DEMOCRACY & JUSTICE
COLLECTED WRITINGS
BRENNAN CENTER FOR JUSTICE

The Fight for Democracy
Michael Waldman, Wendy Weiser, Chisun Lee, Lawrence Norden

Impeachment
Neal Katyal

Criminal Justice Reform
Cory Booker, Kamala Harris, Amy Klobuchar, Lauren-Brooke Eisen, Rashad Robinson, Topeka K. Sam, Elizabeth Warren

Voting Rights
Desmond Meade, Myrna Pérez

Racial Justice
Ta-Nehisi Coates, Melissa Murray, Wilfred U. Codrington III, Michael German

Executive Power
Elizabeth Goitein, Susan Rice, Andrea Mitchell, Victoria Bassetti

Partisan Gerrymandering
Katie Fahey, Michael Li, Yurij Rudensky

PLUS:

Rule of Law
Preet Bharara, Christine Todd Whitman, Mike Castle, Christopher Edley Jr., Chuck Hagel, David Iglesias, Amy Comstock Rick, Donald B. Verilli Jr.

Protecting Fundamental Rights
Ruha Benjamin, Sherrilyn Ifill, Kate Shaw, Reva Siegel

AND:

Erwin Chemerinsky, Jennifer Weiss-Wolf

BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY SCHOOL OF LAW

Democracy & Justice: Collected Writings 2019

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, in the courts, and in the court of public opinion.

ABOUT DEMOCRACY & JUSTICE: COLLECTED WRITINGS 2019

The material in this volume is excerpted from Brennan Center reports, policy proposals, and issue briefs. We have also excerpted material from public remarks, congressional testimony, and op-ed pieces written by Brennan Center staff and fellows in 2019. All Brennan Center events were produced by Mellen O'Keefe and Adrienne Yee.

EDITED BY ALAN J. BEARD

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Introduction from the President

February 2020

Dear friends,

We are at a turning point for our country. At this moment of polarization, our democracy is being put to the test.

This isn't the first time the rule of law has been at risk. Scandal and abuse have often been followed by renewal — in the Progressive Era, after Watergate. But not always. It is our job to turn this hour of corruption into a season of reform.

There's encouraging news. Over the past few years, a democracy movement has been born. Diverse and multiracial, it draws on the energies of millions across the country. It insists that the answer to attacks on democracy is to strengthen democracy. We can't address the climate crisis — or gun violence, health care, LGBTQ rights, or economic and women's equality — if we don't fix our system.

This civic energy has produced real progress. H.R 1, the For the People Act, was passed by the House of Representatives. And automatic voter registration, redistricting reform, campaign finance changes, and criminal justice reform measures have been enacted in states across the country.

The Brennan Center for Justice at NYU School of Law stands at the center of that fight. We're independent, nonpartisan, and devoted to the facts. Last year, our experts testified before Congress 12 times. We helped lead efforts to enact public campaign financing in New York. And we exposed the abuse of presidential emergency power.

The year 2019 was extraordinary. This volume includes a collection of some of our work. The stakes are even higher in 2020. How can we ensure that the election is free, fair, and secure? How can we make it more likely that the country focuses once again on the values of the Constitution?

We look forward to working with you in this great fight in the months and years ahead.

Best regards,

Michael Waldman
President

Democracy & Justice: Collected Writings 2019 Table of Contents

STRENGTHENING DEMOCRACY

THE PRESIDENCY AND THE RULE OF LAW

FAIR REPRESENTATION

VOTING RIGHTS

CRIMINAL JUSTICE REFORM

THE COURTS

EQUALITY

PROTECTING FUNDAMENTAL RIGHTS

STRENGTHENING DEMOCRACY

American Democracy Is Under Threat

Michael Waldman

In 2016, the Russian government mounted an aggressive campaign to hack our election infrastructure and spread misinformation. In 2018, the midterms were marred by mass voter purges, long lines, and voter suppression. Both elections made clear: reform is urgently needed.

One year before ballots are cast in November 2020, our election systems are under extraordinary stress. The research conducted by the Brennan Center, bolstered by our experience in the fight for voting rights in states across the country, confirms that there is strong reason for concern.

The right to vote is at the heart of democracy. Yet over the past decade, 25 states have put in place new laws making it harder to vote, for the first time since the Jim Crow era. Many states continue to disenfranchise people living and working in our communities because they have a past felony conviction. Voter roll purges have surged, particularly in states previously covered by the preclearance provisions of the Voting Rights Act. All these obstacles to the ballot hit hardest communities of color and the poor, young, and elderly. Voter suppression remains a potent threat to American democracy and a bitter challenge to the ideals of equality.

And there is a new and unnerving challenge: foreign interference threatens to disrupt and degrade the 2020 election. We all know that Russia intervened in 2016. Progress has been made since then. But next year, several states will still require voters to cast ballots on hackable electronic voting machines that do not leave a paper trail. Others will conduct no postelection audits to verify an accurate vote count.

How can we ensure that the 2020 election will be free, fair, and secure? And going forward, how can we modernize our elections so they fully and accurately reflect the voices of Americans? We believe strongly that the best response to attacks on our democracy is to strengthen our democracy.

So, we strongly urge Congress to enact bold reform. Here, there is reason for optimism. Earlier this year, this House passed H.R. 1 — the For the People Act of 2019. That legislation is the most sweeping democracy reform bill the Congress has taken up since 1965. We encourage the Senate to follow the House and pass this bill now. We also urge the House to pass a revitalized Voting Rights Act, as it committed to doing in H.R. 1. In addition, we urge the Senate to match this House's proposed $600 million appropriation to the states for election security.

Americans are hungry for positive solutions. Despite new barriers to participation, turnout surged from a 72-year low in 2014 to a 100-year high in 2018. Voters in states across the country passed ballot measures for voting rights and redistricting reform. Citizens are energized and engaged, a true democracy movement. Congress should act with the same urgency as its constituents and undertake bold reform to revitalize our election systems.

Excerpted from testimony before the House Administration Committee, Subcommittee on Elections, October 17, 2019.

SIGNIFICANT THREATS TO ELECTION INTEGRITY IN 2020

The Brennan Center monitors challenges to our elections nationwide. Our attorneys, social scientists, and researchers have worked with election officials and citizens in dozens of states. Here are the principal areas of concern for the 2020 election.

Voter Purges and List Manipulation

Voter purges refer to the process by which election officials attempt to remove from registration lists the names of those ineligible to vote. Done right, purges ensure that the rolls are accurate and up to date. When done improperly, however, they disenfranchise legitimate voters. Often, that happens too close to an election to correct the error. Bad purges cause confusion and delay at the polls.

H.R. 1 contains new protections to prevent improper purges, including new guardrails on the use of interstate databases that purport to identify voters who have reregistered in a new state, but that have been proven to produce deeply flawed data. It also includes provisions for automatic voter registration and same day registration — policies that ameliorate the impact of improper purges. We urge the committee to continue to press for these important reforms.

Across the country, state laws deny millions of citizens the right to vote because of a criminal conviction, including at least 3 million who are no longer incarcerated.

Election Security

Foreign interference and inadequate election security represent a second significant threat in 2020. As the Mueller report concluded, Russia waged a campaign to interfere in our election "in sweeping and systematic fashion." Moscow did more than hack Democratic National Committee (DNC) and campaign emails. In addition to a massive effort on social media, the Russians targeted state and local election officials, breached two state registration databases and extracted data from one, and used spear-phishing attacks to gain access to and infect computers of a voting technology company and at least one Florida county.

There is every reason to think these threats continue, especially now that the whole world knows how vulnerable we are. Before the midterm election, the director of national intelligence testified that the "lights are blinking red." Robert Mueller, in his July congressional testimony, warned, "Many more countries are developing the capability to replicate what the Russians have done." He added, the Russian effort "wasn't a single attempt. They're doing it as we sit here. And they expect to do it during the next campaign."

The country undoubtedly has made progress in protecting our elections. In 2016, 20 percent of votes were cast on machines with no paper backup. By next year, we estimate that number will drop to 12 percent. Several states are replacing outdated voting equipment. But major challenges remain.

At least 26 states, for example, totaling 243 electoral votes, are not currently on track to require postelection audits prior to certification of the election. Traditional postelection audits, which generally require

manual inspection of paper ballots cast in randomly selected precincts or on randomly selected voting machines, can provide assurance that individual voting machines accurately tabulated votes.

Disenfranchisement Laws

Disenfranchisement laws — a relic of the Jim Crow era that continues to haunt our elections — represent a third significant threat to voters in 2020. Across the country, state laws deny millions of citizens the right to vote because of a criminal conviction, including at least 3 million who are no longer incarcerated.

These laws vary dramatically from state to state. They range from permanent disenfranchisement for everyone convicted of a felony in Iowa and Kentucky, to no deprivation of voting rights at all in Vermont and Maine. Between these extremes, some states distinguish among different types of felonies, others treat repeat offenders differently, and some have varying rules on what parts of a sentence must be completed before rights are restored. Navigating this patchwork of laws can confuse election officials and prospective voters about who is eligible to participate. The result is large-scale de facto disenfranchisement of voters who are eligible but do not know it.

More Challenges

We face, of course, numerous other challenges to election integrity in 2020. For example, attempts to suppress votes through deception and intimidation remain all too widespread. This is not a new problem, but now social media platforms make the mass dissemination of misleading information easy and allow perpetrators to target particular audiences with precision. In a recent analysis for the Brennan Center, University of Wisconsin Professor Young Mie Kim documented hundreds of messages on Facebook and Twitter designed to discourage or prevent people from voting in the 2018 election.

Inadequate election day resources and long lines may also deter voters in 2020, particularly voters of color. A Brennan Center study found that, in the 2012 election, voters in precincts with more minorities experienced longer waits and tended to have fewer voting machines. A more recent academic paper using cell phone data found that, in the 2016 election, voters in Black neighborhoods were significantly more likely to wait in long lines than voters in white neighborhoods. The Brennan Center continues to research election resource allocation, and we plan to release a report on this issue early next year [2020].

In addition, state legislatures continue to add new obstacles to the ballot box. This year, at least five states have enacted new laws restricting voting access. These laws continue a decade-long turn toward placing direct burdens on people's right to vote.

BOLD REFORM IS NEEDED

Our elections face urgent threats, and we must respond with equal urgency. We should take this moment of public engagement to press for long-needed changes to ensure free, fair, and accurate elections every year going forward. We encourage Congress to pass H.R. 1, to restore the Voting Rights Act, and to appropriate necessary funds for election security.

H.R. 1 — A Breakthrough for Voter Access

H.R. 1 comprises reforms to revitalize every aspect of American democracy. Among the most important of H.R. 1's reforms is automatic voter registration (AVR). AVR is a simple but transformative policy that could bring millions into the electoral process. Under AVR, all eligible citizens who interact with designated government agencies are automatically registered to vote

unless they decline registration. Fully implemented nationwide, it would add 50 million to the rolls, lower costs, and improve accuracy and security.

H.R. 1 includes myriad other important measures to expand voting rights and strengthen democracy. Among these, it incorporates the Democracy Restoration Act, which would restore federal voting rights to citizens with past criminal convictions living in our communities.

Revitalize the Voting Rights Act

The Voting Rights Act of 1965 (VRA) was the nation's most effective civil rights law. In 2013, however, the Supreme Court struck down the "coverage formula" that determined which jurisdictions were subject to preclearance. This decision effectively blocked the preclearance system from operation. The years since have demonstrated the urgent need to revitalize the law. State and local jurisdictions have continued to implement discriminatory voting rules, disenfranchising voters of color in election after election. Over the course of several months, this committee has held a series of field hearings in states across the country, documenting serious challenges to voting accessibility and fair election administration.

These ongoing problems demand a strong but thoughtful response. When the Supreme Court gutted preclearance, it stated explicitly that Congress could fix the VRA, using current data and taking a wider perspective. Moreover, the VRA has long been a bipartisan congressional priority — the reauthorization in 2006 passed the House overwhelmingly and the Senate 98–0 — and it should be once again.

For its part, H.R. 1 also contains a strong commitment to revitalizing the VRA. The Voting Rights Advancement Act (H.R. 4), currently under consideration in this House, contains an updated coverage formula and other vital protections carefully tailored to current conditions. We encourage Congress to follow through on its commitment in H.R. 1 and to act expeditiously to restore the VRA to its full strength.

Strengthen Election Security

First and foremost, election security in 2020 requires funding. The Brennan Center has long supported both a complete, nationwide transition to paper ballot voting machines and the implementation of risk limiting audits (RLAs), an effective check on election results, to ensure security and confidence in electoral results. But these and other critical reforms require money, and states are running out of time to put new machines and systems in place for 2020. We enthusiastically applaud the House for proposing to appropriate $600 million for election security in the appropriations bill voted on in June. This represents a robust down payment on our overall election security needs — which the Brennan Center estimates will cost approximately $2.2 billion over the next five years. We are encouraged that the Senate has agreed to appropriate $250 million for election security on a bipartisan basis. But we believe it is critical that the final spending bill reflect the House's proposed appropriation as well as its provisions to ensure that the funds are used for election security rather than unrelated activities.

Funding is an important first step toward securing our elections, but Congress can and should do more. At present, for example, there is almost no federal oversight of the private vendors who design, build, and maintain our election systems. That should change. We recommend that Congress adopt a mandatory reporting system for all cybersecurity incidents for election vendors and consider additional reforms, such as vendor employee background checks. In addition, Congress should make permanent the Department of Homeland Security's designation of election systems as "critical infrastructure." A permanent designation will help to guarantee that states are provided with priority access to tools and resources available from DHS and greater access to information on cyber vulnerabilities on a voluntary basis.

The For the People Act

Wendy Weiser, Rudy Mehrbani, and Daniel I. Weiner

In its first major legislative move in 2019, the House of Representatives passed H.R. 1, the For the People Act. It was the most sweeping democracy reform measure to pass either chamber since the 1960s. The measure included the major structural reforms crafted and advanced by the Brennan Center over the past decade. The Center's experts testified before three House committees on the legislation. The measure has stalled in the U.S. Senate and has not been brought to a vote.

Wendy Weiser: H.R. 1. is historic legislation. We cherish our democracy, the world's oldest. But for far too long, public trust has declined, as long-standing problems with our system of self-government have worsened. In this past election, we saw the result: some of the most brazen and widespread voter suppression in the modern era; super PACs and dark money groups spending well over $1 billion, raised mostly from a tiny class of megadonors; the ongoing effects of extreme gerrymandering; large-scale purges of the voter rolls; and a foreign adversary exploiting at-risk election technology in an attempt to meddle with our elections.

But in 2018, we also saw citizens awaken to the urgent need for action. This Congress was elected with the highest voter turnout since 1914. Many of you took office with a pledge to reform democracy. And in states across the country, voters approved ballot measures aimed at unrigging the political process, tackling redistricting, voting, and money in politics, often by large bipartisan majorities. Voters sent a clear message: the best way to respond to attacks on democracy is to strengthen it.

The public hunger for change demands a strong response. This legislation includes the key reforms to revitalize American democracy — including automatic voter registration, small donor public financing, redistricting reform, and a commitment to restore the Voting Rights Act. It is fitting that this bill is designated as the very first introduced in this Congress. Democracy reform must be a central project for our politics now and going forward.

Rudy Mehrbani: For a number of years, we have been witnessing an erosion of the ethical guardrails that generally prevented abuse by public officials. The recent spate of allegations focusing on ethical transgressions by public officials has further undermined faith in our democratic institutions and highlights the urgent need for Congress to respond with effective reforms. I hope to convey four points in this testimony: First, ethics practices followed by past administrations — Republican and Democratic — are consistent with and bolster fundamental democratic principles. But they are not required by law, though many long assumed that they were. Second, legislative reform is needed to fill the gaps. Without binding regulation, ethics in the executive branch depends primarily on leadership — namely, a commitment to visible

Excerpted from testimonies before the U.S. House of Representatives. Wendy Weiser testified before the Committee on House Administration, February 14, 2019. Rudy Mehrbani testified before the Committee on Oversight and Reform, February 6, 2019. Dan Weiner testified before the Committee on House Administration, September 25, 2019.

and sustained leadership on ethics issues, which is not guaranteed. We need to shore up the guardrails that exist to ensure consistent ethical behavior from senior political leaders. Third, a robust and transparent ethics program supports the goals of the political appointments process. Though some argue that commonsense ethics rules deter talent from federal government service, in my experience the opposite is true. In fact, a commitment by an administration to ethical conduct in government can result in more interest from quality candidates from a diversity of backgrounds who are willing to serve longer. Finally, H.R. 1 contains commonsense reform proposals that are strong first steps for addressing existing gaps in government ethics rules. These proposals warrant strong bipartisan support from all members of Congress.

Daniel I. Weiner: Any plan to overhaul the Federal Election Commission (FEC) must address three core challenges: pervasive partisan gridlock, the lack of a clear leader to hold accountable for how well the FEC runs, and a civil enforcement process that has always produced long delays, leaving respondents in limbo and undermining the deterrence value of the commission's penalties.

