insisted, implausibly, "The voices of intemperate and foolish agitators do not reach me at all.")

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Electoral concerns even loomed over the greatest of all breakthroughs — the Voting Rights Act of 1965. The legislation resulted from the bravery of thousands of Southern black citizens who risked violence and death to protest for voting rights. At the same time, the wary dance between Dr. Martin Luther King, Jr. and President Lyndon Johnson, two viscerally skilled Southern political leaders, defined the final push.

King and Johnson met and spoke repeatedly in the months before Selma. King would press for a voting rights bill. Johnson would reply, as he did in December 1964, "Martin, you're right about that. I'm going to do it eventually, but I can't get a voting rights bill through in this session of Congress." Eventually Johnson would find himself orating at King about the glories of a voting rights bill when it passed. "That will answer 70 percent of your problems." King, for his part, talked about black voting rates and how a surge in voting for Democrats could lead to a "new South." "Landslide Lyndon" (who had stolen his first Senate election) felt compelled to describe his soaring vision; the moral leader felt compelled to demonstrate his savvy political chops.

Roosevelt backed women's suffrage. The Republicans and Socialists did as well. But Democrat Woodrow Wilson reflected his segregationist party's ambivalence about voting. Voting, he explained, was a matter of states' rights.

Johnson never told King that he had asked the Justice Department to secretly draft a voting rights bill. Soon a quiet deal was struck with the Senate Republican leader, Everett Dirksen, who was known as the "Wizard of Ooze." King, in turn, never stressed to the president that he was already working to stage a public drama in Selma, Alabama, one of the worst spots for blacks in the South, culminating in the bloody police beatings of John Lewis, Amelia Boynton, and other marchers on the Edmund Pettus Bridge.

After the televised violence on Bloody Sunday, demonstrations erupted all over the country. "Rarely in history has public opinion reacted so spontaneously and with such fury," narrated *TIME* magazine. Johnson let the pressure build to the point where Alabama Gov. George Wallace had to come to the federal government for help. LBJ browbeat Wallace for hours. "Hell, if I'd stayed in there much longer," Wallace complained, "he'd have had me coming out for civil rights." Energized, Johnson finally proposed the voting rights bill in a legendary speech before Congress.

The electoral impact was never far from the minds of any of the participants. After signing the Act, Johnson pulled aside the student leader John Lewis, whose skull had been fractured in Selma.

Decades later, by then a senior congressman, Lewis recounted his wide-eyed encounter as a 22-year-old. "Now, John," Johnson told the activist, "you've got to go back and get all those folks registered. You've got to go back and get those boys by the balls. Just like a bull gets on top of a cow. You've got to get 'em by the balls and you've got to squeeze, squeeze 'em 'til they hurt."

African-American voting rates soared in the South. But Johnson was prescient when he told his aide Bill Moyers after signing an earlier civil rights bill, "I think we just delivered the South to the Republican Party for a long time to come." The migration of white Southern voters to the increasingly conservative Republican Party became the key political fact of the past half century, realigning American politics.

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What about today? This election comes after a period when longstanding rules of American democracy have come under intense strain. The modern conservative movement took cues from Paul Weyrich, the founder of the American Legislative Exchange Council (ALEC) and co-founder of the Heritage Foundation. Weyrich was blunt about his goals in a 1980 speech warming up for Ronald Reagan. "How many of our Christians have what I call the 'goo goo' syndrome — good government," he mocked. "They want everybody to vote. I don't want everybody to vote." Over the past 15 years, conservative activists and politicians began a push for more restrictive voting laws. At first the effort didn't go far; statistically, an individual is more likely to be killed by lightning than commit voter fraud. But demographic pressure built, as turnout by minority voters soared, culminating in the election of Barack Obama in 2008. In 2010, Republicans won control of many state capitols in protest against Obama's policies and the deep recession. The next year, they passed two dozen laws to make it harder to vote for the first time since the Jim Crow era. Many were blocked by courts before the 2012 election. But the next year, in *Shelby County v. Holder*, the Supreme Court struck down the heart of the Voting Rights Act. Now 16 states will have new restrictive voting laws

Electoral concerns even loomed over the greatest of all breakthroughs — the Voting Rights Act of 1965.

on the books for the first time in a high turnout presidential election. Meanwhile, *Citizens United* and other court rulings upended decades worth of campaign finance law.

It's been an oddly mismatched debate. Republicans such as John McCain once strongly supported campaign reform. (In fact, in 2008 McCain participated in the presidential public financing system while Obama did not.) George W. Bush signed the reauthorization of the Voting Rights Act. But the Republican Party leadership now lines up against new voting rules and campaign finance laws, even disclosure. Democrats, meanwhile, offered only a tepid response. Obama never introduced legislation to expand voter access or restore public campaign financing, even when his party had a filibuster-proof majority in the Senate.

This campaign, of course, has rattled those presumptions. Will this be another election where fundamental questions about American democracy will be debated in November? It is too early to tell. Voters may be just blowing off steam. Public anger could curdle into simple nationalism and nativism. The self-financing Donald Trump routed the super PAC-backed Jeb Bush. Or it could be another one of those moments when the parties find their voices debating the basic question of who should have power in America.

If this is such a "democracy moment," it will not be the last one. As John Adams understood, "There will be no end of it." Let's hope so.

Too Many Are Trying Too Hard to Make It Too Difficult to Vote

Hon. Eric Holder, Jr.

In May, the Brennan Center hosted the first national conference on automatic voter registration. Nearly 400 attendees from 20 states came to New York University to share strategies for this breakthrough reform, which could add tens of millions of voters to the rolls. The former attorney general delivered keynote remarks.

Fifty years after the passage of perhaps the most significant civil rights legislation in our nation's history — the Voting Rights Act of 1965 — that most basic of American rights, the right to vote, is under siege. As President Johnson said when he signed the Voting Rights Act, the "right to vote is the basic right, without which all others are meaningless." At a time when we should be expanding opportunities to cast a ballot, there is a movement in America that attempts to make it more difficult. Abetted by a wrongly decided, factually inaccurate, and disconnected Supreme Court decision, too many in this country are trying too hard to make it too difficult for the people to express their views.

At a time when we should be expanding opportunities to cast a ballot, there is a movement in America that attempts to make it more difficult.

Let me start with a basic statement upon which all can agree: Every person attempting to vote should have to show that he or she is who they claim to be. Too many today forget that this has always been the case and that in the past our fellow citizens were allowed to demonstrate this in many credible ways. Let me say that again: There has always been a component of identifying yourself before you could cast a ballot — it is only very recently that some states have become overly prescriptive and unfairly restrictive in enumerating what is sufficient proof. It has only been in the very recent past and in certain states with certain legislatures and certain governors that this more restrictive, prescribed approach has been mandated. And why? The usual justification stated is to ensure the integrity of the electoral system by preventing voter fraud. Given the nature of the fraud that is to be eliminated, the new restrictions must, I assume, be designed to prevent in person, false identification voting.