H.R. 1 addresses each of these problems. It would curtail gridlock by reducing the number of commissioners from six to five, with no more than two affiliated with the same party, effectively requiring one commissioner to be a true independent. It would create clear political accountability for the FEC's management by allowing the president to name a real chair to serve as its chief administrative officer (this individual would continue to have only one vote on policy and enforcement matters). It would end the practice of allowing commissioners to continue in office indefinitely past the expiration of their terms. And it would take steps to streamline the enforcement process, including by giving the commission's nonpartisan staff authority to investigate alleged campaign finance violations and dismiss frivolous complaints — subject to overrule by a majority vote of commissioners.

U.S. Elections Are Still Not Safe from Attack

Lawrence Norden and Daniel I. Weiner

Over three years since the Russian government interfered in the 2016 election, our voting infrastructure remains in peril. More states, including all battlegrounds, will use machines with a paper backup in 2020, but other major vulnerabilities persist. A mobilization is needed to ensure that the 2020 election will be free, fair, and secure.

Russia's attack on American elections in 2016, described in Special Counsel Robert Mueller's recent report as "sweeping and systematic," came as a shock to many. It shouldn't have. Experts had been warning of the danger of foreign meddling in U.S. elections for years. Already by 2016, the wholesale adoption of computerized voting had weakened safeguards against interference and left the United States vulnerable to an attack. So, too, the shift to digital media and communications had opened new gaps in security and the law that could be used for manipulation and blackmail.

Russia — and perhaps other powers like China and Iran — will likely try to exploit these vulnerabilities once again in 2020. The United States was caught flat-footed the last time. Now, nearly three years after the Russian efforts first came to light, the United States has made relatively little progress toward hardening its electoral system against interference. Each day it waits to do so raises the likelihood of another election tainted by significant foreign meddling.

Fortunately, there are still measures that Congress, the Federal Election Commission, and other policymakers can take to substantially blunt a future attack. With just over six months remaining until the New Hampshire primary and the start of 2020 voting, lawmakers and executive branch agencies should make election security a priority by upgrading equipment, guarding against hacking, and combating foreign influence operations.

SECURE THE EQUIPMENT

A recent Department of Homeland Security report confirms that in 2016, Russia most likely conducted "research and reconnaissance" against election networks in all 50 states. They breached and extracted data from one state registration database, used spear-phishing attacks to gain access to and infect computers at a voting technology company, and successfully breached election networks in at least two Florida counties. The very infrastructure that allows Americans to vote was under attack.

The federal government has made some progress toward safeguarding these systems in the years since. State and local election offices now have greater access to cyber-security advisers and risk assessments, and the states, the federal government, and the companies that provide equipment used at the polls share more information than they once did. Congress in 2018 provided the states with $380 million to spend on election security.

This op-ed was published by *Foreign Affairs,* July 23, 2019.

And yet, with a vast, decentralized election infrastructure — composed of more than 8,000 separate local election jurisdictions — the United States still has a long way to go if it means to secure its polls. The machinery by which the country records and counts votes varies by county and even town, ranging from the manual counting of hand-marked paper ballots to the digital recording of votes on touch-screen computers. Voting equipment in many precincts urgently needs to be upgraded if it is to be protected from outside interference.

Experts agree that antiquated, paperless voting machines, for instance, are dangerously insecure. And yet counties and towns in 11 states, including battleground states like Georgia and Pennsylvania, continue to use such machines. If someone tampers with a paperless voting machine, no independent paper record will exist by which to check the software results and correct for the manipulation. Congress should take steps to ensure that these systems are replaced before the 2020 election. But paper backups help only when counties and states review them. At the moment, only 22 of the 39 states that have paper records of every vote require postelection audits to ensure the accuracy of electronic totals. It is long past time for Congress to require such audits throughout the country.

Similarly, the risk assessments that electoral jurisdictions now employ can only be effective if the risks they identify are correctable. But the jurisdictions often lack the funds to address their security risks. In many cases, election officials know they should be upgrading their equipment to make it more secure but they simply can't do it. To take just one example, local election officials in 31 states recently reported that they needed to replace their voting equipment before the 2020 election, but nearly two-thirds of them said they did not have the money to do so, even after the distribution of the $380 million from Congress last year.

House Democrats recently passed an appropriations bill that would provide state and local election jurisdictions with an additional $600 million. House Republicans have proposed a smaller $380 million. Neither amount would fully secure U.S. election infrastructure, but either could underwrite welcome improvements. Ultimately, Congress must accept that election security is a national security issue, and just as Congress has the responsibility to protect the country's ports from foreign assault, so too does it have an obligation to provide states with the funds needed to secure elections.

GUARD AGAINST BLACKMAIL

Not all election interference involves direct manipulation at the polls. Russia's most successful gambit in 2016 was probably the hacking and release of embarrassing emails from Democratic Party servers and private accounts. Thanks to extensive U.S. media coverage, the effort paid off handsomely. The special counsel concluded that President Trump's campaign knew about, encouraged, and willingly benefited from this strategy but did not actively participate in it.

Russia has a long history of using damaging information (*kompromat*) to embarrass or blackmail prominent officials in other countries. The digital age has made such tactics easier to pull off and their fruits easier to disseminate. Though hacking into another person's email account and stealing their information is illegal in the United States, such laws hardly matter to a rival government. The only way to effectively guard against digital blackmail is to invest in protecting politically sensitive targets. In an ideal world, the government would finance these enhanced protections, but even if Congress does not want to spend additional money there are other legal changes that would help.

Campaigns are short-term operations, and as such they are unlikely to invest their own funds in cybersecurity. But some finely tuned changes to campaign finance rules would allow them to accept outside resources for this purpose. The Federal Election Commission has already taken several steps in

this direction. In May it ruled that a nonprofit established by the Belfer Center at Harvard's Kennedy School could provide cybersecurity assistance to campaigns on a nonpartisan basis without triggering campaign contribution limits. It recently issued another opinion allowing a for-profit company to provide discounted assistance as part of its business model. While these piecemeal efforts are helpful, a more comprehensive solution probably needs to come from Congress. As a first step, Congress could exempt the cost of cybersecurity enhancements from limits on how much well-heeled national party organizations, such as the DNC and RNC, can give to affiliated candidates.

Once compromising material is stolen, few means exist to contain its influence. The First Amendment likely prevents the government from restricting the media's use of stolen information. But the government could encourage the U.S. news media to alert audiences to attempted election manipulation and to choose not to report on stolen information. The French government credits such efforts with helping blunt Russia's attempt to meddle in its 2017 presidential election through an election-eve dump of hacked information from Emmanuel Macron's presidential campaign, interspersed with fake documents.

Voting equipment in many precincts urgently needs to be upgraded if it is to be protected from outside interference.

When it comes to campaign behavior, however, Congress can and should draw some bright legal lines, and it should do so sooner than later. The Mueller report includes examples of Trump campaign officials encouraging the release of hacked information and entertaining offers for dirt on political opponents. While some of this conduct could have violated existing laws, Congress should clarify the law to eliminate any doubt that a campaign's or party's solicitation or receipt of any benefit from a foreign government is prohibited. Congress should also require campaigns to report credible offers of free assistance or collaboration from foreign governments and political parties and all payments to foreign vendors.

CLOSE GAPS IN THE LAW

In 2016, Russia unleashed a campaign of disinformation and propaganda that helped inflame the American electorate. The campaign focused on amplifying social discord; lowering turnout, especially in minority communities; and helping Donald Trump to defeat Hillary Clinton. Russian operatives used paid posts on social media platforms to reach algorithmically selected audiences while remaining invisible to the wider public. Some of the paid posts referenced candidates or campaign slogans, but most addressed divisive political issues or spread conspiracy theories in order to stir up social tensions and discourage voting. While the posts themselves were paid, they were designed to be shared for free.

Russia used a large number of sham social media accounts, Facebook pages, and websites to address the same topics as those in the paid posts. These unpaid communications were also designed for widespread sharing. Many came from real people using assumed identities online, but some were generated by bots masquerading as live humans. Russian state-backed media organizations like RT and Sputnik developed and helped to further spread the content that appeared in both paid and unpaid communications. Russia was also behind some more traditional campaign advertising: according to investigative reporters for the *Guardian*, people with ties to the Russian government made substantial donations to at least one U.S. nonprofit, the National Rifle Association, which spent more

than $30 million on campaign ads in support of Donald Trump.

All of these activities were possible because of gaps in U.S. law. So-called dark money groups like the NRA are not required to disclose any of their donors, making them easy conduits for foreign cash. Internet campaign ads can also fall into a regulatory gray area: transparency rules and the ban on ads from foreign nationals apply only to communications containing specific words that "expressly advocate" for or against candidates. As such these rules are easy to evade. Issue advocacy that doesn't reference any candidate is entirely unregulated. And while agents of other governments operating within the United States — including state-backed media entities like Russia's RT and Sputnik, which have significant penetration in U.S. markets — can be subject to the requirements of the Foreign Agents Registration Act (FARA), the act contains numerous exceptions and is under-enforced.

Congress can close many of these gaps. The bipartisan Honest Ads Act updates rules governing transparency in campaign advertising to include internet campaign ads beyond those containing express advocacy. It also requires major platforms to create public online databases of their political ad sales, which would include digital copies of the ads themselves and information about the audience the ad targeted, the number of views, the ad's cost, and its purchaser. Passing the DISCLOSE Act, which has been introduced in every Congress since 2010, would eliminate the problem of dark money altogether by requiring nonprofits, such as the NRA, to reveal their donors when they engage in substantial campaign spending. Another bill currently before Congress, called the Deceptive Practices and Voter Intimidation Prevention Act, would make it a crime to disseminate false information online for the purposes of preventing eligible voters from voting or registering to vote, as Russian operatives did to minority communities in 2019. Congress should pass that bill. Finally, Congress must also wrestle with the question of what additional mandates could be used to uncover unpaid deceptive foreign online activity, including the use of bots and deepfakes (highly realistic fake video and audio content), without infringing on civil liberties.

Effectively securing the next election will require not just passing new laws but also enforcing the laws that currently exist. The Federal Election Commission often fails to do so, in part because of frequent deadlocks among its six members. Congress should reduce the number of commissioners from six to five and give the commission's professional staff the ability to independently investigate violations of the law. Similarly, Congress can address FARA enforcement by establishing a FARA enforcement unit within the Department of Justice and by allowing the statute to be enforced civilly as well as criminally, which would lower the government's burden of proof to establish and remedy violations. Congress should require FARA registrants — including media entities like RT and Sputnik — to disclose their status as foreign agents in public communications, including television and radio broadcasts and paid advertisements.

As FBI Director Christopher Wray said earlier this year, "Our adversaries are going to keep adapting and upping the game." The United States must do the same. The trade-offs will be difficult: countering foreign interference, like fighting terrorism, requires policymakers to wrestle with the basic question of how to defend the United States without unduly compromising its core values. Safeguarding American sovereignty must be balanced against fundamental principles like the free flow of information and the decentralization of power. That calculus is not always easy. But it must be made. The longer political leaders wait, the likelier that citizens will live to regret their failure.

U.S. Election Infrastructure Is Dangerously Under-Regulated

Lawrence Norden, Gowri Ramachandran, and Christopher Deluzio

Private vendors manufacture and maintain much of America's election infrastructure yet are subject to fewer federal regulations than the companies that make colored pencils. We know dangerously little about the security features of voting machines, registration websites, and electronic poll books. Secrecy and consolidation create an unacceptable risk to the vote.

More than 80 percent of voting systems in use today are under the purview of three vendors. A successful cyberattack against any of these companies could have devastating consequences for elections in vast swaths of the country. Other systems that are essential for free and fair elections, such as voter registration databases and electronic poll books, are also supplied and serviced by private companies.

Yet these vendors, unlike those in other sectors that the federal government has designated as critical infrastructure, receive little or no federal review. This leaves American elections vulnerable to attack. To address this, the Brennan Center for Justice proposes a new framework for oversight that includes the following:

- **Independent oversight.** A new federal certification program should be empowered to issue standards and enforce vendors' compliance. The Election Assistance Commission (EAC) is the most logical agency to take on the role. Unfortunately, from its founding, the EAC has had a history of controversy and inaction in carrying out its core mission. In this paper, we assume that the EAC would be charged with overseeing the new program, and we make a number of recommendations for strengthening the agency so that it could take on these additional responsibilities. Whichever agency takes on this role must be structured to be independent of partisan political manipulation, fully staffed with leaders who recognize the importance of vendor oversight, and supported by enough competent professionals and experts to do the job.

- **Issuance of vendor best practices.** Congress should reconstitute the EAC's Technical Guidelines Development Committee (TGDC) to include members with more cybersecurity expertise and empower it to issue best practices for election vendors. (The TGDC already recommends technical guidelines for voting systems.) At the very least, these best practices should encourage election vendors to attest that their conduct meets certain standards concerning cybersecurity, personnel, disclosure of ownership and foreign control, incident reporting, and supply chain integrity. Given the EAC's past

Excerpted from the Brennan Center report *A Framework for Election Vendor Oversight,* published November 12, 2019.

failures to act on the TGDC's recommendations in a timely manner, we recommend providing a deadline for action. If the EAC does not meet that deadline, the guidelines should automatically go into effect.

- **Vendor certification.** To provide vendors a sufficient incentive to comply with best practices, Congress should expand the EAC's existing voluntary certification and registration power to include election vendors and their various products. This expanded authority would complement, and not replace, the current voluntary federal certification of voting systems, on which ballots are cast and counted. Certification should be administered by the EAC's existing Testing and Certification Division, which would require additional personnel.

- **Ongoing review.** In its expanded oversight role, the EAC should task its Testing and Certification Division with assessing vendors' ongoing compliance with certification standards. The division should continually monitor vendors' quality and configuration management practices, manufacturing and software development processes, and security postures through site visits, penetration testing, and cybersecurity audits performed by certified independent third parties. All certified vendors should be required to report any changes to the information provided during initial certification, as well as any cybersecurity incidents, to the EAC and all other relevant agencies.

- **Enforcement of guidelines.** There must be a clear protocol for addressing violations of federal guidelines by election vendors.

Congressional authorization is needed for some but not all elements of our proposal. The EAC does not currently have the statutory authority to certify most election vendors, including those that sell and service some of the most critical infrastructure, such as voter registration databases, electronic poll books, and election night reporting systems. For this reason, Congress must act in order for the EAC or another federal agency to adopt the full set of recommendations in this report. Regardless, the EAC could, without any additional legislation, issue voluntary guidance for election vendors and take many of the steps recommended in this paper as they relate to voting system vendors. Specifically, it is our legal judgment that the EAC may require, through its registration process, that voting system vendors provide key information relevant to cybersecurity best practices, personnel policies, and foreign control. Furthermore, the EAC may deny or suspend registration on the basis of noncompliance with standards and criteria that it publishes.

Ultimately, the best course of action would be for Congress to create a uniform framework for election vendors that adopts each of the elements discussed in this paper. In the short run, however, we urge the EAC to take the steps it can now to more thoroughly assess voting system vendors.

Small Donor Public Financing Significantly Boosts Citizen Engagement

Nirali Vyas, Chisun Lee, and Joanna Zdanys

New York State's lax campaign finance laws let special interests play a disproportionate role in dictating policy. Politicians, many of whom started out in city government, fret about how reform would affect their own fundraising. Because a strong city system and a loophole-ridden state system stand side by side, we can see who gains a louder voice from small donor public financing.

INTRODUCTION

This spring New York enacted a historic law committing to establish voluntary public financing for state elections. The governor and legislative leaders appointed nine commissioners to design the system by December 1. The commission's goals are to incentivize candidates to seek small donations, reduce pressure on them to solicit large gifts, and encourage qualified candidates to run for office. Its work could fundamentally transform a political process dominated by big checks and infamous for undermining the public's trust.

This study adds new evidence to a body of research that demonstrates small donor public financing is the most effective, proven policy solution to meet the commission's goals.

In addition to known benefits, this study shows that a small donor public financing system, of the kind New York City has offered candidates for city office for decades, incentivizes candidates to engage many more in-district donors for campaign support and gives these in-district donors (including small donors) significantly greater financial influence, compared with campaigns where candidates do not use small donor public financing.

BACKGROUND

New York State candidates depend overwhelmingly on large individual and corporate donors. In the 2018 election, small donations ($200 or less) amounted to just 5 percent of the funds that state candidates raised. Just 100 people donated more than all 137,000 estimated small donors combined. This imbalance of financial influence breeds perceptions of pay-to-play government and deters people from running for office if they lack access to wealthy networks. Research shows that small donor public financing will boost the role of non-wealthy New Yorkers and bring greater diversity to the state's donor pool. Governor Cuomo's recent bill to provide a 6-to-1 match of donations up to $175 could have dramatically increased the 2018 candidates' fundraising from

Excerpted from the Brennan Center report *The Constituent-Engagement Effect of Small Donor Public Financing: A Statistical Comparison of City Council (2017) and State Assembly (2018) Fundraising in New York City,* published September 9, 2019.

small donors, from 5 percent to 30 percent of campaign funds. And the policy serves to expand the racial and economic diversity of the donor pool. This new analysis shows still another important benefit of small donor public financing. The option drives candidates to solicit support from many more of their future constituents and gives those constituents far greater financial influence in these campaigns. Put simply, the policy serves to strengthen the ties between candidates and the New Yorkers they hope to serve.

FINDINGS

The effects of public financing become clear when comparing otherwise similar candidates who took the two different fundraising routes. In New York City, which unlike New York State offers its candidates the option of small donor public financing for city elections, there are 21 State Assembly districts that almost exactly overlap geographically with 21 City Council districts and where sufficient campaign finance data from the most recent respective election cycles are available. This allows us to compare candidates for City Council and State Assembly running in the same communities. We examined candidates' fundraising records to study the impact of public financing, controlling for differences in degree of opposition, incumbency, and type of office sought (city or state).

This analysis shows that opting into small donor public financing was a statistically significant reason for a stronger record of constituent engagement. In each of the following ways, the median publicly financed City Council candidate outperformed their privately funded State Assembly and City Council counterparts in the same neighborhoods.

Opting into small donor public financing was a statistically significant reason for a stronger record of constituent engagement.

Publicly financed candidates

- attract more donors from the candidate's own district,
- raise a larger portion of their funds from donors in the district, and
- raise a larger portion of their funds from small donors.

These findings bolster the already substantial evidence available to the New York Public Campaign Financing Commission and other policymakers that small donor public financing is the most effective way to meet their official mandate. The policy serves to amplify the voices of regular New Yorkers, brings a greater diversity of donors to participate in a critical part of the democratic process, and encourages candidates to spend more time in, and raise more of their campaign support from, the districts they seek to represent.

THE PRESIDENCY AND THE RULE OF LAW

Government Science and Political Pollution

Preet Bharara, Christine Todd Whitman, Mike Castle, Christopher Edley Jr., Chuck Hagel, David Iglesias, Amy Comstock Rick, and Donald B. Verilli Jr.

Government relies on scientific analysis and research to create sound public policy. Too often, however, political officials interfere to make the facts fit their own agenda, rather than craft their agenda to fit the facts. And at times, those officials shouldn't hold their positions of power in the first place. A bipartisan task force outlined how to curb political interference in government science and fix a broken appointments process.

In recent years, the norms and expectations that once ensured that our government was guided primarily by the public interest rather than by individual or partisan interest have significantly weakened. There are now far fewer constraints to deter abuse by executive branch actors. This report focuses on two distinct areas: the growing politicization of government science and research and the breakdown of processes for filling key government positions.

Objective data and research are essential to effective governance and democratic oversight. But over the last few decades, the safeguards meant to keep government research objective and publicly accessible have been steadily weakening. Recent administrations have manipulated the findings of government scientists and researchers, retaliated against career researchers for political reasons, invited outside special interests to shape research priorities, undermined and sidelined advisory committees staffed by scientists, and suppressed research and analysis from public view — often material that had previously been made available. In many cases, they have appeared to pay little political price for these missteps. This trend has culminated in the efforts of the current administration not only to politicize scientific and technical research on a range of topics but also, at times, to undermine the value of objective facts themselves. Now, we are at a crisis point, with almost weekly violations of previously respected safeguards.

- The acting White House chief of staff reportedly instructed the secretary of commerce to have the National Oceanic and Atmospheric Administration (NOAA) — part of the Department of Commerce — issue a misleading statement in support of the president's false assertion about the trajectory of a hurricane, contradicting an earlier statement released by the National Weather Service. The secretary of commerce reportedly threatened to fire top NOAA officials in pressuring them to act.

Excerpted from *Proposals for Reform Volume II,* a report by the Brennan Center's National Task Force on Rule of Law & Democracy, published October 3, 2019.

- The Department of Agriculture relocated economists across the country after they published findings showing the financial harms to farmers of the administration's trade policies.

- The Interior Department reassigned its top climate scientist to an accounting role after he highlighted dangers posed by climate change.

- The Environmental Protection Agency (EPA) adopted rules that prevent leading experts from serving on science advisory boards and encourage participation by industry-affiliated researchers.

- The White House suppressed a report showing a toxic substance that is present in several states' water supplies endangers human health at levels far lower than previously reported by the EPA.

Less than half the senior roles at the Departments of Justice and Homeland Security are filled.

Political officials have the prerogative to make policy decisions and even challenge the science and methodology of career experts, but accurate, nonpolitical, government-supported research and analysis should be protected. Indeed, government research has shifted the course of human history through, for example, the space race, cures for disease, food- and water-safety measures, and computer and internet technology innovations.

Effective government also depends on a reliable process for filling senior government positions with qualified professionals who are dedicated to doing the people's work. Recent presidents have filled critical jobs with unqualified cronies while leaving other posts vacant and have found ways to sidestep the Senate's approval role, nullifying a crucial constitutional check. For their part, lawmakers have rubber-stamped some nominees who are unqualified or have conflicts of interest while dragging their feet on considering others, often based on whether or not the Senate majority and the president share a party.

The consequences are readily apparent: less than half the senior roles at the Departments of Justice and Homeland Security are filled; at least a dozen agencies — including two cabinet departments — are run by non–Senate-confirmed acting officials two years into this administration; and the Senate confirmation process takes five times longer than it did 40 years ago.

If left unchecked, both of these trends are likely to do damage. Government research that is guided by politics, not the facts, can lead to ineffective and costly policy, among other harms, and a dysfunctional appointments process risks stymieing vital government functions. Both developments also threaten to exact a long-term price, if allowed to stand. They risk creating a dangerous precedent,, opening the door to abuse by future administrations, which may push the envelope ever further.

We are committed to teaching future administrations the opposite lesson — that these abuses of power violate broadly recognized standards of honest and effective government, long accepted by both political parties. Abuse once again can beget reform. And the task of advancing this reform could not be more urgent and cannot be for one or another party alone. We have big problems to solve in this nation. If we cannot agree on the facts underlying potential solutions to those problems, and we do not have qualified and dedicated people in place to develop and execute on them, we will imperil the future of our democracy. To protect government research from politicization and keep it accessible, we offer proposals that would

- create scientific integrity standards and require agencies to establish protocols for adhering to them,
- prohibit politically motivated manipulation or suppression of research,
- ensure the proper functioning of scientific advisory committees, and
- increase public access to government research and data.

To fix the process for filling senior government positions, we offer proposals that would

- encourage the appointment of qualified and ethical people to key government posts,
- make it harder for presidents to sideline the Senate during the process,
- streamline the confirmation process for executive branch nominees, and
- protect national security by fixing the vulnerable White House security clearance process.

Our proposals narrowly target areas that are ripe for executive abuse. But as former federal government officials, we have seen up close how other factors contribute to government dysfunction and undermine democratic values. We conclude this report by highlighting these factors — in particular, our broken campaign finance system, the president's expansive emergency powers, the weakening of Congress as a check on the executive, and the politicization of the judiciary — and we reaffirm the essential role that a functioning system of checks and balances plays in protecting our democracy.

The Trump Impeachment

Neal Katyal and Michael Waldman

After reports surfaced that Donald Trump attempted to extort the new president of Ukraine for dirt on his leading political opponent, calls for impeachment reached a fever pitch. Among those urging House Speaker Nancy Pelosi to act was Neal Katyal, the former acting solicitor general of the United States. Two weeks before the final House vote, Katyal sat down with Brennan Center President Michael Waldman to discuss the origins of impeachment in the Constitution, the Ukraine scandal, and the dangers of failing to hold Trump accountable for his actions.

Michael Waldman: Why did the founders put impeachment in the Constitution, and where did they get it from?

Neal Katyal: A lot of founders didn't actually think we needed impeachment in the Constitution. Like Elbridge Gerry said, we have reelections, the president's going to run for reelection. And this was before the constitutional amendment that limited presidents to two terms. So, Gerry said, why don't we just use reelection to police an erring executive or a really evil executive and vote him out of office?

Others, Madison and Hamilton in particular, said, what if you have a president who is beholden to a foreign power? What do you do when you have a president who cheats for reelection? And that led even Gerry to say, oh no, we need an impeachment clause in the Constitution.

If Hamilton and Madison and Gerry and others were here and you asked them about the paradigmatic case for impeachment, this is literally it. There was a big debate in Philadelphia about what should be the standard for an impeachable offense. And ultimately, they settled on the phrase "treason, bribery, or other high crimes and misdemeanors."

I've been asked why child separation isn't an article of impeachment. I'm as torn up about child separation as anyone, and I think it is evil and grotesque. But I don't think that is what our founders thought of as a high crime and misdemeanor. I don't think they meant it for policy differences. What they really meant it for, when you go back and study Philadelphia, is one simple thing: is the president putting his personal interests over those of the American people? And that's why that word "high" is in there.

In terms of high crimes and misdemeanors, it doesn't actually mean a crime. It really means an offense against the state. And that's what the word "high" is there to signal — something that is a betrayal of your oath.

Waldman: Why did the founders design impeachment the way they did, with the House voting for impeachment and then the Senate engaged in a trial?

Excerpted from remarks given at *Impeachment: A Conversation* at NYU School of Law, December 3, 2019.

Katyal: Our founders established a strong presidency. And you want that because oftentimes, Congress can't get stuff done. And you sometimes need a president to come in and act when there's a swift need to do so.

In light of that, the founders' thinking was, if you have a strong presidency, what do you do when that president errs? What do you do when that president does something gravely wrong? In general, the architecture of the Constitution is divided between the House and Senate because they represent distinct interests. One is more state's interests. The other is more popular. That's the way in which that compromise developed into the impeachment clause itself. A simple majority vote in the House of Representatives is enough to impeach. A two-thirds vote in the Senate is necessary to convict and remove a president.

Waldman: The notion has developed that a president must commit an actual crime to be impeached and removed from office. Is that actually necessary?

Katyal: I don't think constitutional scholars or the precedent of these impeachments creates the standard that you need a crime. I do think crimes were committed here. If that's your standard, Trump easily meets it. But I don't think that is the lesson from prior impeachments. And there are so many things that aren't crimes, and certainly weren't crimes in 1787, that are undoubtedly impeachable offenses. Indeed, bribery, which is in the Constitution as an impeachable offense, was not a crime in 1787 in the federal code. So, I don't think that could be the standard.

Waldman: We all know that up until recently, Nancy Pelosi was very reluctant to move forward with impeachment. She was reluctant even before they knew what the Mueller report was going to say and even after it was released. But when the Ukraine scandal came down, there was very little hesitation, and you embrace that as well. Why did President Trump's actions in Ukraine spur impeachment proceedings and not Russia, violations of the emoluments clause, the obstruction of justice that seems to have taken place under the Russia investigation, and everything else?

Katyal: I think the Ukraine scandal was different for three reasons. One is, this involves the president's actions as president. Mueller was really about what Trump and the Trump campaign did in 2016 as a candidate. Here the allegations are that the president was using his strong presidential powers over foreign affairs. Things like holding up aid and an official White House meeting. He's flexing his commander-in-chief powers for his personal ends. There's something distinctly wrong when you have a sitting president using his powers that way. And if this president gets to do it, then every future president gets to do it. And even that one check that was in the Constitution originally, reelection, ceases to be a check because of the awesome powers of the presidency to go and seek information and assistance from foreign governments to help your reelection campaign.

The second is, the velocity really mattered here. Mueller gets bogged down in a 22-month investigation. And because of that, the public starts to get numb to it. By contrast, Ukraine is really simple and clean. And that brings me to the third point. Here, you got a smoking gun and it's the gun the president himself released. He released what he calls "a perfect transcript, a beautiful and perfect transcript." It's not a transcript. As the very first line states, "This is not a transcript." But it's also not really beautiful or perfect unless you're seeking to remove him from office, in which case it's pretty good.

All I want people to do is focus on this July 25 transcript. That's all you need to understand that the president should be impeached. Because in that July phone call, the president of Ukraine says, "I really want these javelin missiles." And then Donald Trump says, "OK, but I need a favor from you, though." And then goes into wanting Zelensky to investigate the Bidens.

The Law Is Designed to Punish, Not Protect, Whistleblowers

Michael German

Federal law is supposed to protect whistleblowers from retaliation when they report wrongdoing. Yet for the past several months, President Trump and Republicans in Congress have repeatedly tried to identify the individual whose anonymous complaint triggered the House impeachment inquiry. As a former FBI whistleblower explains, major flaws in the Whistleblower Protection Act prevent it from fulfilling its objective.

I never intended to become a whistleblower. In 2002, when I'd been an FBI agent for more than a dozen years, my bureau supervisors in Florida asked me to help get a stalled undercover terrorism investigation in Florida back on track. When I discovered that a poorly trained FBI informant had illegally recorded part of a conversation between the investigation's subjects, the supervisor told me to just pretend it didn't happen. I couldn't do that, so I reported it to the FBI special agent in charge, as the law and bureau policy required. I assumed that the issue would be handled and I could go back to work. Instead I was removed from the operation. Ultimately, I left the bureau.

I imagine that the whistleblowers who reported President Trump's troubling phone call with the Ukrainian president were just like me: seeing an abuse of power, they simply wanted to notify the authorities responsible for investigating such matters, and then resume their duties on behalf of the American people. Unfortunately, the byzantine process Congress established for intelligence community whistleblowers makes it easy for those who would prefer to isolate, discredit, and attack the messengers to avoid confronting the corruption they reported.

I joined the FBI in 1988 because I felt a call to service. The bureau entrusted me with specialized training in law enforcement tactics, access to national security secrets, a gun, a badge, and a car. Then it sent me out into the world, with the expectation that I would always use my authority lawfully. I worked on all kinds of cases, from savings and loan failures to undercover investigations of violent neo-Nazi skinheads. My supervisors consistently gave me superior ratings and performance awards.

All that changed when I reported malfeasance within the FBI. Instead of addressing the illegal recording, the responsible supervisors began falsifying the case files to hide their mismanagement. I followed FBI policy and reported this to the bureau's internal-affairs investigators at the Office of Professional Responsibility (OPR). Headquarters officials told me I would never work undercover again. When the OPR refused to investigate, again I followed protocol and reported the matter to the Justice Department inspector general, along with new allegations of retaliation. The FBI then investigated me, pursuing claims made by the individuals whose misconduct I had reported and trying to discover what I "really wanted."

This op-ed was published by the *Washington Post,* October 11, 2019. Michael German is a Brennan Center fellow.

Headquarters, meanwhile, made good on its promise to prevent me from working undercover or training other agents.

After a year and a half passed with no resolution or respite, I finally reported it all to the Senate Judiciary Committee, which forced the inspector general to begin an investigation and then fought for four years to get the proof that what I said was true. But there's no evidence any of the supervisors were held responsible. Knowing that the retaliation within the bureau would only increase because I'd gone outside of it, I resigned. I joined the American Civil Liberties Union in Washington and have since assisted many intelligence community whistleblowers at all stages of the process, from deciding whether to make a complaint to seeking new employment after being unfairly fired.

Knowing that the retaliation within the bureau would only increase because I'd gone outside of it, I resigned.

The whistleblowers whose reports triggered the impeachment investigation of Trump now face a more public form of abuse, with threatening taunts from the White House and partisan smears questioning their motives. Unfortunately, Congress rendered itself all but impotent to protect them, codifying a narrow, obstacle-filled pathway for intelligence employees to report government wrongdoing.

When Congress passed the Whistleblower Protection Act of 1989, providing federal employees who reported waste, fraud, abuse, or illegality with a process to challenge retaliatory personnel actions, it exempted the FBI and intelligence agencies from the law. Alternative, internal systems for adjudicating retaliation claims were set up for the FBI (through Justice Department regulations) and intelligence agency employees (through the Intelligence Community Whistleblower Protection Act of 1998). These systems give these agencies the opportunity to suppress whistleblower reports and discredit whistleblowers before they get to Congress, while depriving those targeted with reprisals of an independent forum to vindicate their rights. In essence, Congress created a process that impedes federal workers from providing the information lawmakers need to perform their oversight function.

It isn't unusual for an intelligence agency employee who spots a problem to try to resolve the matter within his or her office, as the first whistleblower reportedly did by going to a CIA lawyer. When internal reporting doesn't achieve an appropriate result, it is normal for whistleblowers to seek advice from knowledgeable sources about how to go outside the agency. That, it appears, is why the Ukraine whistleblower sought advice from House Intelligence Committee staff.

In fact, the whistleblower had little choice but to seek that outside advice, because of the sheer complexity of these laws and regulations. In practice, they function more like traps than shields. Only by following complicated rules is a whistleblower protected by law from retaliation — and if, for example, a whistleblower reports to the wrong officials, he or she could forfeit those protections.

What's more, the protections are weak. Forcing whistleblowers down a narrow path makes it much easier for managers to identify them. (Employee X knew about this issue and recently asked a colleague how to make contact with the inspector general, for example.) And since intelligence employees are routinely subjected to background checks, agencies can easily launch retaliatory inquests: they can aggressively pursue any minor administrative noncompliance and subject the whistleblower to disproportionate disciplinary action. People at the FBI had a saying: "No one is administratively pure." Intelligence workers need to maintain security clearances to keep their jobs, and the agencies have broad discretion to revoke

them, with limited due process rights.

The intelligence agencies successfully lobbied for exemptions from whistleblower protections by arguing that these complicated reporting processes are necessary to protect classified information. But this is wrong on two counts. First, intelligence community whistleblowers and the members and staff of the House Intelligence Committee all hold security clearances and know how to properly handle classified information. The idea that they would suddenly forget their training when faced with a whistleblower complaint is specious.