Although there is no statistical proof that this is, in fact, an issue about which the nation should be concerned, the vote fraud mantra is said so often, almost robotically, that some people have unthinkingly begun to believe that the issue is real. But studies have shown that the actual instance of in-person voter fraud is extremely rare. And this is very logical — the penalties associated with voter fraud, usually felonies, far outweigh the impact that an individual or group of people might effect. To truly impact an election

Holder delivered these remarks at the Brennan Center's conference, *Automatic Voter Registration: Why and How,* May 18, 2016.

Requiring photo IDs could cause enough of a drop off in legitimate Democratic voting to add 3 percent to the Republican vote.

would probably require substantial numbers of people somehow holding themselves out as voters that they are not — which would increase almost exponentially the exposure of the scheme. No such widespread schemes have been detected.

The Brennan Center has stated that "it is more likely that an individual will be struck by lightning than that he will impersonate another voter at the polls." One expert found 31 cases out of more than 1 billion ballots cast in the United States from 2000 to 2014. People of good faith, people grounded in the facts, really have to ask where is the problem and have to conclude that there simply isn't a consequential one and that the restrictive voting laws enacted to combat the next to nonexistent problem — with their serious, negative collateral impacts — are not needed. Instead of ensuring the integrity of the voting process they actually do the opposite: by keeping certain groups of people away from the polls.

If there is not a fact-based voter impersonation problem, what then could be the basis for the photo identification push? Sadly, one party has decided to lash itself to short-term political expediency and put itself on the wrong side of history. History will be harsh in its assessment of these efforts. In a 2007 article, the *Houston Chronicle* quoted the political director of the Texas Republican Party and stated, "Among Republicans it is an article of religious faith that voter fraud is causing us to lose elections," he said. "He doesn't agree with that, but does believe that requiring photo IDs could cause enough of a drop off in legitimate Democratic voting to add 3 percent to the Republican vote."

In Pennsylvania in the last presidential election in 2012, the Republican state house majority leader listed a few partisan issues that would help Mitt Romney in the state. After listing guns and abortion he said, "Voter ID which is going to allow Governor Romney to win the state of Pennsylvania — done." A federal court in Washington, D.C., in throwing out a Texas Republican-supported voter identification law, stated that it would impose "strict, unforgiving burdens on the poor." (And remember, under that Texas law a state university student ID was found not to be adequate proof, but a state-issued concealed weapons permit was.) Finally, in Wisconsin last year, a chief of staff to a leading Republican state senator resigned after attending a party caucus in which, he said, some legislators were "literally giddy" over the effect of the state voter ID law on minorities and college students.

Let us be frank. Faced with demographic changes that they perceive go against them and saddled with a governing philosophy at odds with an evolving nation, some Republicans have decided that if you can't beat 'em — change the rules. Make it more difficult for those individuals least likely to support Republican candidates to vote. This is done with the knowledge that by simply depressing the vote of certain groups — not even winning the majority of votes of those groups — elections can be affected. A 2014 study by the GAO found that more restrictive voter ID laws decreased the votes of young people, minorities, and the poor in Kansas and Tennessee in 2012.

A recent study conducted at the University of California, San Diego, after controlling for a variety of factors, concluded that these new laws disproportionately affected Democratic voters. The study found that Democratic turnout dropped about 7 percent where strict photo ID laws were in place, Latino turnout decreased by 10 percent, and there was an increase in the participation gap between whites and people of color. If one were to try to define, to find, vote fraud that, in fact, is where it is.

The nation's attention and laws should not be focused on these phantom illegal voters. The Census Bureau reported that in the 2008 presidential election, of the 75 million adult citizens who did not vote, 60 million were not registered and therefore not eligible to cast a ballot. That is one of the places where we should focus our efforts. In a speech I gave in 2011 at the LBJ Library, I called for the automatic registration of all eligible citizens. The logic of the arguments I made then is still sound. The ability to vote is a right — it is not a privilege. Under our current system, many voters must follow needlessly complex and cumbersome voter registration rules. …

The Census Bureau reported that in the 2008 presidential election, of the 75 million adult citizens who did not vote, 60 million were not registered and therefore not eligible to cast a ballot. That is one of the places where we should focus our efforts.

Governments can, and should, automatically register citizens to vote by compiling — from existing databases — a list of all eligible residents in each jurisdiction. Several states have taken steps in that direction. Oregon implemented an automatic registration procedure at its DMV in January and has already seen a nearly four-fold increase in registrants. California, Vermont, and West Virginia have passed similar laws and other states are leaning in that direction. It is estimated that if implemented at DMVs, and other key government agencies, these needed reforms could add 50 million eligible voters to the rolls, save money, and increase accuracy in the records necessary to the system.

We must also address the fact that although one in nine Americans move every year, their voter registration does not move with them. Many would be voters don't realize this until after they've missed the deadline for registering, which can fall a full month or more before Election Day. Election officials should work together to establish a program of permanent, portable registration — so that voters who move can vote at their new polling place on Election Day. Until that happens, we should implement fail-safe procedures to correct voter roll errors and omissions, by allowing every voter to cast a regular, non-provisional ballot on Election Day. Several states have already taken this step, and it's been shown to increase turnout by at least 3 to 5 percentage points. These modernization efforts would not only improve the integrity of our elections, they would also save precious taxpayer dollars. …

And we must recognize that our ability to ensure the strength and integrity of our election systems — and to advance the reforms necessary to achieve this — depends on whether the American people are informed, engaged, and willing to demand fact-based contentions and common-sense solutions and regulations that make voting more accessible. Politicians may not readily and willingly alter the very systems under which they were elected even though 80 percent of Republicans oppose the *Citizens United*

decision and two-thirds of voters support strengthening voting protections and restoring the Voting Rights Act. Only we, the people, can bring about meaningful change and alter current discriminatory trends. In this regard, I want to commend the Brennan Center for its leadership on these issues. The Center first proposed automatic voter registration in 2007 and has done much since then to advance the policy — and other voting enhancements — through extensive research and public education.

So speak out. Raise awareness about what's at stake. Call on the political party most responsible to resist the temptation to suppress certain votes in the hope of attaining electoral success and, instead, work to achieve this success by appealing to more voters. What do they fear — the very people who they claim they want to represent? And urge policymakers at every level to re-evaluate our election systems — and to reform them in ways that encourage, not limit, participation. Insist that they make it easier to register and easier to vote.

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Now is not the time to retreat in the face of a partisan assault on the most basic of American rights. The battle to ensure the voting rights of all Americans is a defining one. This is not only a legal issue, it is also a moral imperative. If we are to be the nation we claim to be, we must challenge, in every way possible, those who would undermine our democracy and who have lost faith with the covenant between government and the people. The right to vote is not only the cornerstone of our system of government — it is the lifeblood of our democracy. I am confident that with a focused citizenry and with leaders like those in this room today this struggle for right will be won. If we are to remain true to those who sacrificed and died to ensure the right to vote, we must not fail.

Automatic Registration: Lessons from California

Hon. Alex Padilla

Less than three months after taking office in 2015, California's secretary of state sponsored legislation to create automatic voter registration. Estimates are that California has nearly 7 million eligible unregistered voters. The bill was signed into law in the fall of 2015. At a Brennan Center conference, Padilla reflected on his experience in trying to pass the measure, and how he wants to modernize elections.

I've been asked to share some insights of the experience of getting automatic voter registration through the legislature, and how some of the uniqueness about California could be of value as other states take this on. First, one of the fights that we had to get over was, "Well there's going to be voter fraud." Right, we hear that far too often. "How are you going to make sure that you're not registering systematically somebody who's not eligible to be a voter?" Because we heard in California, you're giving driver's licenses to undocumented individuals. Yes, California does provide driver's licenses to the undocumented, but as the Department of Motor Vehicles (DMV) assures us, and written into the bill, is that their information never gets shared with us for purposes of voter registration.

By the way, even if another state doesn't provide driver's licenses for undocumented individuals, they do provide driver's licenses for people like my parents, who were legal permanent residents for decades. They're over 18, but they're not citizens. So you just build it into the protocol. What about 16- and 17-year-olds who may be citizens, but have a driver's license? You do an age filter. There's no barrier, no challenge that we can't work around.

We heard a concern from some immigrant rights groups on behalf of legal residents, and even some on behalf undocumented immigrants, about how do we make sure that if somebody is registered inadvertently that they're not punished later for a crime that they didn't commit? Government automatically registered them possibly. We're pretty sure we're not going to do that. But just in case, we wrote language into the bill that would put the fault on the government side, not on the individual's side, so that it doesn't create issues later for them.

We also wanted to make sure that we're working with the DMV to provide very clear language on voter eligibility. When we do it on paper now, we have to check those boxes. Under penalty of perjury, yes, I'm a citizen and eligible, and I'm filling out this form that's true and correct, and that language is

Padilla delivered these remarks at the Brennan Center's conference, *Automatic Voter Registration: Why and How,* May 18, 2016.

going to be blaring for people going through new motor voter, just as an extra precaution.

We're also, through automatic voter registration, providing materials in the nine languages other than English required in California under the federal Voting Rights Act. We're doing it at the counter, at the point of sale at DMV. In California, we're piggybacking on a previously funded technology upgrade at the DMV.

For people renewing by mail, for people renewing online, we're building in the protocols to ask those questions right then and there. It's also not lost on us that we're really building just a foundation here. Even though we're going to get 90 percent, maybe, of the eligible but unregistered, we're not capturing 100 percent. What efforts can we do to capture more folks who are eligible but unregistered that won't be at the DMV? Once we lay down the technology backbone here, I envision being able to expand to other state department and agencies.

As a new registered voter you get the invitation to the democracy party that you never got before.

There may even be local governments involved as well, for all the people who come in and provide name, address, date of birth, signature. Whether you're signing up for community college classes or coming into our employment development department, because you're now unemployed. Whether you're returning from a tour of duty and signing up for veterans' benefits. Millions of people previously uninsured are coming in to sign up for health care under the Affordable Care Act, through our health benefits exchange. We can be conducting voter registration there as well, systematically. Again, capture in real time, the political party preference, their language preference, and if they want to be a permanent vote by mail voter. Once we lay the new motor voter technology foundation in place, I envision that happening over the next several years. …

Last, but not least, I want talk about an attitude that I came across. Even from some of the supporters of automatic registration as we proposed it. It always took the form of something like this: "Well Alex, why are you going through all this effort? Just because you register somebody to vote doesn't mean they're going to vote." If you haven't heard that already, expect it. I disagree. Maybe not 100 percent of them will turn out and vote, but if nothing else, think about this: If you're eligible to vote in the United States of America, but not a registered voter, you do not receive the voter information guide from your state. If you're eligible to vote, but not registered, you don't get the sample ballot from your county. Automatically these new registered voters will receive the voter information guide, they'll receive a sample ballot, and maybe they won't hear from all the candidates, or the politicians seeking re-election. But they'll hear from the smart ones who know somebody's now eligible to vote, and I need their vote.

The bottom line is, as a new registered voter you get the invitation to the democracy party that you never got before. You get that invitation to participate, and the information that there is an election coming up, the date, when, where, and how to vote.

This brings me to my next project. I also put this in the voting rights category. Let's modernize how we conduct elections in recognition of life in the 21st century. We talk about automatic registration. Why not go one step further and talk about automatically putting a ballot in the hands of every registered voter each and every election? We have a tremendous opportunity here if we really do this right. As we free up time, energy, resources away from voter registration because of success on automatic registration, we can shift some of that time, energy, and resources on voter outreach, education, and turnout.

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I want to just bring it all together and say, here's what our voting rights agenda will be in the 21st century. Yes, we must defend and protect our voting rights, and insist that Congress, sooner rather than later, restore Section 4 of the Voting Rights Act, that was compromised by the Supreme Court. I'm not satisfied with just playing defense. I like to play offense. Offense is how you put points on the board, and we can play offense when it comes to voting rights by automatically registering all eligible voters. We can play offense by automatically sending every registered voter a ballot, and providing more choice for when, where, and how to cast that ballot.

We can play offense by taking the savings through these reforms and investing in voter outreach and education and turnout.

We can play offense by taking the savings through these reforms and investing in voter outreach and education and turnout. I believe this is the agenda of how we overcome historical barriers to the ballot box, and to participation, and this is how we instill the tradition of voting for all people, and strengthen our democracy. This is how we fight back against the attacks on voting rights that we see in far too many states in our country right now. While we wait for Congress to act, we embrace the opportunity for states to be able to act now. This is our agenda.

Expanding the Electorate

Wendy Weiser, Jeremy Bird, and Sam Wang

At a Brennan Center conference, one major question for attendees: Would wider registration result in higher turnout and greater participation? In this excerpt from the day's conversation, a lawyer, a political organizer, and a neuroscientist look at the surprising power of a change in registration rules.

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

We in the United States face a turnout crisis. Our last federal election saw the lowest voter turnout in 72 years. Even with all the enthusiasm around this year's presidential primaries, turnout remains embarrassingly low. According to a recent Pew study analysis of the first 12 primaries this year, turnout was around 17 percent for Republicans, less than 12 percent for Democrats, and that's actually considered reasonably high. …

You want to solve economic inequality issues in this country, let's start by solving economic inequality issues with voters on Election Day.