Second, the process doesn't prevent leaks; it encourages them. Frustrated by a system that appears designed to block reports of abuse from getting to the proper policymakers, and lacking real protections against retaliation, many whistleblowers decide it is safer and more effective to go directly to the press. Former special agent Jane Turner followed proper channels in reporting mismanagement of investigations into sex crimes against children but suffered excruciating retaliation before resigning under threat of termination. This outcome may explain why Terry Albury, the only black agent then serving in the FBI's Minneapolis field office, felt his only recourse to report racial and religious profiling in the FBI's counterterrorism program was to provide documentary proof to the press. Indeed, the public knows about the Ukraine whistleblowers only because the process broke down and word leaked that a whistleblower report was being suppressed.

It is time for Congress to give FBI and intelligence agency employees the full whistleblower guarantees enjoyed by other federal workers. Congress must reassert its right to receive information directly from federal employees, and it must provide an independent adjudicator to hear whistleblower reprisal claims, with appeals to federal courts to vindicate their rights. The public servants tasked with protecting our nation deserve protection themselves.

Trump's Troubling Rebuke of Congressional Oversight

Victoria Bassetti and Tim Lau

Even before the Trump administration stonewalled the House impeachment inquiry, the White House refused to comply with subpoenas and oversight requests. Notably, the administration ignored a deadline for releasing President Donald Trump's tax returns and attempted to block subpoenas for current and former officials to appear before Congress in the aftermath of the Mueller report. The unprecedented roadblock set up a major constitutional confrontation.

Tim Lau: The Trump White House has resisted nearly all House requests for documents and information. Are there any historical parallels we can reference, and if so, how do they compare with this time around?

Victoria Bassetti: There aren't precise historical parallels because the Trump administration's refusal to comply with House subpoenas and oversight requests is so sweeping and broad. We've never quite seen anything like this before.

However, there are two recent historical comparisons some people might make. One is the investigation that followed the U.S. attorney firing scandal that started in late 2006 during the George W. Bush administration. And a second comparison is the House of Representatives' 2012 investigation into the so-called Fast and Furious scandal involving the Bureau of Alcohol, Tobacco, Firearms and Explosives. With these two cases, we have examples of a Democratic House investigating a Republican executive branch and of a Republican House investigating a Democratic administration.

So those are two most recent analogies, but even they don't really hold up to the Trump administration's refusal to comply with Congress's subpoena and oversight requests. Both of the previous cases involved narrow topics about specific incidents and specific people. And in both cases, the House effectively "won." In the U.S. attorney firing scandal, the House ultimately got their witnesses and documents after a number of legal proceedings. And in the Fast and Furious scandal, both the Justice Department and White House ended up turning over a large number of documents to the House. Although the House did ultimately cite then attorney general Eric Holder for contempt, it did not further pursue the matter in court.

Neither of the previous examples had the same scope and breadth as the Trump administration's recalcitrance — or the calculated, in-your-face rebuke to the House's oversight authority. What the Trump administration is doing now is all encompassing. They're dragging their feet on pretty much every issue that the House wants to do oversight on. The current situation is more extreme in its affront to our constitutional separation of powers.

This interview appeared on the Brennan Center website, May 7, 2019. Victoria Bassetti is a Brennan Center fellow and former counsel for the Senate Judiciary Committee.

Lau: The Trump team argues that it's already finished its job, so to speak, by "complying" with the full process of the Mueller report.

Bassetti: First of all, complying with the Mueller investigation is different from complying with a properly issued subpoena from Congress, whose status as a coequal branch of government is crucial to a functioning constitutional system of democracy. Also, it's a stretch to say that Trump complied with the Mueller investigation. But even if he had, it does not relieve him from respecting our constitutional system.

Second, the House has an incredibly important and radically different role to play than Mueller might have played in investigating Trump. Congress is the institution that passes obstruction-of-justice laws, and they probably have a lot to learn about how to modify those laws based on the aftermath of the Mueller report. Additionally, Congress can potentially pass laws on the independent counsel process. So they might want to learn how Attorney General William Barr handled the Mueller investigation, and based on that, decide that some type of legislation needs to be passed. Finally, Congress plays a critical role in protecting and securing elections, including the allocation of funds to states or to the executive branch for administering our elections.

Across all of these issues, Congress's ability to fully know the facts and to investigate them thoroughly is critical for our democracy to work and to be protected against hostile powers. Congress also plays a critical role in keeping our justice system fair, providing strong defenses against obstruction of justice, and ensuring that the Justice Department can adequately investigate executive branch officers so that no one is above the law.

And let's remember that Congress's authority to subpoena and to request documents goes back to the founding decades of our democracy. As early as 1795, Congress was using its investigative and contempt power. By 1821, a Supreme Court ruling held that Congress has the inherent authority to seek information and to hold people in contempt for refusing to provide it. In other words, Congress's subpoena authority and its power to enforce its subpoenas are almost as old as our Constitution.

Lau: What kind of role, if any, will the courts play moving forward?

Bassetti: There's a strong likelihood that a lot of this is going to end up in the courts. At the end of the day, I don't see how the House is going to accept the Trump administration's recalcitrance, which leaves going to the courts as the final option. So we're going to have kind of a triple play of our constitutional institutions swirling about one another trying to negotiate this conflict. What that means is that if the House exercises its subpoena authority, Congress and the Trump administration are frequently going to be in front of the courts as they attempt to adjudicate this conflict. And there are few things that are likely to happen.

The first is that it's likely going to go slowly, so it's unclear to what extent there will be any resolution for these cases before the 2020 election. However, there's always a possibility that some individual cases will be fast-tracked. The second is that the courts tend to exercise restraint when it comes to mediating these interbranch conflicts, and that the courts tend to attempt to use sort of a deference when adjudicating these cases. But third, despite that deference, I think it's highly likely that the courts will ultimately be forced to decide. If that happens, the long line of precedent — regarding executive privilege and the scope of Congress's power to request documents and for people to appear — is largely in Congress's favor. That doesn't mean, however, that Congress is going to win every one of these battles.

Lau: Where do these recent developments fit within the broader narrative of the Trump presidency?

Bassetti: Over the last two years, we've consistently seen the Trump administration act like they are above and beyond anyone's oversight and questioning. In one recent example, just a few weeks ago, Commerce Secretary Wilbur Ross refused to appear before the House and Senate Appropriations Committees to answer questions about his own budget requests. Also a few weeks ago, Treasury Secretary Steven Mnuchin gave cursory respect to the House Banking Committee's request for him to stay past a certain period of time. Right now, these high-level administration officials increasingly have an attitude of almost sneering at Congress, which sets up an increased potential for conflict across the board.

Lau: What can Congress do to strengthen the rule of law and constitutional norms?

Bassetti: You know, that's a very difficult task for Congress right now because the prospect of President Trump signing reforms into law [is] not particularly high at this moment. But it seems indisputable to me that the process of thinking through the codification of norms and rule of law principles needs to begin soon.

And that issue, as you know, is one that the Brennan Center Task Force has issued a report on, with a number of really critical suggestions on how to move forward on these reforms. But as it stands today, Congress unfortunately has only has two tools at its disposal. One is the slow-moving, slightly weak power that it has to enforce subpoenas. Going to court to seek contempt takes a long time and is difficult to accomplish.

The other major tool that Congress has at its disposal is the power of the purse, or its appropriations power. But that is an awfully blunt instrument. And as we know, using that power is not a straightforward process and can potentially create a crisis or a shutdown. The fact that there are really only these two tools — one weak and one incredibly strong but blunt and hard to use — really points to the need for something in between, in terms of laws. And it really points to the need for a return to a sense of comity and bipartisanship and shared values about our constitutional institutions.

Congress Must Rein In the President's Emergency Powers

Elizabeth Goitein

Two months before Trump declared a national emergency over his desired border wall, the Brennan Center published an alarming article in *The Atlantic* detailing emergency powers federal law grants to the president. As it turns out, there need not be a real emergency at all for the president to exercise broad authority with little to no oversight. For the first time ever, Congress passed legislation overriding Trump's bogus emergency declaration. The president vetoed it. Now the matter is in court.

Congress made history and dealt President Trump a political blow by rejecting his declaration of emergency at the border. But the margins weren't sufficient to override his Friday veto. The president's critics are thus likely to lose this legislative battle. Yet a broader war is now afoot to prevent future abuses of emergency powers. With lawmakers from both parties newly awakened to the risks these powers pose, there is a real chance to win it.

Under the National Emergencies Act of 1976, a declaration of national emergency gives the president access to a range of statutory authorities that would otherwise lie dormant. I oversaw research at the Brennan Center for Justice that cataloged 123 such powers, including to shut down radio stations, freeze Americans' bank accounts, and detail troops to any country.

The checks on presidential overreach that Congress established have proved toothless. The law provides that a state of emergency expires after a year unless the president renews it — but serial renewal has become the norm. It mandates that Congress meet every six months to consider votes on whether to end an emergency — but lawmakers have ignored that provision. It originally allowed Congress to terminate emergencies without the possibility of a presidential veto — but the Supreme Court held such "legislative vetoes" unconstitutional in 1983.

Members of Congress have begun to see the danger in this state of affairs. Democrats understand that if Trump prevails in the courts, he may come back to this well again. Republicans worry that future Democratic presidents could use emergency powers to establish new policies on climate change or guns without Congress's approval.

During the Senate debate on Trump's emergency declaration, even Republicans who voted with the president — including Majority Leader Mitch McConnell, John Cornyn, and Tom Cotton — acknowledged the need to revisit the National Emergencies Act. Republican Representative Tom Reed, joined by 7 other Republicans and 12 Democrats, has introduced a bill to require that emergency declarations lapse after 60 days unless approved by Congress.

Republican Representative Andy Biggs, who backs the president's border emergency, introduced a bill with an even shorter timeline

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for congressional approval — 30 days. Fifteen Republican senators, including Mike Lee, Ron Johnson, Chuck Grassley, and Ben Sasse, are sponsoring similar legislation. Trump himself tweeted that if Congress wants to "update the law," he would "support those efforts."

Congress should seize this rare bipartisan moment. A requirement of congressional approval after 30 or 60 days would be a critical safeguard, but lawmakers shouldn't stop there. A president wrongly wielding emergency powers could do a great deal of damage in 30 or 60 days. The 1976 law fails to include a definition of "national emergency," and Congress should establish one. It should be broad enough to cover a range of circumstances without giving the president a blank check. At a minimum, an "emergency" should involve a significant change of circumstances that poses an imminent threat to public health, safety, or other important national interests.

The checks on presidential overreach that Congress established have proved toothless.

Reform legislation should also acknowledge that permanent emergencies are unacceptable. Once approved by Congress, states of emergency should expire after six months unless Congress votes to renew them, and no emergency should exceed five years. Conditions lasting that long are not unforeseen or temporary, which are basic elements of an emergency. They are instead a "new normal," and if the president's existing powers are insufficient to address them, Congress should provide new ones.

His tweets notwithstanding, it's possible President Trump would veto any such changes. But given the strong bipartisan support for reform, Congress might even be able to pass it with a veto-proof majority. That would be the most significant rebalancing of power between the president and Congress in decades — a victory for American democracy that would tower over any wall Trump manages to build.

Things Worth Fighting For

Susan Rice and Andrea Mitchell

A former national security advisor and U.S. ambassador to the United Nations spoke to a top journalist just two weeks after the Ukraine scandal exploded. Before a large audience at New York University, they examined Donald Trump's abuses of power through the lens of foreign affairs and American leadership in the world.

Andrea Mitchell: How important is it for a president of the United States to have advisors who will tell him or her when they are going off course?

Susan Rice: It's absolutely essential. And if we don't have that, we're in deep trouble. And I think frankly, particularly now three and a half years into this administration, people who have sufficient integrity and self-respect have for the most part left. And that's a real problem.

When I served President Obama, there were many mornings when I walked in the Oval Office to give the presidential daily briefing, the PDB, and what I had to say he didn't want to hear. Because it was either unpleasant, or complicated, or problematic. But he expected me to give it to him unvarnished.

...

Mitchell: The president of the United States is under investigation for a conversation, which the White House released, in which he very clearly says to the Ukrainian leader, "I need a favor." And that favor, he goes on to explain, involves investigating one of his chief political adversaries.

He comes out on the South Lawn today and when asked, after dodging the question several times yesterday at a news conference, what he wanted President Zelensky to do, explicitly says, "I wanted him to investigate the Bidens." And then he goes on to say, "And I think the Chinese should investigate them also."

Rice: This truly is unbelievable. And let's just unpack what happened. A president who swears that he didn't ask the Russians to interfere in our elections in 2016, where all the evidence is to the contrary, now admits, after denying and then admitting, that he has now asked the Ukrainians to provide dirt on a political opponent and interfere in our elections, corrupt our democracy.

But today, by asking China to do the same, he's now inviting our most formidable adversary, with the means to interfere in our elections without his blessing, to do so. And just think about it. China must be looking at this and thinking at least two things.

One is, the president of the United States is dangerously unhinged, and highly unpredictable, and extremely vulnerable.

Excerpted from remarks given at *Things Worth Fighting For* at New York University, October 3, 2019. Susan Rice is the author of *Tough Love: My Story of the Things Worth Fighting For.* Andrea Mitchell is chief foreign affairs correspondent for NBC.

The second thing is, if you're China, you're thinking, he just told us what it's going to take to end this trade war. If we give him some manufactured, made-up dirt on Joe Biden, what can we get in a negotiation on trade? Or for Huawei, or whatever it is they want. He just sold out our manufacturers, our farmers, every single one of us, for some BS dirt that doesn't exist on Joe Biden. We're basically saying to the Ukrainians, or rather Trump is saying, "We don't care what the Russians do. I just want some dirt for me personally. Me, myself, and I."

And the Crowdstrike thing? How is that about anything other than trying to whitewash Russian interference and make up a manufactured thing about Ukraine, which had, as far as I'm aware, nothing to do with the 2016 election?

If you put all these pieces together, including what you just described, it adds up to "Let's sell out Ukraine for the benefit of Russia."

...

Mitchell: I want to ask you about Benghazi, which was clearly the most painful experience for you, for the country, your friend Chris Stevens, the ambassador, who was killed along with three other Americans. As you describe it, and as many of us covering it at the time felt, you were hung out to dry. Your mother warned you against going out on the Sunday talk shows in the aftermath of the attack. What did she say to you?

Rice: I had just come from Andrews Air Force Base, where I and other members of the cabinet, the president and the vice president, were greeting the families who had lost their loved ones. And we received the caskets that had come home. It was horribly painful for us, not to mention excruciating for the families.

Three months earlier, my mom had had a stroke and was still recovering, so I wanted to stop by on my way home and check on her and see how she was doing. I go into her basement and she's sitting at the table listening to CNN. Without turning the television down she says, "What are you doing for the weekend?" And I said, "On Sunday I'm going on all five of the Sunday shows to talk about what's happened this week."

If you all recall, it was not only Benghazi but the attacks on many of our diplomatic facilities around the world. Not terrorist attacks, but violence by demonstrators. It was also just over a week before the opening of the General Assembly at the United Nations. And the issues of Iran and Palestinian statehood and Netanyahu coming were all in the fore. So I was asked by the White House that afternoon if I would go on the shows. They had already asked Secretary Clinton, and she declined.

And my mother's gut on this from the very beginning was "I smell a rat. You should not do this." I'm like, "Mom, what are you talking about? I've done this many times before." "I just know this is not a good idea, you really shouldn't do it."

My mother understood intuitively what perhaps Secretary Clinton and Tom Donilon and others understood very concretely, which is that when you are the first person out in a crisis that's going to be highly politicized, something is going to be wrong about the information you have. And they're going to shoot not just the message but the messenger, too. I learned that the hard way. Because it never occurred to me, frankly, to put myself before the team.

FAIR REPRESENTATION

The Supreme Court Has Failed the Constitution

Michael Waldman and Eliza Sweren-Becker

In a 5–4 ruling last summer, the Supreme Court held that federal courts have no role to play in even the most extreme instances of partisan gerrymandering. It decided that the topic was a "political question" and thus nonjusticiable, a frustrating dodge of its responsibility for advocates of fair maps. Now, the fight has shifted to the states and Congress. The Constitution's elections clause gives reformers powerful tools, as Chief Justice John Roberts's opinion noted.

Gerrymandering is nothing new. It happens when political insiders draw district lines to benefit themselves or their parties, or to squeeze minorities out of power. In the very first congressional election, Patrick Henry drew a misshapen district in a bid to keep James Madison from winning. But lately, with digital technology and partisan ruthlessness, gerrymandering has gotten much worse. Highly precise gerrymanders dilute the voting strength of an emerging nonwhite majority.

Gerrymandering may not stop the underrepresented from gaining power, but it can slow fair and accountable government. Consider North Carolina, one of the states whose rigged maps were blessed by the Supreme Court on Thursday. North Carolina's electorate is evenly divided, yet the congressional map is deep red; Republicans hold 10 seats, Democrats only 3. How could that happen? The legislator in charge explained he would have created an even starker imbalance had it been feasible: "I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."

On Thursday, five conservative justices said there was nothing they could do about this. Gerrymandering, they ruled, was a "political question." That sudden reluctance to get involved in political matters is especially rich coming from the court that struck down a century of campaign finance law in *Citizens United* and gutted the Voting Rights Act in *Shelby County* a few years after that.

The framers, keen students of human nature, were acutely aware of abuses of power. Concern over fair representation was one of the reasons they staged the revolution and wrote the Constitution. "No taxation without representation" was the slogan of the original tea party. They worried about corrupt England, with its malapportioned "rotten boroughs," and fretted about Old Sarum, a hilltop in England with no people but a seat in Parliament. John Adams said the first principle of a republic was that the legislature should be "in miniature, an exact portrait of the people at large."

They wrote these concerns into the Constitution in a provision called the elections clause. It gives states the power to set the "times, places and manner" of elections but give Congress the power to override as a check against self-interested state politicians. It's an unusual provision — one of the few that give the national government the authority to intervene in state law.

Two delegates from gerrymandered South Carolina tried to strike the language when the

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Constitution was still in draft. Madison was aghast. He found it essential since, as he said, "It was impossible to foresee all the abuses that might be made of the discretionary power." Madison knew that insiders would try to draw district lines to "favor the candidates they wished to succeed." But he believed the people should choose their representatives, not the other way around.

Similar concerns were raised as the Constitution was ratified by the states. At the Massachusetts ratification convention, Theophilus Parsons warned that without federal oversight, "in times of popular commotion, and when faction and party spirit run high, [it] would introduce such regulations as would render the rights of the people insecure and of little value," and would "make an unequal and partial division of the state into districts for the election of representatives." Sound familiar?

When the Supreme Court refuses to step in, Congress and the states have the power to end extreme and abusive partisan gerrymandering.

In their wisdom, the framers pointed the way for what must happen next. When the Supreme Court refuses to step in, Congress and the states have the power to end extreme and abusive partisan gerrymandering. Just as the elections clause envisions, the House of Representatives this year passed a national requirement for states to use redistricting commissions as part of H.R. 1, the For the People Act. Senate Majority Leader Mitch McConnell (R-KY.) is blocking it from a vote in the Senate. Without irony, he calls it a "power grab." The Supreme Court plainly seems to disagree.

And just this month, New Hampshire's legislature sent a bipartisan bill to Governor Chris Sununu that would create an independent advisory redistricting commission to redraw the state's political boundaries. The state would join others including California, Arizona, and Ohio in using independent panels. In November, voters passed five ballot measures to curb gerrymandering. Michigan, Colorado, and Utah created strong independent commissions. In Thursday's opinion, Roberts wrote approvingly, "Numerous states . . . are restricting partisan considerations in districting through legislation," and went on to cite the wave of recent voter victories.

Let's hope he means it. In 2015, the court emphatically endorsed state ballot measures to curb gerrymandering. But four dissenters argued that voters cannot fix gerrymandering this way, and conservative advocates have even claimed Congress lacks the authority under the elections clause to create redistricting commissions. None other than the chief justice wrote the dissent. Voters could not constitutionally pass such reforms, he wrote then. His new decision points in a different and better direction.

When the framers drafted the elections clause, they did not imagine today's supercharged, software-aided, partisan gerrymandering. But they certainly thought, as a bedrock principle, that the people, in the states and in Congress, had the power to act.

If the Supreme Court won't follow the spirit of the framers, we the people have no choice.

Citizenship Questions on the Census Have No Historical Pedigree

Brianna Cea and Thomas Wolf

In March 2018, the Trump administration announced it would add a citizenship question to the 2020 census. The goal, as later revealed by files on the hard drive of a deceased GOP strategist, was to help Republicans and non-Hispanic whites while diluting the political power of Latinos. The Trump administration told the Supreme Court that such a question was justified by the census's history. A careful review of the record, including newly unearthed archival research, suggests otherwise.

Later this month, the Supreme Court will take up Commerce Secretary Wilbur Ross's controversial decision to collect the citizenship status of everyone in the country in the 2020 census. In court filings, the Trump administration has defended the citizenship question as normal and inoffensive, part of an "unbroken tradition" whose "pedigree dates back nearly 200 years."

But look closer, as we did, and history tells a different story. Over the last year, we pored over archival material including 19th-century census-taker instructions and decades-old papers on government statistics. We discovered that the Trump administration's history is misleading, where it's not outright false.

Never in the census's 230-year history has the decennial questionnaire asked for the citizenship status of *everyone* in the country. In reality, when a citizenship question was asked at all, it was directed to small segments of the population, such as foreign-born men 21 or older (1890–1910) or foreign-born people (1930–1950), mainly to gauge how well they were assimilating.

What's more, these questions had a bad track record. They were part of an approach that the Census Bureau ultimately rejected as incompatible with its constitutional duty to count every person.

History isn't on Ross's side. But one federal court already bought the administration's "we've done this before" narrative, so it's vital to set the record straight before the nation's highest court is similarly misled and the census is imperiled.

Before 1960, the Census Bureau tried to pursue two goals at once with the decennial census: to count everyone and to collect other information the government needs, such as mortality or employment statistics. This led to major problems. These censuses were tremendously long, enormously expensive, often took years to complete, and — most important — were plagued by inaccuracy. Census takers were bogged down seeking out answers to question such as whether anyone in the household was "a prisoner, convict, homeless child, or pauper."

By the 1950s, the Census Bureau was able to apply emerging technology and new statistical methods to evaluate how accurate

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its population count had been. It was deeply flawed. Later analyses put the undercount of the 1950 census at 5 million to 5.5 million people, including a 12 percent to 13 percent undercount of people that the bureau labeled "nonwhites." The bureau also learned that it could collect better data more cheaply by asking most questions only to portions of the population and extrapolating from there.

So the Census Bureau slimmed down its head-count form to a handful of questions. Everything else it put on a longer survey that went out to small sample groups. It has used that model ever since.

Never in the census's 230-year history has the decennial questionnaire asked for the citizenship status of everyone in the country.

Citizenship-related questions were among the first to go. The bureau took them off the census completely in 1960 (except for New York and Puerto Rico, which had unusual redistricting needs). And, from 1970 onward, citizenship-related questions were only ever on the smaller surveys, like the long form (through 2000) or the American Community Survey (from 2005 on). But census officials *never* let similar questions back on the headcount form, because they knew that would hurt the count.

The bureau has long recognized that anti-immigrant environments make citizenship questions problematic. In the 1970s, as waves of immigrants from Latin America and Asia arrived here, lawmakers and activists began searching for ways to limit their political power. In the lead-up to the 1980 and 1990 censuses, anti-immigrant groups and their allies pushed the bureau to exclude immigrants in this country illegally from the head count. To do so, the bureau would have to try to collect everyone's citizenship status.

The bureau repeatedly resisted these pressures. Census Bureau director John Keane warned the Senate in 1985 that citizenship questions posed a huge risk because "the Census Bureau could be perceived as an enforcement agency." Efforts to gather this information, he said, would lead people to refuse to participate in the census for fear that their answers could be used against them.

In the lead-up to the 2020 census, President Trump's rhetoric and policies have already created headwinds for an accurate head count. Bureau research in 2018 found that 35 percent of Asian respondents, 34 percent of Black/African American respondents, and 32 percent of Latino respondents feared information about them would be illegally shared with other government agencies (as compared with 24 percent of respondents overall). Adding a citizenship question will not help matters.

When the issue lands before the Supreme Court on April 23, the history of the census will be central to the arguments. That history should make it clear: There's no justification for a citizenship question in 2020.

"I'd Like to Take On Gerrymandering in Michigan."

Katie Fahey

In November 2018, voters approved pro-democracy ballot measures in states across the country. In Michigan, voters established an independent commission to effectively eliminate partisan gerrymandering. A young Michigander, new to politics, launched the effort with a social media post.

I am in front of you today because in 2016 I was afraid to go to a Thanksgiving dinner. I did not want to talk about who voted for who. I did not want to have another uncomfortable situation where my family was arguing and making moral judgments on each other based on who we voted for. I made a Facebook post that said, "Hey, I'd like to take on gerrymandering in Michigan. If you'd like to help, let me know," smiley face. Great credentials I come to you with.

My background was in sustainability, particularly in the grocery industry. I spent most of my working career crawling around in garbage cans and recycling bins and doing waste audits. But in Michigan we had the Flint water crisis, which I'm sure most of you are familiar with, as well as a lot of laws that seemed to go against what the people of Michigan actually wanted. I was sitting at work thinking about how, with the lack of anything changing, another Flint water crisis is not preventable. The leadership in our state was too busy pointing at each other about whose fault it was when the people of Michigan actually could've tried to prevent that crisis but were denied. And so I thought, "Well, I'm going to take my extra time and try to amend the constitution."

The Michigan Constitution is actually kind of inspiring. It opens up Article I, Section 1: "All political power is inherent in the people." We took that very, very literally. We're like, "We're those people; this is our power." The really cool thing, though, was that even after I made that Facebook post and did not expect to lead a political movement, a bunch of people started emailing me, saying, "I've cared about gerrymandering for so long; I'm so excited you're finally going to do something about it." I quickly Googled how to end gerrymandering. Not a lie. Thank you, Ballotpedia.

We knew that we had to do the very simple task of writing constitutional language, gathering 315,654 registered Michigan voters' signatures in 180 days, and then just get roughly 2.5 million people to vote yes for this thing they've never heard of. I was pretty pessimistic and honestly felt pretty alone in Michigan. I felt like I was one of the only people who cared about these systemic issues, one of the few people who, instead of arguing who was better to vote for, wanted to argue about what kind of policies we should be passing. To my surprise, there are so many people hungry to do that.

We did 33 town halls in 33 days, asking the people of our state: What should be in this constitutional amendment? How do we want redistricting to look? Who should draw these

Katie Fahey, the leader of Voters Not Politicians, was honored at the Brennan Legacy Awards Dinner in New York City, November 19, 2019.

lines? What types of criteria should matter? Then Michael Li came in and treated us with so much respect. When you looked around the table, you saw a veterinarian, a stay-at-home dad, a brain surgeon, a catering manager, some girl that crawls around in garbage cans for a living, people from rural Michigan, people from urban Michigan, and we had some lawyers too; don't worry, there are plenty. But instead of judging us, he came with an unbiased attitude of "You guys have done the research, let's get to work." And he helped us walk through and make really important decisions based on the research that the Brennan Center had done so that we could actually make an informed decision to make a beautiful constitutional amendment that withstood a Supreme Court challenge to make it onto the ballot. Yes.

When you come to the table saying, "Hey, I've got a couple thousand people who all met online and we're really serious about ending gerrymandering," a lot of groups just laugh at you. But instead, the Brennan Center trusted the people. And throughout our campaign, what started as one Facebook post ended up turning into over 10,000 volunteers, over 428,000 signatures, over 16,000 individual donors, and ultimately 2.5 million voters. Yes.

And so to be able to accept the Brennan Legacy Award is a huge honor. And the only reason we can even have that legacy is because of the legacies so many of you in this room have helped build that allowed us to get here.

The thing I keep thinking about the most is that when I was in fourth grade, I remember learning about gerrymandering. I don't know why I remember this. I didn't think I would do anything about it. But I remember asking the teacher, if we know that it's not right, why don't we do anything about it? And she said, "Well, that's just the way it is," which has never been an answer I've liked, ever.

Now, when I think about the fourth graders in Michigan who are learning about gerrymandering, yes, they're going to learn that it still exists. Unfortunately, in many states it still does. But they're also going to be able to learn about the thousands of people that, like you today, spent their nights and weekends staying up until four in the morning doing case law research, debating in Google chats about whether communities of interest should be higher than existing community boundaries for our redistricting proposal. And they'll come to know that because thousands of people decided to care and use the skills and talents that they had, because they weren't afraid that even if they weren't the experts, and that even if they had to start with Googling "How to end gerrymandering," they were actually successful.

Now 9.9 million people in Michigan, for the first time ever, get to be involved in this political process that will impact the next decade of elections. For the first time ever, they're going to actually be able to be in the room where it happens and say how they want their representation to look and how they want to be represented in our state capitol and in Washington, DC. That is the beauty of America.

I just want to leave you with saying thank you, again. Something

Now 9.9 million people in Michigan, for the first time ever, get to be involved in this political process that will impact the next decade of elections.

I hope will be part of our legacy is showing that so many people out there do care and they do know what's wrong with the system, but they're not sure what to do about it. And us in this room — the people who do actually know the things we can do about it, who know how to bring lawsuits and how to start ballot initiatives or how to write laws or have community conversations — we are the people who can actually help make that a reality.

We can help people understand how their little part can connect to this wider picture, which is the only way we get to keep our republic, as Benjamin Franklin said. The only way we get to keep it is if we each find our part, and you all are the leaders who can actually help people imagine how. Don't underestimate that. Because I used to, and now when I think about Michigan, instead of feeling like it's broken and like I'm the only one who cares, I think about at least 50 faces in every single county who dedicated their time, energy, and money — without any guarantee of success — to fight for a better future for Michiganders of any political denomination.

And so, thank you so much. It's such an honor. I look forward to the many more successes that the Brennan Center helps enable. Thank you.

Rethinking Race and Redistricting

Michael Li and Yurij Rudensky

Independent redistricting commissions are key to ensure fair elections and a government that reflects a changing population. Done right, they can create fair maps. Done wrong, they can reinforce racial imbalance and make it harder for communities of color to achieve full representation.

INTRODUCTION

The round of redistricting that took place after the 2010 census was in many ways a frustrating one for communities of color.

To be sure, communities of color were largely able to hang on to the gains of earlier decades, thanks to the swan-song presence of Section 5 of the Voting Rights Act. But there were very few new gains — despite the rapid growth of Latino and Asian communities in many parts of the country. The cycle also saw the shockingly cynical use of race as a tool of political gerrymandering that took advantage of increasing division of the two major political parties along racial lines. Egregious examples of this tactic took place not just in southern states like North Carolina, but also in northern states like New York, where the careful fracturing of African American and Latino communities on Long Island was key to engineering a pro-Republican state senate map.

Efforts to block aggressive redistricting in the courts, likewise, proved to be a decidedly mixed bag. Racial gerrymandering claims, to the surprise of some, were an unexpectedly robust tool to challenge the packing of African American voters in the South. But the other traditional tools used to protect the electoral power of communities of color were far less effective. Constraints placed by the Supreme Court, for example, on vote dilution claims under Section 2 of the Voting Rights Act meant that Latino communities in North Texas were unable to win any additional representation, notwithstanding explosive and record levels of Latino growth in the region. Similarly, courts took a highly superficial approach to questions of intentional discrimination that allowed highly discriminatory maps to remain in place.

The next cycle of redistricting is likely to be even more challenging for communities of color because of the courts' restrictive interpretation of key parts of the existing doctrinal framework. Further, communities themselves are changing in ways that make it harder to apply existing tools — and the courts, including the Supreme Court, are changing in ways that could make them even less favorably disposed to traditional race-based remedies. If the 2010 map cycle was frustrating, the 2020 cycle has the potential for being seriously frightening. It is time for a somber reassessment of the tool kit.

This article will look at the current state of law as it relates to protection of communities of color in the redistricting process, the stress points that will make the next round of redistricting in 2021 even more challenging, and then finally some of the ways those stress points can be relieved.

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I. STRESS POINTS: WHY THE NEXT REDISTRICTING CYCLE WILL BE DIFFERENT (AND POTENTIALLY WORSE)

A. The Shifting Demographic Landscape

One of the biggest reasons for the increased difficulty of ensuring fair representation for communities of color is the fact that, while the country is becoming more demographically diverse, it also is simultaneously becoming increasingly interwoven. Latinos have moved into historically African American neighborhoods in Los Angeles, for example, while African Americans and Latinos have moved into previously all-white suburbs in places like Atlanta, Austin, and Raleigh-Durham. At the same time, gentrification is upending the traditional ethnic mix of cities across the country like Brooklyn and St. Louis.

This increasing demographic complexity runs headlong into long-standing interpretations of the Voting Rights Act assuming that communities are composed of one majority group and one minority group, with a high degree of segregation. But those predicates increasingly are not the case, making use of traditional remedies harder and harder.

B. The Growing Overlap of Race and Party

At the same time the country has gotten more diverse, it also has become increasingly racially polarized in political terms, especially in the South. At the time Section 2 was designed, whites and African Americans in the South both still voted overwhelmingly in the Democratic primary. By the 1980s this began to change, as southern white voters began a drift to the Republican Party. This drift became a flood by 1994 and has continued even into this decade.

As this shift was happening, the Supreme Court created a legal loophole with its ruling in *Easley v. Cromartie (Cromartie II)* that politics could be used to explain — and justify — a map that had been seemingly drawn along racial lines. While a map drawn with close attention to race would fail under the court's racial gerrymandering line of cases, it could survive if map drawers could show that race had been a proxy for politics.

C. The Loss of Section 5

On the legal side, one of the most profound changes in the next round of redistricting after the 2020 census will be the absence of Section 5 of the Voting Rights Act.

Alaska and Arizona were required to have all redistricting plans precleared (preapproved) by the Department of Justice or a federal court before they could go into effect. Another six states were required to obtain federal government approval for the portions of redistricting plans covering parts of the state where there had been a history of discrimination. The preclearance requirement covered local government redistricting plans as well as legislative and congressional plans. To win preclearance, the burden was on the jurisdiction to show that the plan was nondiscriminatory and would not leave minority voters worse off with respect to "their effective exercise of the electoral franchise" (a principle known as nonretrogression).