Only one state has started implementing automatic voter registration so far: Oregon. We're already seeing really positive results. We've heard that the state's Department of Motor Vehicles voter registration rates have skyrocketed, going from roughly 4,000 a month to 12,000 to 15,000 registrations a month. Recent data put out by the Oregon New Motor Voter coalition suggest that these registrations are also translating into greater turnout. According to a new analysis, young people age 18 to 29, who are automatically registered in Oregon, actually voted at higher rates in the primary than those who were registered using traditional means. If you look at the unaffiliated voters — so those who couldn't vote in the presidential primaries, and they only voted in the nonpartisan local and judicial elections — turnout was 10 percent for those who voted, who were registered automatically. This was compared to only 3.3 percent for those who registered using traditional means. In all, automatic registration really seems to have an impact on participation, according to the early returns.

Jeremy Bird, Founding Partner, 270 Strategies and former National Field Director, Obama for America

Think about the times that you've volunteered on a campaign, or worked on a campaign. I remember so many times, having my list of voters who we were trying to turnout, and knocking on the door a week before the election, 30 days before the election, the day before the election, and the person opening the door wasn't the person on my list, and talking to them about why they weren't on that list. Disproportionately, these people were from communities of color, disproportionately young people, and disproportionately

These remarks are excerpted from the Brennan Center's conference, *Automatic Voter Registration: Why and How,* May 18, 2016.

low-income communities. Where people were already excluded from my list of voters, because they weren't registered, and it was within the window of the ability to participate in the process. …

Our resources could shift fundamentally with automatic voter registration. I just want to take you to 2012 for a second. On the Obama campaign we knocked on the door, or called 150 million times to different voters — 150 million times to either talk to somebody who was a persuadable voter, or to do a get-out-the-vote conversation with a voter that was already registered.

We also registered 2.1 million voters. To register 2.1 million voters on the Obama campaign took 700,000 volunteer shifts. If we redirected those volunteer resources, of those people that did that voter registration, we would have been able to knock on or call 35 million additional voters, and engage them in the process — and invite them to the Democratic Party. …

For campaigns alone, to redistribute our resources toward people who are already registered, and to have those conversations to be about when, where, why, and how to vote — as opposed to getting them on the list to start with — that would fundamentally change the way we run our campaigns, and I think fundamentally changes the way in which we can bring people into the process. …

If our electorate is more diverse, our elected officials will be as well. That comes in all the forms we've been talking about. Where on Election Day, the distinction between income, in terms of who turns out is vast. You want to solve economic inequality issues in this country, let's start by solving economic inequality issues with voters on Election Day. Our elected officials will be younger, more diverse, and more representative of the population, if more people are participating. I think in terms of fundamentally changing who is elected and representing us, part of that is about fundamentally changing who's voting.

Sam Wang, Professor of Neuroscience and Molecular Biology, Princeton University

I guess there could be some question about why a neuroscientist, or a cognitive scientist, might even be here at all. What I would like to do is give a little bit of information about exactly how one could go about estimating the benefits of automatic voter registration. As we've heard already, approximately 24 percent of voting eligible adults in the United States are not registered to vote. That's about 53 million people. The question is how could we understand how much benefit there would be, especially given that it is innovative to be doing automatic voter registration? It's only been enacted in four states.

To predict what might happen, we have to rely on principles from other areas of knowledge: my own field, neuroscience, or behavioral science, and cognitive science. I want to give you two ideas, and then build out from those ideas.

The first idea is that from cognitive science and behavioral science there's something called the power of the default option. The general idea is that human beings, as it turns out, don't like to think very hard. The term that's used is "cognitive misers." We choose, if it's a reasonable option, we will choose the default option, and then take that, if it's a reasonable option. That's a powerful point that I think that we all know intuitively.

The second point is the power of not having to plan ahead. Generally speaking, we think that we can plan ahead, but in studies ranging from things like organ donation to saving for retirement, it seems that there is some barrier to making plans far into the future, to a future that we can't necessarily see. In particular, we use something called executive function. Executive in the domain of behavioral science doesn't mean the person who's in charge of the company. It means executing actions, and so there's a part of your brain that's important for executive function, the pre-frontal cortex. …

[Letting voters opt out rather than requiring them to opt in] has several advantages. … Let me give you a couple of estimates of what removing this barrier would achieve. The first example is savings plans. There's a famous study in behavioral science done by Brigitte Madrian and Dennis Shea. This comes from 2001, and it has to do with retirement savings. What they showed was that participation rates in an opt in approach led to about 65 percent participation after three years. That sounds pretty good. Then when the system was switched to automatic enrollment, that participation rate jumped to 98 percent. Okay so that's a jump from 65 percent to 98 percent. That's relevant because voter registration is about 76 percent nationwide.

Another example is organ donation. It turns out that among drivers in Europe, and in some nations, organ donation registration is opt in, so you have to actively seek out the opportunity to do that. In other countries, you are a donor automatically, and you have to opt out. In opt-in countries the rate is 14 percent, in opt-out countries the rate of organ donation is 94 percent. Now we've got a huge jump. In these examples what we have is an end point compliance rate of 94 to 98 percent, for an outcome that is socially agreed upon to be good.

In the case of voter registration, starting from 76 percent, going to 94 percent, that difference would get about 40 million people more registered nationwide.

What that means, just from these two examples, I could give you more examples, but the general idea is that getting above 90 percent is evidently achievable. In the case of voter registration, starting from 76 percent, going to 94 percent, that difference would get about 40 million people more registered nationwide.

Will registering increase voting?... Of people who are registered currently, about 77 percent of those vote in presidential election. Even if that percentage drops with automatic registration, an estimate would be that nationwide close to 30 million people are likely to vote who otherwise would not. …

I know that we want to talk about things like alienation and engagement in politics, but I just want to point out that, even though automatic voter registration has that certain faintly technical sound, to be totally frank, what people are trying to accomplish here can potentially have a much larger effect than getting people in and grabbing them. A really good effect, as evidenced by the studies we heard about from Professor Nickerson. That's a few percentage points. But if you look at the people who have to register 20 to 30 days in advance, 48 percent of them vote. If you look at the ones who can register same day, 72 percent.

Now, one could suppose the hypothesis that people in Minnesota, Wisconsin, New Hampshire, Iowa are somehow less alienated than people in Hawaii, West Virginia, Oklahoma, and Texas. That's a 24 percentage point difference. What that means is that potentially by doing what you're here to do today, that could potentially be an effect that is 10 times as large as these very interesting effects of shoe leather going door to door and talking to people. Just automatically, by just going from opt in to opt out, boom, you can get a 10-fold increase. It feels like a good thing to do.

Big Money is a Barrier to Advancing Civil Rights

Wade Henderson

In June, the Brennan Center joined with other leading organizations to discuss how the outsized influence of money in politics is also a civil rights issue for the 21st century. The chief of the nation's leading civil rights coalition spoke powerfully for reform.