The impact of Section 5 was profound. But it looks unlikely at this time to be a factor in the next round of redistricting, thanks to the Supreme Court's decision in *Shelby County v. Holder*, which invalidated not Section 5 itself, but the formula used to determine what states and jurisdictions are subject to preclearance, finding that the formula had "no logical relationship to the present day." Congress could adopt a new coverage formula to replace the one invalidated by the Supreme Court, but it seems unlikely that could happen in the current political environment.

D. The Limits of Section 2

Though the Supreme Court has not yet signaled an intent to call the constitutionality of Section 2 of the Voting Rights Act into question, the Court has, in the last 12 years, nonetheless become more restrictive in how it interprets voting rights laws, expressing increasing discomfort when it comes to making nuanced judgment calls on questions of race.

Since the Voting Rights Act was amended in 1982, Section 2 of the act has been the key tool for communities of color seeking to vindicate their voting rights by challenging discriminatory redistricting plans, at-large election systems, and other electoral devices and voting regulations. The act, even in its 1982 update, largely contemplated a black and white paradigm where the voting power of Black communities was systemically undermined in relation to their white counterparts. Judicial interpretation of Section 2 has, for the most part, stayed true to this original conception.

But the Supreme Court has demonstrated a preference for more mechanical applications of Section 2, which will make it fundamentally more difficult to make the case and community specific inquiries to account for the growing complexity of communities of color.

II. RETHINKING THE TOOL KIT

A. Build the Jurisprudence and Argument for Coalition Districts

In response to accelerating demographic shifts and the increasingly complicated geographic distribution of communities of color, advocates have adopted a variety of techniques aimed at preserving the political power of cohesive multiracial coalitions. In large part, tactics have been driven by necessity. Federal courts have not yet definitely interpreted Section 2 of the Voting Rights Act as protecting the political power of cohesive multiracial coalitions. Residential patterns, meanwhile, show that communities of color are becoming more diverse and living in closer proximity to each other.

To help preserve the political integrity of these complex areas and to work in solidarity with each other, Black, Latino, and Asian groups came together to engage in unity mapping in certain jurisdictions. The process brings together community leaders from various racial and ethnic groups that live in close proximity to each other to craft a consensus plan that is jointly presented to redistricting authorities.

Unity mapping has proved to be effective at preserving the political power of communities of color, at least in the few iterations that it has been used. But its utility is limited to the extent that map drawers care to consider the unity map suggestions. Many jurisdictions, particularly ones with legacies of significant redistricting abuses, are likely to be less susceptible to the pressures of accepting public mapping than states such as California and New York.

B. Be Prepared to Give Teeth to Communities of Interest

If traditional race-based remedies are becoming harder to use, an important alternative could be the protections for communities of interest that a growing number of states are adding to their state constitutions. Wielded well, a communities of interest provision can be powerful in enhancing representation, sometimes in unexpected ways. In California, for instance, the state's new independent redistricting commission chose to draw a district in the foothills of Los Angeles based on extensive citizen testimony about unmet needs related to wildfire prevention. Communities of interest protections, likewise, can help communities of color, making it possible to argue, without invoking race, that ethnically heterogenous neighborhoods with extensive socioeconomic commonalities should be kept together in the same district. This would avoid abuses like the aggressive fracturing of African American, Latino, and Asian communities that occurred this decade in places as politically different as Texas and New York.

C. Build on the Opening of *Cooper v. Harris*

Tackling the artificial race versus politics distinction also would help challenge maps where politics is used as the excuse for maps that adversely impact communities of color. And this is an area where advocates might be able to look for help from a surprising source: the Supreme Court.

Although the Supreme Court helped green-light the politics as an excuse for racial discrimination argument with its 2001 decision in *Cromartie II*, by the middle of this decade there were signs that the justices may have had enough. When asked to decide whether race or politics drove the aggressive redesign of North Carolina's 12th Congressional District in 2011, the justices faced a situation where the factual record was complicated, with evidence of both racial and political considerations at play. The state defended the map as politics rather than race and argued that under *Cromartie II*, the African American voters challenging the map could not win unless they could produce an alternative map that had the same pro-Republican political effect as the state's reconfigured 12th District.

Justice Kagan rejected North Carolina's arguments in a careful 6–3 decision in *Cooper v. Harris* that, on the surface, was an unexciting opinion about deferring to the not clearly erroneous factual findings of the district court that race had predominated in the drawing of the map. But the opinion also signaled a broader turning away — albeit a tentative one — from the notion that politics can excuse adverse racial impacts. First, the majority rejected the notion that *Cromartie II* required plaintiffs in a racial gerrymandering case to produce an alternative map showing that it was possible to meet the state's nonracial objectives without using race (in this case a partisan advantage for Republicans). The elimination of the alternative map requirement significantly undermines the viability of the politics defense in racial gerrymandering cases. Because of the close alignment of race and politics in much of the South, it is very difficult to draw maps to give a partisan advantage to one party or the other without using racial minorities as the means. In many places, the high levels of racially polarized voting make it impossible. If the alternative map requirement in *Cromartie II* had survived as a hard and fast rule (rather than as a permissive means of showing predominance) then most racial gerrymandering claims would fail where the defense was politics. But the Supreme Court did not stop there. In a footnote, Justice Kagan pushed the doctrine further, writing that "the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics." In other words, whether race is considered for racial reasons or for political reasons matters not.

CONCLUSION

Protecting the interests of communities of color in redistricting has always been challenging. But for reasons rooted both in changing courts and in a changing America, that task could be more difficult than ever in 2021. At the same time, a fluid landscape provides a rare opportunity to break away from constraining orthodoxies and to rethink and recraft tools that have long shown their limitations. There is reason for both fear and hope. What there is not, is time for compliancy.

A Diverse Nation Demands Collaboration

Mireya Navarro

Demographers predict that by the year 2045, white Americans will constitute a minority of the U.S. population. Already, this has generated a harsh backlash that now dominates politics. How can the country manage change and reflect the reality of its population? One answer can come from places in the country that already have undergone demographic transformations.

Our country's demographics keep changing fast, and major shifts have already happened in places across the nation — including in Texas, where the Democratic presidential candidates will hold their debate on Thursday night.

Texas is one of five states without a majority racial or ethnic group. And Houston, home to Texas Southern University, where the candidates will face off, is 45 percent Latino and only 25 percent non-Hispanic white.

So goes the nation as racial and ethnic diversity spreads. Next year's census is expected to show that whites have become a minority in the overall population under 18 years old, a point already reached among those in the age group under 15. This postmillennial generation will be eligible to vote soon enough.

As the country steadily moves on from the era of one dominant racial group and one minority group, there are opportunities for both Republicans and Democrats to focus on building coalitions across racial lines.

To date, our politics hasn't met the challenge. President Trump and the Republican Party have responded with an unworkable model: tamping down the political power of emerging populations, stirring anxiety among white Americans, and shutting down borders. The multiracial reality is that even when minorities become a majority, they still often lose.

Democrats have made more efforts than Republicans to change this reality, but there's room for improvement. The candidates at the debate on Thursday should examine the role racism plays in the disparities in income and education that exist for Black and Latino people even in progressive and majority-nonwhite states like California. They should respond to the low turnout of Latino and Asian voters nationwide and their dismal share of elected positions. And they should take the opportunity to take a hard look at Texas, where protracted struggles over power have played out in lawsuits over discriminatory voter identification laws, overly aggressive voter purges, and gerrymandering that denies fair legislative and congressional maps to the state's large nonwhite communities.

There is one other promising path, and I saw it in Houston. As a reporter in that city 20 years ago, I observed a model for avoiding the zero-sum game that some politicians depict to frighten audiences and to win votes.

I profiled three businessmen — a Black architect, a Latino engineer, and a white construction contractor — who had joined forces to help elect Houston's first Black mayor, Lee P. Brown. Even then, no single racial group held a majority in the city, and the

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businessmen put race aside to come together for mutual benefit. They saw what could be gained by pooling their money and political clout behind the same candidate — in their case, the city building contracts they hoped would come their way if they backed a winner.

Theirs was a pragmatic calculation; they weren't close friends. The white businessman, Richard Lewis, who owned a construction company, described himself as a "Republican from the womb." Mr. Lewis told me he fell behind Mr. Brown, a Democrat who supported affirmative action, because the city's demographics, with its Black-Latino combined majority, made it clear that a Republican could not win.

"I wanted to be in a position of influence," he told me.

Such multiracial coalitions require cross-racial dexterity and entail some compromises and conflicts in seeking alliances. They may not be permanent. But they hold the promise of stability and new strengths in reaching a middle ground between assimilation and ethnic divisions: shared power built on common interests.

"There are a lot of things you can learn" from working in these coalitions, said Richard Castañeda, the Mexican-American engineer, who is now 73 and retired in San Antonio.

Rather than racist overreaction to population trends, how much more constructive to remind concerned voters that power is not just about the numbers. Since 2000, Latinos in Houston have helped elect two white mayors and a second black mayor, the incumbent Sylvester Turner. Political scientists say Latinos lag in voter registration and turnout.

People participate when they feel empowered, research shows. "In places where nonwhites are a majority, politicians and organizations are much more likely to mobilize and engage issues of concern to minority voters, boosting their turnout substantially," said Bernard L. Fraga, author of the book *The Turnout Gap: Race, Ethnicity, and Political Inequality in a Diversifying America.*

There are opportunities for both Republicans and Democrats to focus on building coalitions across racial lines.

The path to the presidency can be paved with plans that pay more attention to how to inspire more voters; address disparities among demographic groups; and foster collaboration in elections, in drawing voting maps, in getting an accurate census that counts everyone. Through our democracy, we have the tools to make a transformative change that takes advantage of the new racial dynamics of more interwoven and multicultural communities as an opportunity to deliver better results for all our citizens — stronger economic interests, better civic engagement, a more participatory system. It can serve as an example to other democracies grappling with their own population shifts.

Getting mired in toxic distractions helps no one, of any race.

VOTING RIGHTS

A Surge of Abusive Voter Purges

Kevin Morris

Voter purges — the large-scale deletion of voters' names from the rolls — are on the rise in states formerly covered by the Voting Rights Act. Purges that are implemented incorrectly disenfranchise legitimate voters and cause confusion and delay at the polls. And when they are applied in a discriminatory manner, they disproportionately affect minority voters. Mass voter purges must be stopped, but as a major statistical analysis by the Brennan Center shows, states continue to use them at alarming rates.

Using data released by the federal Election Assistance Commission (EAC) in June, a new Brennan Center analysis has found that between 2016 and 2018, counties with a history of voter discrimination have continued purging people from the rolls at much higher rates than other counties.

This phenomenon began after the Supreme Court's 2013 ruling in *Shelby County v. Holder*, a decision that severely weakened the protections of the Voting Rights Act of 1965. The Brennan Center first identified this troubling voter purge trend in a major report released in July 2018.

Before the *Shelby County* decision, Section 5 of the Voting Rights Act required jurisdictions with a history of discrimination to submit proposed changes in voting procedures to the Department of Justice or a federal court for approval, a process known as "preclearance."

After analyzing the 2019 EAC data, we found:

- At least 17 million voters were purged nationwide between 2016 and 2018, similar to the number we saw between 2014 and 2016, but considerably higher than we saw between 2006 and 2008;
- The median purge rate over the 2016–2018 period in jurisdictions previously subject to preclearance was 40 percent higher than the purge rate in jurisdictions that were not covered by Section 5 of the Voting Rights Act;
- If purge rates in the counties that were covered by Section 5 were the same as the rates in non–Section 5 counties, as many as 1.1 million fewer individuals would have been removed from voter rolls between 2016 and 2018.

To be clear, we report the total numbers of voters removed by a county for any reason. Election officials purge voters they believe are ineligible for a variety of reasons, including death and moving outside the jurisdiction. This analysis does not assess how many voters were improperly purged.

This piece appeared on the Brennan Center website, August 1, 2019.

WHY PURGES CAN BE PROBLEMATIC

To be sure, there are many good reasons for a voter to be purged. For instance, If voters move from Georgia to New York, they are no longer eligible to cast a ballot in the Peach State. As such, they should be removed from Georgia's voter rolls. Similarly, voters who have passed away should be removed from the rolls. Reasonable voter list maintenance ensures voter rolls remain up to date.

Problems arise when states remove voters who are still eligible to vote. States rely on faulty data that purport to show that a voter has moved to another state. Oftentimes, these data get people mixed up. In big states like California and Texas, multiple individuals can have the same name and date of birth, making it hard to be sure that the right voter is being purged when perfect data is unavailable. Troublingly, minority voters are more likely to share names than white voters, potentially exposing them to a greater risk of being purged. Voters often do not realize they have been purged until they try to cast a ballot on Election Day — after it's already too late. If those voters live in a state without Election Day registration, they are often prevented from participating in that election.

Voters often do not realize they have been purged until they try to cast a ballot on Election Day — after it's already too late.

APPROXIMATELY 17 MILLION PURGED BETWEEN 2016 AND 2018

In our report last year, we noted that 16 million voters were purged between the federal elections of 2014 and 2016, and that this was almost 4 million more names purged from the rolls than between 2006 and 2008.

The latest data from the EAC shows that between the presidential election in 2016 and the 2018 midterms, more than 17 million voters were purged. While this number is higher than what we reported last year, it is likely due to the fact that more jurisdictions reported their data in 2018, pushing the reported total higher. The median purge rate among counties that consistently report their data has remained largely the same.

PURGE RATES IN SECTION 5 JURISDICTIONS CONTINUE TO BE HIGHER

Prior to *Shelby County,* jurisdictions covered under Section 5 of the Voting Rights Act collectively had purge rates right in line with the rest of the country. A major finding in last year's report was that jurisdictions that used to have federal oversight over their election practices began to purge more voters after they no longer had to preclear proposed election changes. The 2016–2018 EAC data shows a slightly wider gap in purge rates between the formerly covered jurisdictions and the rest of the country than existed between 2014 and 2016.

This is of particular interest because this continued — and even widening — gap debunks possible claims that certain states would experience a one-time jump when free of federal oversight, but then return to rates in line with the rest of the country. They haven't.

The median purge rate across the country in counties that were never covered by Section 5 of the Voting Rights Act decreased slightly between 2016 and 2018. In contrast, the purge rates ticked up in parts of the country that were covered at the time of the *Shelby County* decision. We found sustained higher purge rates in parts of the country that have a demonstrated history of discrimination in voting. If these formerly covered jurisdictions that reported their data each year had purged voters at rates consistent with the rest of the country — which they did before the *Shelby County* decision — they would have purged 1.1 million fewer voters between 2016 and 2018. In our report last year, we noted that *Shelby County* was likely responsible for the purge of two million voters over four years in these counties. The effect of the Supreme Court's 2013 decision has not abated.

NEXT STEPS

As the country prepares for the 2020 election, election administrators should take steps to ensure that every eligible American can cast a ballot next November. Election administrators must be transparent about how they are deciding what names to remove from the rolls. They must be diligent in their efforts to avoid erroneously purging voters. And they should push for reforms like automatic voter registration and Election Day registration, which keep voters' registration records up to date.

Election Day is often too late to discover that a person has been wrongfully purged.

Our Last Chance to Make Sure the 2020 Election Is Fair

Myrna Pérez

The Voting Rights Act is widely regarded as the most effective piece of civil rights legislation in history. For nearly five decades, it blocked hundreds of discriminatory voting laws from taking effect. But in 2013, the Supreme Court gutted the VRA with its decision in *Shelby County v. Holder.* The ruling triggered a predictable flood of discriminatory voting rules. Congress can act to reinvigorate the law by applying it nationally and using new standards. In December, the House passed the Voting Rights Advancement Act. The measure now sits in the Senate.

On Friday the House of Representatives showed the country that it will not tolerate racial discrimination at the polls. It passed the Voting Rights Advancement Act, a bill that would restore the 1965 Voting Rights Act to its full strength. Our country needs that reform and others to make the 2020 election free and fair for all.

Since its founding, America has moved slowly toward granting suffrage to more and more Americans, bringing more people into the electoral process. The Voting Rights Act of 1965 has been instrumental to that progress. But in 2013 the Supreme Court dramatically weakened that law.

In *Shelby County v. Holder*, the court disabled the act's provision that required states and localities with histories of racial discrimination in voting to "preclear" new voting regulations.

The preclearance system had allowed federal authorities to vet proposed voting rules for racial discrimination before they could cause injury. From 1965 right up until the *Shelby* decision, this safeguard blocked many restrictions that would have made it more difficult for black and brown people to participate and vote.

Starting around 2010, states across the country had already introduced legislation that would put unnecessary barriers in front of the ballot box, particularly for voters of color. Some states with early voting reduced the number of days of advance access to the polls. Others required forms of identification to vote that lawmakers knew many Americans did not have. States like Tennessee also burdened community groups that help register voters with unnecessary regulations and restrictions.

This only got worse after *Shelby County*, when several of the states once held in check by preclearance immediately enacted restrictions on voting that would have been, or had been, blocked by the federal government.

Now, with a weakened Voting Rights Act, lawyers have had to combat voter suppression using time-consuming and expensive methods, and many voters have had to vote under the problematic law because elections happen faster than court resolutions.

Next year, Americans will choose their president, a person whose nominations to the Supreme Court will have an impact on voting rights and other important matters nationwide. Voters will also elect 11 governors, seven states' secretaries of state, and other officials who set and implement policies that

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impact our everyday life, including state voting rules. With looming uncertainty, we do not want to go into 2020 without all the available protections against voter suppression in place.

Congress has the first responsibility: pass a restored Voting Rights Act, now, with the Senate. But that is not enough. Our legislators should also provide adequate funding to states and localities to administer their elections.

And others need to join the effort to protect the vote. Governors and secretaries of state need to make sure that the technology Americans use to vote is secure, and that Americans have fair polling place resources — voting locations, machines, and poll workers when they vote. Voters need to get themselves and their family, friends, and neighbors registered; check to ensure their registration status stays active; and make sure that everyone (including themselves) can get to the polls and vote.

Elections are when we all get to have our say about the direction the country is going in. Today might be our first step in ensuring they remain democratic.

A Leap Forward for Democracy in Florida

Desmond Meade

For 150 years, Florida's constitution permanently stripped the right to vote from anyone convicted of a felony. In 2018, an overwhelming majority of voters in the state passed Amendment 4, granting the right to vote to 1.4 million people. The Brennan Center helped draft the measure's language. It was the biggest extension of the franchise since the 26th Amendment lowered the voting age to 18. The movement in Florida was led by a formerly incarcerated man who earned a law degree but still could not vote.

When I think of the six most important words in the Pledge of Allegiance — "with liberty and justice for all" — that is a country in which I want to live. That is a place where it doesn't matter the color of your skin, doesn't matter your economic status, doesn't matter your sexual identity, doesn't matter your immigration status. If you set foot on this land of ours, you will enjoy liberty and justice.

I stand here in front of you tonight — with great thanks to the Brennan Center and appreciation for all the honorees — and I'm like, what am I going to tell a room so full of distinguished people? Activists and champions for democracy. A room full of attorneys and some judges. What can I say that can leave a lasting impression on you? That as you walk out these doors tonight, whatever level you are on and your championing of democracy will be multiplied even more. And I say that because, while there is a part of me that's so honored and elated that I'm being recognized, there's another part of me that has a heavy heart. Because in spite of the great work that the Brennan Center has been doing for quite a number of years, in spite of the many hours and blood, sweat, and tears that we have put into our daily lives and our activism, we're at a very critical point in this country. I'm not just about an election, I'm talking about this country as a community.

I can give you the numbers. I can dazzle you — 1.4 million. These new voters will transform the political landscape. I could tell you all that, but there's something much deeper. There's something much deeper at stake. At the end of the day, it's not about an individual. I could talk about an individual, how bad they are or what they're doing that's so wrong. I could talk about one side or the other, but at the end of the day, I think what we're facing is much bigger than that. I think what we're facing is the question of what is democracy going to look like? Is it going to be anything near what we hold dear in our hearts?

Have we moved beyond that point? When have we been such a country, where neighbors are against neighbors, and one side is criminalizing the other, and another side is demonizing the other? When have we been so far apart? This is what we're facing. I believe that we're at a critical moment in our nation where we must stand up as a people, and we must set aside whatever it is that divides us and come together — and we don't come together based on fear or hate.

Desmond Meade leads the Florida Rights Restoration Coalition. He received the Brennan Legacy Award in New York City, November 19, 2019.

That was the thing that I really appreciated when we won Amendment 4, because over 5.1 million people voted and none of those votes was based on hate or fear, but rather on love, forgiveness, and redemption. That was the biggest thing that happened that night, because it proved to not only the state of Florida, but to this country and to the world, that love can in fact win the day. It proved that, in spite of our differences, we can come together along the lines of humanity for the greater good. That we don't have to tear each other down, but we can build by loving each other up, by wanting for our neighbor what we would want for ourselves.

The spirit that embraced the entire campaign was one of love.

That's where we're at this evening, ladies and gentlemen. I felt compelled to just shift my message a little bit and let it be a call to action. We've already known that this has been a success because we've already raised over a million dollars for the Brennan Center, but now, how can we improve over a million lives through love? What can we do to promote that? 'Cause Martin Luther King Jr. once said that hate can't drive out hate and darkness can't drive out darkness, but what can defeat all of that?

It's love.

But boy, that's a challenging thing to do. In spite of the attacks that we may be getting in the onslaught . . . how? How can we love those who we believe despise us or seek to destroy us? I propose to you tonight that we can, and I propose to you that if we could get in proximity of those with whom we may not agree, and if we can commit to embracing them with love, I believe that we will overcome. I believe that we will set our nation back on a trajectory that promotes a democracy we believe in. And until we do that, we're just going to sink deeper and deeper and deeper.

I don't know about y'all, but you know, one of the keys that I thought was special for Amendment 4 was that it was led by people who were directly impacted. I always tell folks that those who are experiencing the pain are more invested in ending the suffering — and ending it as permanently as possible. And like Myrna Pérez said, there were times when there was no one around and my beautiful wife, Sheena, and my mother-in-law allowed me to use their home to collect petitions. And we were in an old, beat-up old Ford Taurus named Shaniqua. We're traveling the state of Florida putting about 50,000 miles each year on the car, talking to any and everybody about rights restoration, even though there was no money and there were no resources. But there was that one thing that I couldn't get away from, and it was the pain. It was the suffering. Knowing that when I woke up the next morning, I still couldn't vote. Knowing that when my wife ran for office, I couldn't even vote for her. That commitment from people who are closest to the pain.

And I want to thank the Brennan Center for actually supporting people who are closest to the pain and bringing their level of expertise. 'Cause I don't say it much, but you know, at the very beginning, at the very beginning when everyone thought that my idea was crazy,

my friends at the Brennan Center said, yeah, might be crazy, but you might be on to a little something. So, let's do a little research. And believe it or not, that research that the Brennan Center so wholeheartedly supported served as a catalyst to spur on more conversation and allowed more doors to be open so I could convince people that it was not crazy. And that got the ball rolling. For that, I thank the Brennan Center. But at the heart of this were people closest to the pain. The driving force was people closest to the pain. The spirit that embraced the entire campaign was one of love.

When you think about it, you're talking about voting rights in a state like Florida and you're talking about giving voting rights to people with felony convictions. In the political climate we were in, there was no way in heck that this should have even gotten on the ballot, much less fast. But in the same political climate, not only did we get it on the ballot, the very same people that we thought were going to be our main opposition ended up endorsing the campaign. And we know that when we got over a million more votes than any candidate received, we know at least a million came from the other side.

If that is not something to be hopeful about, then I don't know what is. But when it comes to pain, we don't think about Democrat, we don't think about Republican, we don't think about right, we don't think about left. What we think about is the pain that we're suffering and the need to end it now. That's what we think about. And so I'm so grateful for the hundreds of volunteers we had in the state of Florida — like Myrna said, there's no way I could have done it by myself, and I want to give a special shout-out to the women in my life, like my beautiful wife, Sheena. This is no knock against the men, but let me tell you, at every tough juncture in this campaign, it always seemed to be a woman that was present to help move this on. That's the truth.

So I'm hoping that us men step up a little bit, that we turn it up because, I'm telling you, the women really showed up and showed out in this campaign, and that's also an untold story. But like they say, if you want to get it done, I guess you've got to make sure you have a woman on board to make it happen.

I really do believe that the 2020 election is the most critical election that this country has ever seen. And the one thing that I'm definitely pushing for is making sure that every American citizen in the state of Florida with a felony conviction who has a desire to participate can have that opportunity. I am fully committed to making sure that whether they have fines and fees, or whether they just don't know what's going on with Amendment 4, or whether they are qualified or not, that we are fully committed to making sure that each and every one of them can have that opportunity. Because I really believe that no matter how they vote, a more inclusive democracy is a more vibrant democracy, and a more vibrant democracy is good for all of us.

I believe that that's what we must focus on in our democracy, and that we focus on engaging each other with love to ensure that each and every person who sets foot on these grounds will enjoy liberty and justice. And so, for my closing, I would ask you if you would please bear with me, and I'm going to use my privilege as an honoree. I would like each and every one of you all to stand and recite the Pledge of Allegiance with me.

And when we get to those last six words, I really want you to think about a family member or a friend or constituent or an ally who has to live in fear because of their immigration status. Who has to live in fear because of their sexual identity. Who would feel left out because they have a felony conviction, or who has to live in shadows because of their last name or the religion that they practice. And I know each and every one of you all knows at least one person that fits into that category. And as you say those six words, use those last six words as a personal pledge to go a little further in ensuring that we have a true democracy for all.

Florida Voters Spoke. The Governor Must Listen.

Myrna Pérez, Sean Morales-Doyle, Eliza Sweren-Becker, and Patrick Berry

Less than a year after Florida voters approved Amendment 4, Governor Ron DeSantis signed a bill denying voting rights to returning citizens until they settle any court debts connected to their convictions. The law would disproportionately affect African Americans and low-income voters. A federal lawsuit challenged the rule and won a partial preliminary victory. Florida officials then appealed and lost. According to the 11th Circuit Court of Appeals, the new law created "a wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay — that is, it punishes more harshly solely on account of wealth — by withholding access to the ballot box."

GRUVER V. BARTON

United States District Court for the Northern District of Florida

1. On November 6, 2018, a supermajority of nearly 65 percent of Florida voters — more than five million people — approved one of the largest expansions of voting rights in the United States since the passage of the Voting Rights Act of 1965. In enacting the Voting Restoration Amendment, known as Amendment 4, voters revised the Florida Constitution to abolish permanent disenfranchisement of nearly all citizens convicted of a felony offense. Amendment 4 automatically restored voting rights to over a million previously disenfranchised Floridians who had completed the terms of their sentences including parole or probation — ending a broken system that disenfranchised more than 10 percent of all of the state's voting-age population and more than 20 percent of its African American voting-age population, *Hand v. Scott*, 285 F. Supp. 3d 1289, 1310 (N.D. Fla. 2018). Its passage was a historic achievement for American democracy and made clear that Florida voters intended to end lifetime disenfranchisement and give their fellow citizens a voice in the political process.

2. Florida's prior disenfranchisement provision originated in the 1860s, as part of Florida's prolonged history of denying voting rights to Black citizens and using the criminal justice system to achieve that goal. From the shadow of that history, voters overwhelmingly chose to expand the franchise to persons previously excluded. Floridians recognized, as the U.S. Supreme Court has, that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Excerpted from a complaint filed in the United States District Court for the Northern District of Florida in *Gruver v. Barton,* June 28, 2019. The Brennan Center, together with the ACLU and NAACP Legal Defense and Education Fund, represented 10 citizens who were blocked from registering.

3. This action challenges the attempt by certain Florida lawmakers to vitiate Amendment 4's enfranchising impact by making restoration of voting rights contingent on a person's wealth. Amendment 4's language is clear and simple — individuals with a conviction for any felony other than murder or a sexual offense will have their voting rights "restored upon completion of all terms of sentence including parole or probation." Yet, on June 28, 2019, Governor Ron DeSantis signed legislation — which the Senate and House ultimately passed along party line votes — that attempts to drastically claw back the voting rights conferred by Amendment 4 and retract Plaintiffs' right to vote. SB7066 provides that returning citizens are not eligible to register or vote until they settle any form of legal financial obligation (LFO) that arises from their conviction — even if those returning citizens will never be able to pay outstanding balances, and even where their outstanding debt has been converted to a civil lien.

4. SB7066 conditions Plaintiffs' right to vote on their wealth and penalizes returning citizens who are unable to pay, in violation of the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments and the ex post facto clause of the U.S. Constitution. If not enjoined, the law will have a massive disenfranchising effect and result in sustained, and likely permanent, disenfranchisement for individuals without means. It creates two classes of returning citizens: those who are wealthy enough to vote and those who cannot afford to. This disenfranchisement will be borne disproportionately by low-income individuals and racial minorities, due to long-standing and well-documented racial gaps in poverty and employment.

If not enjoined, the law will have a massive disenfranchising effect and result in sustained, and likely permanent, disenfranchisement of individuals without means.

5. SB7066 is further unlawful because it was motivated, at least in part, by a racially discriminatory purpose. It is well established that people with felony convictions in Florida are disproportionately Black — a product of higher rates of police stops, arrest, prosecution, and conviction of Black citizens in the criminal justice system. It is also well established that a large majority of returning citizens have LFOs they cannot pay now or in the foreseeable future. In addition, Black Floridians with a felony conviction face intersecting barriers to paying off their LFOs due to hurdles to employment and long-standing racial disparities in wealth and employment across the state. Yet, notwithstanding this disproportionate impact on Black returning citizens, before SB7066 was enacted, lawmakers expressly refused to consider evidence about the racial and socioeconomic impacts of the law and the foreseeable harm to Black communities and rejected

ameliorative amendments that they were advised could have lessened the law's impact on Black returning citizens. There is a strong inference that the law was motivated by discriminatory purposes in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution in light of: the history of racial discrimination underlying Florida's felony disenfranchisement regime; the sequence of events and procedural irregularities leading to SB7066's enactment; the reasonably foreseeable and known discriminatory impact; and the tenuousness of the stated justifications for SB7066.

6. SB7066 will also prevent or at least chill voter registration and voting among returning citizens because Florida has no unified system to accurately record data on LFOs, and no system to access data on federal or out-of-state financial obligations, leaving returning citizens without any reasonable or accessible method of determining if they would violate the law by registering to vote, or means to defend against challenges to their eligibility to vote based on LFOs. Such a scheme violates the Fourteenth Amendment of the U.S. Constitution.

7. SB7066 will also significantly impede organizational Plaintiffs' ability to engage in voter registration activities and thus directly burdens fundamental First Amendment speech and associational rights, which are inseparable and intertwined aspects of those activities. Organizational Plaintiffs' members and volunteers must hesitate in conducting their core voter registration activities due to the risk of creating legal liability for returning citizens who have no means to determine whether their LFOs would make them ineligible to register. As a result, members have been deterred from registering voters. The need to inquire into the status of potential applicants' LFOs has undermined the feasibility of organizational Plaintiffs' voter registration drives.

8. Floridians spoke loud and clear last November by amending their constitution by citizen initiative, "the most sacrosanct of all expressions of the people." *Fla. Hosp. Waterman, Inc. v. Buster,* 984 So. 2d 478, 485–86 (Fla. 2008). It was regularly reported that Amendment 4 would restore voting rights to roughly 1.4 million people in Florida, reflecting the public's understanding that restoration of voting rights would not be contingent on one's wealth.

9. SB7066 reinstates a system of lifetime disenfranchisement for a large number of returning citizens — imposing precisely the unjust system that Floridians overwhelmingly rejected through Amendment 4. The Florida Legislature's attempt to retract voting rights and revert to a system of permanent disenfranchisement for the large class of citizens who cannot afford to pay LFOs — and who are disproportionately people of color — is an affront to the U.S. Constitution. It cannot stand.

Voter Rolls in States with AVR See Significant Gains

Kevin Morris and Peter Dunphy

A decade ago, the Brennan Center put forward a proposal to dramatically shift how elections are run in the United States. Automatic voter registration (AVR), fully implemented, would add 50 million people to the rolls and bolster election security. Already, it has shown it can bring more people into our democratic process.

Over the past five years, a significant reform of voter registration has been enacted and implemented across the country. Automatic voter registration (AVR) offers the chance to modernize our election infrastructure so that many more citizens are accurately registered to vote.

AVR features two seemingly small but transformative changes to how people register to vote:

1. Citizens who interact with government agencies like the Department of Motor Vehicles are registered to vote, unless they decline. In other words, people are registered unless they opt out, instead of being required to opt in.

2. The information citizens provide as part of their application for government services is electronically transmitted to elections officials, who verify their eligibility to vote. This process is seamless and secure.

In the past five years, 15 states and the District of Columbia have adopted AVR. (Three states — Connecticut, Utah, and New Mexico — have adopted something very close to automatic registration.)

How has automatic registration worked? Has it, in fact, increased registration rates as its proponents hoped? This report is the first comprehensive analysis of the impact of AVR on voter registration rates. In the past, individual states have reported increases in voter registration since the adoption of automatic voter registration. But that could be due to many factors, such as compelling candidates or demographic change. Previous analyses have not spoken as to cause and effect or examined the impact of different approaches to AVR.

Is it possible to isolate the impact of automatic registration itself? This multistate analysis leverages low-level voter file data from around the country and cutting-edge statistical tools to present estimates of automatic voter registration's impact on registration numbers.

Excerpted from the Brennan Center report *AVR Impact on State Voter Registration,* April 11, 2019.

Jurisdiction*	Percentage Increase in Registrations
Oregon	15.9
Georgia	93.7
Vermont	60.2
Colorado	16.0
Alaska	33.7
California	26.8
Rhode Island	47.4
Washington, DC	9.4

**In order of implementation date*

This report finds:

- AVR markedly increases the number of voters being registered — increases in the number of registrants ranging from 9 to 94 percent.

- These registration increases are found in big and small states, as well as states with different partisan makeups.

These gains are found across different versions of the reform. For example, voters must be given the opportunity to opt out (among other things, to prevent ineligible people from accidentally being registered). Nearly all of the states with AVR give that option at the point of contact with government agencies; two ask for opt-outs later in the process. The increase in registration rates is similarly high whichever version of the policy is adopted.