For too long money in politics groups and traditional civil rights groups, of which our coalition is a leading voice, have been working toward similar goals but in separate silos. Because of that, our ability to influence broader public policy around issues of mutual concern has really been limited. It's time to bring that together to bridge the divide. What we're hoping is that we recognize in coalition there is strength. We hope as people see connections and interests that we share in common, there will be ways of facilitating a broader set of engagements that we hope will make a difference. Now this year's election is really the first presidential election in 50 years where voters will go to the polls without the full protection of the Voting Rights Act of 1965. Amazing. Many people in this audience, with the exception of myself and a few others, can't remember a time when the Voting Rights Act was not in effect, providing us with the protections that we seek.

For too long money in politics groups and traditional civil rights groups, of which our coalition is a leading voice, have been working toward similar goals but in separate silos. Because of that, our ability to influence broader public policy around issues of mutual concern has really been limited.

The notion that somehow we would not need to retain the Voting Rights Act because our country has evolved in its standards is literally absurd, but it was shattered the day of the Supreme Court's decision in *Shelby County v. Holder*, June 25 of three years ago. That very day, states like Texas and North Carolina implemented new voter ID systems. Federal district courts in both established the fact that those laws would exclude hundreds of thousands of prospective voters simply through a manipulation of the kind of ID that would be useful or allowed in voting. You can vote if you have a concealed carry permit in Texas, but if you have a student ID issued by the state of Texas, it doesn't work. That kind of change is really something to take into account.

At the same time, candidates and affiliated groups have already spent more than $1 billion on election outcomes, more than $1 billion. Now these two facts taken together make it hard to address some of the largest problems facing our nation from immigration reform to criminal justice to economic inequality to infrastructure to investments. All of these things are affected in

Henderson was president and CEO of the Leadership Conference on Civil and Human Rights. These remarks are excerpted from *Money in Politics: A Barrier to a 21st Century Civil Rights Agenda?,* a convening cosponsored by the Brennan Center, Demos, and the Leadership Conference, June 9, 2016.

some way or another by the expenditures that individuals and corporations put on the table to affect the outcome of these debates. Now our voices are not being heard in the voting booth and are not being represented by those who are elected to serve us. As a result, our country's long march toward a more perfect union, a more just society is a longer and a more arduous journey than most Americans believe. Our elections are so directly influenced, some would say even corrupted by money, our government simply can't function as it should.

Elected representatives spend more time raising campaign contributions than legislating. Simply look at the current Congress to really get a sense of how much work is not being done. Women and people of color have a harder time assessing the huge sums necessary to challenge those in power. The priorities of the Congress and state assemblies are driven less by the will of the people and more by what should make donors happy. I hope we can begin the work of figuring out how we dismantle the existing system of big money and elections and create a system that allows for greater engagement by a greater, more diverse number of Americans. If we simply make a down payment in recognizing that we have shared interests and we can connect those interests for a more positive outcome, then we will have made tremendous progress.

Shut Down Rikers?

Glenn E. Martin

Sitting in the East River between Manhattan and LaGuardia Airport, Rikers Island is one of the world's largest and most notorious jails. Rikers houses 7,500 inmates, the vast majority of whom are awaiting trial and have not been found guilty of any crime. They are there because they are too poor to post bail. As recently as 2014, the Manhattan U.S. attorney condemned Rikers's "deep-seated culture of violence." The Brennan Center held a panel discussion on Rikers after a screening of a Bill Moyers documentary, RIKERS.

Who has said we should close it? The governor has said we should take a look at it and think about closing it. The speaker of the Council has said it. The comptroller has said it. Many Council members have said it. The one person who continues to say that it's too difficult and too expensive is Mayor de Blasio.

When I met New York City Mayor Bill de Blasio at his inauguration, I feel as though it was 30 years in the making for me to approach him and say, "You know, Mr. Mayor, I can take a picture with you any time. I'm here to say you should close Rikers."

So within an hour, he heard someone say that to him, and he seemed bewildered by that statement, and he asked me why. …

Our mayor says that it's too difficult and too complicated, and as our governor said back to him in return: "This is New York. Everything is difficult and complicated and expensive. Get used to it and figure it out."

So, when I heard that answer, "Why?" I said to myself, "You know what? We need to build something to help him understand why." There have been two other efforts to close Rikers. One was during the Koch administration; one was during the Bloomberg administration. Both failed miserably, but they failed miserably because the community's voice wasn't at the table. There was no organizing component. This time, the push to close Rikers is going from the community outwards.

We saw a media cycle that happened earlier last year where elected officials weighed in one way or the other, but there was no price for them to pay. When you think of people that have the least appetite for risk, it's our elected officials. We have to build the power close to the ground to create an environment where elected officials are weighing in on this issue, and they knew there is some risk tied to their response. Who has said we should

Martin is founder and president of JustLeadership USA. These remarks are excerpted from a conversation at NYU School of Law with NYU College of Global Public Health Professor Ernest Drucker, Brennan Center Senior Counsel Lauren-Brooke Eisen, and Kathy Morse, a film participant who was formerly incarcerated at Rikers, December 6, 2016.

close it? The governor has said we should take a look at it and think about closing it. The speaker of the Council has said it. The comptroller has said it. Many Council members have said it. The one person who continues to say that it's too difficult and too expensive is Mayor de Blasio.

Just to be clear, there's got to be people out there saying, "Well, if you close a facility, all you do is you take everything that's happening there and you put it in other jails around the city." Well, guess what? We have other jails around the city. Do you see the type of abuse coming out of there systemically, the way you do on Rikers? No.

Why is that? We have a jail in Brooklyn. We have a jail in Manhattan. We have a jail in the Bronx. When correction officers walk out of those facilities, they walk into communities. …

Rikers Island was bought from a slave trader named Rycken, and that place has a history and a culture of abuse. You can try to shift policy all day long and invest more and more money, but culture eats policy for breakfast. It's not until New Yorkers stand up, especially New Yorkers that look like the ones in this room, and demand that Mayor de Blasio close it down that he'll come up with a plan. It'll take a long time to get there, granted. I'm not Pollyannaish about that, but that is when he'll realize that there are thousands of New Yorkers who are going to hold him accountable and responsible for what comes out of that place.

When You Draw the Line, You Make the Rules

David Daley

Gerrymandering has evolved into newer, more pernicious forms. A journalist argues that the 2010 midterm elections were a heist. For just $30 million dollars, the Republican Party locked in state legislatures and seized control of the House of Representatives for a decade.

Savvy Republican strategists, bankrolled by dark money, aided by sophisticated new mapmaking strategies, reinvented the oldest political trick in the book — the gerrymander — in 2010 and 2011 in a thoroughly modern and unique new way.

Our democracy has in fact been rewired at its most basic level: through the lines of our political districts. It goes a long way toward explaining why our politics feel so extreme, so broken, so dysfunctional, and so hard to fix.

Karl Rove laid out the plan in The Wall Street Journal *in March of 2010. "When you draw the line, you make the rules."*

To understand how this happened, we have to look back first to 2008, which brought Barack Obama, a Democratic supermajority in the Senate, as well as a Democratic majority in the House. It was the fourth of five elections in which the Democrats won the popular vote. Go back and watch the live election coverage of that night, and the smartest minds in the Republican Party are despairing over the future of the party and demographic changes that could render them a minority for a generation.

While they despaired, however, a brilliant Republican strategist named Chris Jankowski, the executive director of something called the Republican State Leadership Committee, had an idea. He realized that 2008 represented a Democratic wave and brought the historic election of an African-American president, but he also realized that the truly important election would be held in 2010, because as you all know, the Constitution mandates the redistricting of every state legislative and congressional district following the census. Elections in zero years mean more. They can reverberate throughout the next decade. He also recognized that while each state is a little different, in most every state, the legislature plays the key role in redistricting.

The strategy was so simple and elegant, it's amazing no one had hit on it in quite this way before. Target state House and Senate races nationwide with the goal of flipping state legislative chambers. Draw themselves friendly districts that lock in these gains even in blue and purple states for the next

Daley is former editor in chief of Salon and author of *Rat F**ked: The True Story Behind the Secret Plan to Steal America's Democracy.* These remarks are excerpted from a conversation at NYU School of Law, October 6, 2016.

10 years. Karl Rove laid out the plan in *The Wall Street Journal* in March of 2010. "When you draw the line, you make the rules." The Democrats evidently did not get their *Wall Street Journal* that day. With eight months notice, they could not defend the state legislative districts Rove targeted in flashing neon lights in the country's largest newspaper.

The Democrats' catastrophic strategic failure would echo throughout the rest of this decade. It was in some ways the greatest and most inexpensive political heist in American political history. This play cost the Republicans $30 million to lock in control of the House of Representatives essentially for the next decade. In Connecticut, Linda McMahon would squander $100 million on two losing Senate races.

In Wisconsin, operatives connected to Paul Ryan barricaded themselves in a law firm across the street from the capitol, claimed attorney-client privilege for the maps they drew, required even Republican incumbents to sign confidentiality agreements before being shown the new districts.

You look state by state at how this plan went. In Ohio, Republicans spent $1 million on state House races. They flipped the chamber and gave the Republicans complete control over drawing 132 legislative districts in Ohio. Another million dollars in Michigan brought the House and Senate there. Another million dollars in Pennsylvania delivered veto-proof control over redistricting in yet another blue state.

The following year, they pressed the advantage. In Ohio, Republican strategists barricade themselves into a suite at the Doubletree for months. They dubbed it "The Bunker." They told no one where they were. Together with strategists from John Boehner's team, they devised new lines based on complicated mathematical algorithms.

In Wisconsin, operatives connected to Paul Ryan barricaded themselves in a law firm across the street from the capitol, claimed attorney-client privilege for the maps they drew, required even Republican incumbents to sign confidentiality agreements before being shown the new districts.

In North Carolina, they brought in a master mapmaker named Tom Hofeller who treats redistricting more seriously than espionage, and gives colleagues a presentation warning them never to send public emails, never to leave their computers visible, and not to fire the staff until you're sure the process is completely over.

In Florida, strategists inspired an end run around a new state constitutional amendment mandating nonpartisan redistricting by running a secret shadow redistricting process and funneling maps through phony emails and former interns without their knowledge.

In 2012, Barack Obama is re-elected. Democrats hold the Senate. They garner those 1.4 million more votes, but in the first election run with these new lines in the House, these maps hold. They are the Republican firewall, and this is most dramatic on the state level. Michigan, 240,000 more votes for Democratic House candidates, but the delegation goes 9-5 Republican. In Ohio Republicans narrowly win, just about 50/50. They take 12 of the 16 congressional seats.

This happens in state after state after state. The maps produce just the results they were intended.

You can trace gerrymandering back to Patrick Henry, 1788, the founding of the republic, back to Governor Gerry in Massachusetts in 1790. Both parties have done this for years, sometimes in cahoots.

It's more dangerous now because of technology. Gerrymandering from 1790 through 2000 is in the minor leagues. In 2010, gerrymandering essentially enters its steroids era. Determined partisan mapmakers have access to volumes of census data, voting records, reams of consumer preferences, as well as powerful computer programs that can instantly calculate the result of moving a district line a block in any direction. They can calculate algorithms designed to withstand electoral waves.

Michigan cast 240,000 votes for Democratic House candidates, but the delegation goes 9-5 Republican.

It's the data, the technology, and the ease with which it can be manipulated that makes the post-2010 redistricting cycle fundamentally different from any other in our modern era. Remember, the Democrats were able to ride the Iraq War anger in 2006, and undid the gerrymanders in Ohio and Pennsylvania. That they have no hope of doing that this year under similar electoral conditions is a sign of how effective and enduring and different these lines from 2011 are.

[For example,] Republicans hold 10 of [North Carolina's] 13 districts. How many North Carolina Republicans do you think are in trouble? You need not be Nate Silver to guess the answer. It's zero. All 10 Republicans, all three Democrats, are safe as houses.

When our democratic institutions cease to be governed by citizens at the ballot box, they cease to be democratic. I'm sorry I don't have a happier ending.

Political Parties Are a Part of the Problem

Hon. Mickey Edwards

Edwards spent 16 years in the House as a representative from Oklahoma. He chaired the House Republican Policy Committee and served on the House Budget and Appropriations Committees. In his latest book, The Parties Versus the People, *Edwards argues that political parties are increasingly controlling not only who gets on the ballot, but how politicians behave once in office. Two proposed reforms: eliminate party primaries and randomly assign representatives to committees.*

We have a system that rewards intransigence, rewards incivility, punishes people who cooperate. They're thought of as sellouts. That's what we've got. Our first four presidents did not even like each other, by the way. Washington, Jefferson, Adams, and Madison all agreed on one thing. Don't create political parties. They created parties, but they weren't anything like the parties that we have now. We've created them.

Because of the political party system we've created, where it's always your team against the other team, our republic and our democracy are disappearing.

What do we know about the Court fight now over Scalia's absence? Both parties have given up on the idea that the Supreme Court exists as a separate judicial branch with the job of figuring out what's constitutional. Both parties now see the Supreme Court as a third branch of the legislature. A super branch of the legislature able to overrule the others.

Because of the political party system we've created, where it's always your team against the other team, our republic and our democracy are disappearing.

This is an existential problem. The system we created is carefully designed so that the people remain in charge. You don't go to war unless the people think you should go to war. You raise taxes if the people think you should raise taxes. That's disappearing.

Let me tell you what it's like being in Congress. How many of you have ever been on the House floor, ever seen the House floor? Here in this room, and I'll bet this is true every time you go to a speech, there is a lectern. You go almost anywhere you listen to a speech, there's a lectern. There's not a lectern on the House floor. There are two. There's a Democratic lectern and a Republican lectern. In my first talk on the House floor, I knew what I wanted to say and I was convinced I was right.

I figured the Republicans for the most part were going to support what I was doing. I wanted to appeal to the Democrats. Here we are. You're the Republicans. This is the way it would be. You're the Democrats. I came over and I stood at that lectern and appealed to the Democrats. There was an

These remarks are excerpted from a conversation at NYU School of Law, March 14, 2016.

audible gasp. I swear to God. Republicans and Democrats both came over and said, "No, no. You have to stand at this lectern."

In the House, there is a center aisle, a dividing aisle. Not only do you stand at different lecterns, but you have cloakrooms. There's the Republican cloakroom. There's the Democratic cloakroom. You don't have sandwiches or soup or read newspapers and talk sports together. You're divided into enemy camps from the beginning day when you walk into the Congress. I don't know all of you. I know very few of you. I don't know who's a Republican and who's a Democrat. I don't see any Republicans or Democrats. All I see are Americans. That's not the way it is in Congress. You don't see Americans. You see Republicans and you see Democrats. One is the enemy and one is the ally.

I don't see any Republicans or Democrats. All I see are Americans. That's not the way it is in Congress. You don't see Americans. You see Republicans and you see Democrats. One is the enemy and one is the ally.

The political parties are private, power-seeking, self-aggrandizing clubs. We have allowed them to take over our politics, to destroy our democracy, to destroy our republic, because it suits their advantage. If we don't change it, then this period of why can't we get along, why can't we pass bills, why can't we pass our appropriations, why can't we do things together, why can't we talk to each other, is just going to get worse. It's going to get worse unless we start elevating people who think different.

There are solutions. None of these may be absolutely correct. There may be a variety of ways. You know, 40 percent of Americans today are registered as Independents. They don't have much of a say in most of the states when you're picking who to choose for president. Forty percent are Independents. In Washington State in 2006, people went to the polls and said, "You know. We're really tired of this crap. We're tired of it." They changed the laws. They got rid of party primaries. Today in Washington State, everybody who runs for office, for Congress, for governor, for state legislature, runs on one ballot. Republicans, Democrats, Libertarians, Greens, are all there.

You don't choose which party ballot you vote on. Every single person in the state votes on everybody. Everybody. If nobody gets over 50 percent, then you have two run against each other. You know what? If it's top two are both Democrats, and that's happened, then they can't just appeal. If they're Democrats, they can't just appeal to the left. If they're Republicans, they can't just appeal to the right. Democrats, Republicans, Libertarians, Greens, everybody is going to be voting in that election. That was in 2006 in Washington State. In 2010, California did it. California no longer has party primaries. California no longer has party control of redistricting. That's one way.

If you're in Congress, how do you get a committee assignment? That's where you make the initial decisions. That's where you kill bills or advance bills. How do you get a committee assignment? You get it by promising that you will stick to the party agenda. You put me on that committee and I'll vote the party line. You don't say that, you don't get the committee. Why? Why do we let the parties choose? Why do the party leaders get to choose who's on what committee? It's one Congress, right? Every one of us has the same number of constituents. Every one of us has been elected freely. Why not have a drawing?

Worst Supreme Court Decision Ever?

Adam Cohen

Dred Scott, Plessy v. Ferguson, *and* Korematsu *are widely considered to be among the Supreme Court's worst decisions. The co-editor of the National Book Review argues that this hall of shame should include* Buck v. Bell, *in which the Court ruled 8-1 in 1927 that an "imbecile" could be sterilized against her will. The ruling led to as many as 70,000 Americans being sterilized, and was used as a scholarly prop by the Nazis. He discussed his book with the Brennan Center.*

In 1927, the Supreme Court was asked to decide a simple question: Should Virginia be allowed to sterilize Carrie Buck, a 20-year-old inmate of the State Colony for Epileptics and Feebleminded, who had been falsely declared to be feebleminded? In an 8-1 decision by Justice Oliver Wendell Holmes, the Court ruled that no part of the Constitution, not equal protection, not due process, not the right to bodily integrity, protected Carrie Buck from being sterilized against her will. Plenty terrible, but the Court did even more. It, also, strongly endorsed the eugenics movement and issued a clarion call to the nation to sterilize more unfit people, as they put it.

Justice Holmes wrote that the nation had to sterilize those who, "sapped the strength of the state to prevent our being swamped with incompetence." In words that could have been torn from the pages of a eugenics pamphlet, Holmes declared: "It is better for all the world if instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unjust from continuing their kind."

Then Holmes went on to include in the decision one of the most brutal aphorisms in American jurisprudence. Holmes, the Harvard-educated scion of several of Boston's finest families, said of Carrie Buck, her mother, and her young daughter: "Three generations of imbeciles are enough."

When legal scholars rank the Supreme Court's worst decisions, the competition is considerable. There was the *Dred Scott* case in which the Court ruled that an enslaved man had no right to sue in court for his freedom. There was *Plessy v. Ferguson*, in which the Court upheld Louisiana's law segregating railroad cars by race, and there was *Korematsu v. United States*, in which the Court upheld the internment of Japanese Americans during World War II.

Adam Cohen is the author of *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck.* These remarks are excerpted from a conversation at NYU School of Law, May 12, 2016.

There will always be differences of opinion over which rulings should be on the list of the worst decisions and how they should be ranked, but there can be no doubt that *Buck v. Bell* must have a prominent place.

In its aftermath, not only was Carrie Buck sterilized against her will, but in the end, as many as 70,000 Americans were sterilized. Many of the victims were like Carrie, perfectly normal, both physically and mentally, and they desperately wanted to have children.

Buck v. Bell's reach extended beyond the United States. The Nazi Party, which was on the rise in Germany, used America as a model for its own eugenics sterilization program. The Supreme Court's ruling influenced Germany's genetic health courts, which ordered some 375,000 eugenic sterilizations. In fact, at the Nuremberg trials at the end of World War II, Nazis responsible for those sterilizations cited *Buck v. Bell* in their defense.

The Nazi Party, which was on the rise in Germany, used America as a model for its own eugenics sterilization program. The Supreme Court's ruling influenced Germany's genetic health courts, which ordered some 375,000 eugenic sterilizations. In fact, at the Nuremberg trials at the end of World War II, Nazis responsible for those sterilizations cited Buck v. Bell *in their defense.*

While many of the Court's worst decisions are now central parts of American history, *Buck v. Bell* is not well remembered today. Even in constitutional law courses, it's rarely discussed or only mentioned in passing. The leading American constitutional law treatises, which weighs in at over 1,700 pages, devotes just half a sentence and a footnote to the case.

I'd like to talk a little bit about *Buck v. Bell*, a case that became even more interesting the more I learned about it, and offer a few thoughts about why it remains important.

The United States in the 1920s was caught up in a mania, the drive to use discovered heredity science to perfect humanity. Modern eugenics, which had emerged in England among followers of Charles Darwin, crossed the Atlantic and became a full-fledged intellectual craze. The United States suddenly had a new enemy, bad germ-plasm and those who carried it. The unfit, the eugenicists warned, threatened to bring down not only the nation, but the whole human race. America's leading citizens led the charge to save humanity by promoting eugenics, John D. Rockefeller, Jr., Alexander Graham Bell, and former president Theodore Roosevelt, who took to the pages of a national magazine to insist that the unfit must be forbidden to leave offspring behind them.

The driving force behind the eugenics movement of the 1920s was, historians suggest, the collective fears of the Anglo-Saxon upper and middle classes about a changing America. Record levels of immigration were transforming the nation's ethnic and religious makeup, and with increased industrialization and urbanization, community and family ties were fraying. These anxieties were being redirected and expressed in the form of fears about the unfit.

The eugenics movement offered two solutions, one for the threat from without and one for the danger from within. Its answer to the foreign threat was new immigration laws to limit the number of Italians, Jews, and other non-northern Europeans admitted to the country. The eugenicists

claimed that these groups had inordinately high levels of physical and mental hereditary defects that were degrading America's gene pool. Among other things, they claimed based on intelligence testing, that between 40 and 50 percent of Jewish immigrants arriving at Ellis Island were mentally defective.

In addition to immigration limits to deal with this external threat, the eugenicists worked to address the internal threat through a series of laws designed to prevent the "unfit from reproducing." They began in Connecticut in 1895 with laws prohibiting various kinds of people deemed to be hereditarily unworthy from marrying, but they worried that the unfit would then just reproduce outside of wedlock.

Their greatest target was the feebleminded, a loose designation that included people who were mentally challenged, women who were considered to be excessively interested in sex, and various other categories of individuals who offended the middle class sensibilities of judges and social workers.

Next, the eugenicists promoted segregation, as they called it, placing "defective people" in state institutions during their reproductive years to prevent them from passing their flaws onto a new generation, but holding that many people in institutions for that long was expensive. Finally, the eugenicists turned to sterilization, which was completely effective and could be carried out on a mass scale.

Starting with Indiana in 1907, states adopted legislation authorizing forced sterilization of people judged to have hereditary defects. They called for sterilizing anyone with "defective traits, such as epilepsy, criminality, alcoholism or dependency," another word for poverty.

Their greatest target, however, was the feebleminded, a loose designation that included people who were mentally challenged, women who were considered to be excessively interested in sex, and various other categories of individuals who offended the middle class sensibilities of judges and social workers.

Fears of the tide of feeblemindedness, as it was called, rose to panic levels. A leading psychologist published an influential study arguing that feeblemindedness underlies all our social problems, including crime, poverty, and prostitution. The eugenics sterilization movement's most prominent leader insisted that to remove the, "Worthless one tenth of the nation," 15 million people would have to go under the knife.

Virginia was late to adopt eugenics sterilization. It waited until 1924, 17 years after Indiana's law, but what put it at the center of a legal battle was that the Virginia hospitals decided they did not want to sterilize anyone until their law was tested in the courts, all the way up to the Supreme Court. To accomplish this, they decided to create a legal test case.

It was Carrie Buck's misfortune to be at the wrong place at the wrong time. Carrie's story is a sad one and an infuriating one. She was being raised in poverty by a single mother, and was taken in by a foster family. There was nothing wrong with her physically or mentally, but she was raped by a nephew of her foster mother. When she became pregnant out of wedlock, the family had her declared epileptic and feebleminded, and shipped her off to the State Colony for Epileptics and Feebleminded.

The Colony held a hearing on whether Carrie should be sterilized, a proceeding heavily stacked against her, and ruled that she should be. It was this order that was appealed through the Virginia courts and up to the U.S. Supreme Court.

It was the great Oliver Wendell Holmes who had the last word on Carrie's fate and who, with his broadside against society's imbeciles, lent his enormous intellectual prestige to the sterilization cause. Holmes was not a man who easily found enjoyment, but he would later say that upholding Virginia's sterilization law and Carrie's sterilization gave him real pleasure.

Those who airbrush *Buck v. Bell* from history would likely offer a simple explanation, that it is an anomaly. The Supreme Court, they would argue, was briefly caught up in eugenics, but it was short-lived, a one-time mistake, and the issues it raises are ones the nation long ago put behind it.

But this argument has serious flaws. First, unlike so many of the Court's worst rulings, *Buck v. Bell* has never been overruled. In a 1942 case, the Court struck down an Oklahoma law providing for sterilization of certain criminals, but it did so because of its objection to the definition of which crimes would lead to sterilization. The Court expressly choose not to overturn or even limit *Buck v. Bell,* and after the ruling, states continued to sterilize many thousands of people.

As recently as 2001, the U.S. Court of Appeals in Missouri, just one step below the Supreme Court, cited Buck v. Bell *in ruling on the case of a woman [with mild cognitive disabilities] who was ordered by the state to be sterilized.*

As recently as 2001, the U.S. Court of Appeals in Missouri, just one step below the Supreme Court, cited *Buck v. Bell* in ruling on the case of a woman [with mild cognitive disabilities] who was ordered by the state to be sterilized.

The 21st century is being held as the century of biology, an era that experts say will be defined by "the new biology of genomic research, including the vastly deeper understanding of the genetic blueprint for individual humans." Scientists are now able to edit human embryos, paving the way for what the press has dubbed "designer babies." This will make it far easier for the state to impose eugenics if it chooses.

A final reason *Buck v. Bell* remains critically important is that its deepest subject is a timeless one: power and how those who have it use it against those who do not. Carrie Buck was at the bottom of the nation's economic and social hierarchies. In her plea to the Court, she was asking for protection from powerful people and institutions that threatened to do her harm. Throughout the history of American law, that has not been a good position to be in.

In the end, this is the most troubling thing about *Buck v. Bell*. It presented the Court with a stark choice between the ancient Babylonian code of Hammurabi's ideal of protecting the weak against the strong and the precise opposite. The ancient principle of justice teaches that the purpose

of law is to ensure that the strong do not harm the weak. The eugenicists and the state of Virginia insisted the strong must harm the weak, and that it was the law's duty to help.

Faced with this decision, the Supreme Court did not merely side with the strong. It enthusiastically urged them on, and insisted it would be better for all the world if society's strongest members simply finished off people like Carrie once and for all. Even the ancient Babylonians understood that helping the strong to obliterate the weak is the very opposite of justice.

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Justice Brennan's law clerks and family were the driving force behind the Center's founding. Over the years they have provided vital leadership, encouragement, and support. We were thrilled to reconvene at a reunion on October 1, 2016, at the U.S. Supreme Court. Our deepest thanks to those who contributed this year:

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