How did we do this study? We were able to isolate the effect of AVR using a common political science method known as "matching." We ran an algorithm to match areas that implemented AVR with demographically similar jurisdictions that did not. Matching similar jurisdictions allowed us to build a baseline figure of what a state's registration rate would have looked like had it not implemented AVR. By aggregating and comparing baseline jurisdictions to AVR jurisdictions, we demonstrated that AVR significantly boosted the number of people being registered everywhere it was implemented.

Our nation is stronger when more people participate in the political process. This report shows that AVR is a highly effective way to bring more people into our democracy.

CRIMINAL JUSTICE REFORM

The Steep Costs of Criminal Justice Fees and Fines

Matthew Menendez, Michael Crowley, Lauren-Brooke Eisen, and Noah Atchison

The national focus on Ferguson, Missouri, shed light on more than police brutality. It also revealed the county's heavy reliance on citations for municipal code violations to fund city government. The practice is widespread, with a harsh and disproportionate racial impact. Fees can imperil former defendants. But do they even raise revenue? The first-ever national study shows they are inefficient as well as unjust.

The past decade has seen a troubling and well-documented increase in fees and fines imposed on defendants by criminal courts. Today, many states and localities rely on these fees and fines to fund their court systems or even basic government operations.

A wealth of evidence has already shown that this system works against the goal of rehabilitation and creates a major barrier to people reentering society after a conviction. They are often unable to pay hundreds or thousands of dollars in accumulated court debt. When debt leads to incarceration or license suspension, it becomes even harder to find a job or housing or to pay child support. There's also little evidence that imposing onerous fees and fines improves public safety.

Now, this first-of-its-kind analysis shows that in addition to thwarting rehabilitation and failing to improve public safety, criminal-court fees and fines also fail at efficiently raising revenue. The high costs of collection and enforcement are excluded from most assessments, meaning that actual revenues from fees and fines are far lower than what legislators expect. And because fees and fines are typically imposed without regard to a defendant's ability to pay, jurisdictions have billions of dollars in unpaid court debt on the books that they are unlikely to ever collect. This debt hangs over the heads of defendants and grows every year.

This study examines 10 counties across Texas, Florida, and New Mexico, as well as statewide data for those three states. The counties vary in their geographic, economic, political, and ethnic profiles, as well as in their practices for collecting and enforcing fees and fines.

KEY FINDINGS

- Fees and fines are an inefficient source of government revenue. The Texas and New Mexico counties studied here effectively spend more than 41 cents of every dollar of revenue they raise from fees and fines on in-court hearings and jail costs alone. That's 121 times what the Internal Revenue Service spends to collect taxes and many times what the states themselves spend to collect taxes. One New Mexico county spends at least $1.17 to collect every dollar of revenue it raises through fees and fines, meaning that it loses money through this system.

Excerpted from the Brennan Center report *The Steep Costs of Criminal Justice Fees and Fines,* November 21, 2019.

- Resources devoted to collecting and enforcing fees and fines could be better spent on efforts that actually improve public safety. Collection and enforcement efforts divert police, sheriff's deputies, and courts from their core responsibilities.

- Judges rarely hold hearings to establish defendants' ability to pay. As a result, the burden of fees and fines falls largely on the poor, much like a regressive tax, and billions of dollars go unpaid each year. These mounting balances underscore our finding that fees and fines are an unreliable source of government revenue.

- Jailing those unable to pay fees and fines is especially costly — sometimes as much as 115 percent of the amount collected — and generates no revenue.

- The true costs are likely even higher than the estimates presented here, because many of the costs of imposing, collecting, and enforcing criminal fees and fines could not be ascertained. No one fully tracks these costs, a task complicated by the fact that they are spread across agencies and levels of government. Among the costs that often go unmeasured are those of jailing, time spent by police and sheriffs on warrant enforcement or driver's license suspensions, and probation and parole resources devoted to fee and fine enforcement. This makes it all but impossible for policymakers and the public to evaluate these systems as sources of revenue.

States and localities should pass legislation to eliminate court-imposed fees.

RECOMMENDATIONS

- States and localities should pass legislation to eliminate court-imposed fees. Courts should be funded primarily by taxpayers, all of whom are served by the justice system.

- States should institute a sliding scale for assessing fines based on individuals' ability to pay. The purpose of fines is to punish those who violate the law and deter those who might otherwise do so. A $200 fine that is a minor inconvenience to one person may be an insurmountable debt to another.

- Courts should stop the practice of jailing for failure to pay, which harms rehabilitation efforts and makes little fiscal sense.

- States should eliminate driver's license suspension for nonpayment of criminal fees and fines. The practice makes it harder for poor people to pay their debts and harms individuals and their families. Lawmakers should follow the approach taken by Texas, where recent legislation will reinstate hundreds of thousands of licenses.

- Courts and agencies should improve data automation practices so that affected individuals understand their outstanding court debts and policymakers can more thoroughly evaluate the efficacy of fees and fines as a source of revenue.

- States should pass laws purging old balances that are unlikely to be paid but continue to complicate the lives of millions, as some jurisdictions, including San Francisco, have done. This would also ensure that individuals who have been free and clear of the criminal justice system for many years are not pulled back in simply on the basis of inability to pay.

The Next President Must Address Mass Incarceration

Ames Grawert and Cameron Kimble

In 2018, Congress enacted the First Step Act, the most significant piece of federal criminal justice reform legislation in decades. It marked the maturation of the bipartisan movement to end mass incarceration, a sharp turn from earlier political battles over crime. The next president, regardless of party, must take further steps to fix what is still broken in our criminal justice system.

INTRODUCTION

For many voters, the past two years have brought a new awareness of profound, continuing injustices in American society. Among them is the civil rights crisis of mass incarceration. Even with recent reforms, more than two million Americans remain behind the bars of jails or prisons. Black men and women are imprisoned at roughly six times the rate of their white counterparts. The overuse of incarceration perpetuates economic and racial inequality, two issues at the top of the public concern.

Going into the 2020 election, contenders for the Democratic nomination — and the Republican incumbent — must have a plan to meet these challenges, or risk being out of step with the American people.

This report delineates how that can be done, outlining policies that would slash America's incarceration rate, put people back to work, and reduce racial disparities in the process, while keeping the country safe. These solutions can be a transformative piece of a presidential campaign and help define a new president's legacy.

Some consensus for these changes already exists. Late last year, Congress ended years of deadlock over federal sentencing reform by passing the First Step Act, which will reduce some of the most extreme and unjust sentences in the federal criminal code. These changes will put families back together, make prison more humane, and help restore trust in law enforcement.

But the bill also raises the bar for any candidates seeking the Oval Office. President Trump is already treating the act as a signature accomplishment, touting it among his top achievements in his State of the Union address. Candidates who are serious about combating racial and economic injustice — and want voters to know it — will have to think bigger.

Rather than focusing on individual reforms, candidates for the presidency should commit to tackling some of the most pervasive and damaging parts of our criminal justice system, including overly punitive sentences, bail practices that favor the rich, and drug policies that unfairly target people of color. These aren't intractable problems, but they do call for sweeping changes, far more than what has been introduced to date. And enacting these in Washington can also spur more states to take action.

Excerpted from the Brennan Center report *Ending Mass Incarceration: A Presidential Agenda*, published February 21, 2019.

Incremental reforms will not make the history books. The time for bold action is now, and this report outlines precisely the type of transformative solutions that candidates can champion to define their campaign or cement their legacy.

Transformative Policy Solutions

1. End Imprisonment for Lower-Level Offenses

2. Shorten Overly Long Prison Sentences

3. Pass a "Reverse" of the 1994 Crime Bill

4. Modernize Federal Clemency

5. Additional Solutions

   - Fully fund the First Step Act
   - End the ban on federal college grants for prisoners
   - Abolish money bail
   - End federal prohibition on marijuana
   - Reverse the incentives of federal prosecutors
   - Provide a national response to the opioid crisis

Executive Actions for Day One

1. Repeal draconian, Sessions-era law enforcement directives

2. End federal private prisons

3. Change federal prosecutor incentives

4. Revitalize the Sentencing Commission

5. Use clemency to reduce unfair sentences

CONCLUSION

With racial and economic inequality front and center in the national debate, leaders aspiring to the Oval Office must articulate a clear, ambitious vision for building a more just society. Candidates will likely disagree over the most direct path toward that goal. But ending mass incarceration remains an essential component of any vision for a stronger American society. Reducing our unacceptably high prison population will strengthen communities, reinvigorate the economy, and address continuing racial disparities in our justice system.

That means developing a comprehensive criminal justice platform should be an early goal for any candidate hoping to demonstrate a commitment to racial and economic justice. Considering the broad popularity of reducing incarceration, candidates must think big or risk being forgotten by the wayside in the contentious election season. Half measures won't meet the need or the urgency of this moment. But the solutions proposed in this report will.

New Voices for Reform

Cory Booker, Kamala Harris, Amy Klobuchar, Rashad Robinson, Topeka K. Sam, and Elizabeth Warren

Mass incarceration has crushing consequences: racial, social, and economic. In recent years, however, the politics of crime and punishment has changed fundamentally, and polls show widespread support for a less punitive approach. In advance of the 2020 presidential election, leaders representing affected communities joined top policymakers to offer new solutions.

Senator Cory Booker: The First Step Act was the most sweeping overhaul of the criminal justice system in a decade and included a provision making retroactive a 2010 law that reduced the egregious discrepancies between sentences for crack cocaine and powder cocaine. But it's important to remember that this piece of legislation is just that — a first step.

Despite being home to only 5 percent of the world's population, the United States houses 25 percent of the world's prison population. Since 1980, our federal prison population has exploded by almost 800 percent, largely a direct result of the war on drugs — a government policy that mandated longer, more punitive sentences, often for nonviolent crimes. These laws not only have wasted precious resources by locking people up for low-level crimes instead of focusing on rehabilitation, but have been overwhelmingly disproportionately applied to black, brown, and lower-income Americans. It is painfully clear that something needs to change, and while the First Step Act was a meaningful step forward, there is much more work to do.

That's why earlier this year, I introduced the Next Step Act. Building off the momentum behind criminal justice reform, the Next Step Act would make far-reaching reforms to police encounters, sentencing, prison conditions, and reentry efforts.

The bill would aid reentry efforts by reinstating the right to vote in federal elections for formerly incarcerated individuals; "banning the box" — that is, prohibiting federal employers and contractors from asking job applicants about their criminal history until the final stages of the interview process; creating a federal pathway to sealing the records of nonviolent drug offenses for adults and automatically sealing (and in some cases expunging) juvenile records; removing the lifetime ban on federal TANF and SNAP benefits for former nonviolent drug offenders; removing barriers that prevent people with criminal convictions from receiving an occupational license for jobs, such as hairdressers and taxi drivers; and ensuring that anyone released from federal prison receives a photo ID, birth certificate, and Social Security card.

The Next Step Act would improve police encounters by prohibiting racial profiling by law enforcement agencies; improving the reporting of police use-of-force incidents; and providing better implicit racial bias, de-escalation, and use-of-force training for law enforcement officers. The bill would also improve the ability of those behind bars to stay in touch with their loved ones. Last, it would incentivize states through federal grants to decrease both their prison populations and crime, given 87 percent of those incarcerated are held in state facilities.

Excerpted from the Brennan Center report *Ending Mass Incarceration: Ideas from Today's Leaders,* published May 16, 2019. This collection of essays was edited by Inimai Chettiar and Priya Raghavan.

For too long our broken criminal justice system has been a cancer on the soul of this country, a cancer that has preyed on our most vulnerable citizens. The system as it currently stands is an affront to our most fundamental values of freedom, equality, and liberty. It's time we take the next step toward a more equal, more fair, and more just nation.

Senator Kamala Harris: Traditionally, prosecutors have been rewarded for securing more convictions and longer sentences, but we now understand this kind of focus is harmful. Prosecutors should shift success measures to more modern metrics, such as reducing unnecessary imprisonment, reducing racial disparities, and lowering recidivism rates — moving toward a culture of reducing mass incarceration.

An important way to safeguard our system is to equip public defenders with the resources they need to do their jobs well. Time and resource constraints discourage public defenders from taking cases to trial. The vast majority of felony convictions are now the result of plea bargains — by some estimates, as much as 94 percent at the state level and 97 percent at the federal level. When the salaries of dedicated public defenders do not allow them to cover the cost of living, they cannot do the job that their clients deserve and our Constitution requires.

The dream of equal justice will become a reality only if we reform our criminal justice system, top to bottom.

In our adversarial system, true justice requires balance. And we cannot secure justice with such an extreme imbalance of resources. It is not enough just to have a lawyer; defendants in criminal cases need lawyers who have enough time, money, and resources to unearth all of the facts and exculpatory evidence in their cases. They need lawyers who can stand up in court, fully prepared to challenge the prosecution.

Senator Amy Klobuchar: For nonviolent, low-level drug offenders, there are more effective and innovative solutions than long prison sentences. Why? People are capable of change, and many deserve a second chance.

One way to do that is to address one of the underlying causes of rearrest and recidivism: addiction. One of the most important lessons I learned as Hennepin County attorney is that you can't break the cycle of drug abuse and destructive behavior just by locking a person up.

We need smart solutions that drive people toward treatment and recovery rather than an endless cycle of arrest and incarceration. That's why, as both a member of the Senate Judiciary Committee and a prosecutor, I have fought to expand funding for and access to drug courts. Drug courts — which divert nonviolent, substance-abusing offenders from prison and jail into supervised treatment — offer one of the best opportunities to ensure that those struggling with addiction get the help they need while preserving public safety.

Rashad Robinson, president, Color of Change: Most decarceration solutions presently considered bold by the public should not be considered bold at all. The changes we most immediately want implemented should be perceived as common sense. It's the policies that got us here that should be perceived as radically implausible and wildly unsustainable. Yet too many people think of our criminal justice system as having eliminated practices that are senseless and unjust, rather than being defined by them.

Deep cultural interventions focused on reshaping popular understandings about the justice system en masse — in a way that makes the status quo intolerable — may get us farther than traditional policy advocacy, and get us there faster. Specifically, radically changing the storytelling conventions of crime procedurals, local news, reality television, and daytime talk — the most far-reaching purveyors of misinformation (or any information) about our criminal justice system — might bring about changes we would not otherwise be able to achieve.

Many people learn to think and feel about the law, crime, and the justice system — as well as all the people involved in it — by way of these shows. They set the standard for what we expect from judges, prosecutors, police, and others; what is right and necessary in terms of punishment; and so many other attitudes and understandings, most of which presently depress demand for reform. Unlike other genres — such as hospital dramas that may help reorient public understandings of addiction — crime procedural shows are not leading. They are following orders rather than reason or justice.

We must make it a serious priority to hold major cultural outlets accountable to standards of accuracy — eliminating dehumanizing stereotypes about Black people and others, eliminating flat-out lies about the system and its real-world effects, and incentivizing the promotion of healthy, up-to-date, and accurate ideas that normalize reform and help America become better and stronger.

Topeka Sam, executive director, Ladies of Hope Ministry: Formerly incarcerated women are the experts on transforming the criminal legal system. We need to be. We are the ones who are breaking new ground, telling our stories and translating them into new policies and new laws. We believe that ending the incarceration of women and girls opens the door to ending mass incarceration.

Focusing on women and girls means looking at our homes and communities and the harm that sexual and physical violence creates and perpetuates — for both the people who have been harmed and those who have caused harm. It means looking at how we have come to rely on the police and, at the same time, how the police have become an occupying force in black and brown communities. Focusing on how women and girls are criminalized helps us understand how gender roles constrain and limit everyone. And looking at how the state dehumanizes incarcerated women, the majority of whom are black and brown, reveals how black and brown women are treated by the state in the "free world."

Senator Elizabeth Warren: The hard truth is that America has two separate and very unequal justice systems. The first is a justice system exclusively for the wealthy and the well connected. The second criminal justice system — the system for everyone else — looks very different. In that system, "tough on crime" is the catchphrase of choice. Low-income individuals end up with criminal records or jail time because they can't afford bail or hefty fines and fees. That second criminal justice system disproportionately targets and punishes black and brown Americans.

The dream of equal justice will become a reality only if we reform our criminal justice system, top to bottom.

Start by holding corporate criminals accountable. Last year, on the 10th anniversary of the collapse of Bear Stearns, which kicked off the financial crisis, I introduced the Ending Too Big to Jail Act, a bill that would make it easier to bring criminal charges against bank executives whose organizations defraud consumers. In April, I introduced the Corporate Executive Accountability Act, legislation that would make executives of big corporations criminally liable if their companies commit crimes, harm large numbers of people through civil violations, or commit a new violation while under the supervision of the court or a regulator for a previous violation. We should pass these bills, and more like them.

Getting serious about corporate crime is only one part of the solution. It's also time to change the way our criminal justice system treats those without money and power. We can start by ending mandatory minimums for individuals. We also need to end the practice of jailing people because they can't afford bail or other fines and fees. We should legalize marijuana and wipe clean the records of those who have been unjustly jailed for minor marijuana crimes; end private prisons and the profit incentives that pervert the goal of our justice system; provide more help for people struggling with domestic abuse, substance use disorders, and mental illness; and end the practice of branding the formerly incarcerated with a scarlet letter that closes doors to education, employment, and opportunity.

Undoing the 1994 Crime Bill

Lauren-Brooke Eisen and Inimai Chettiar

The 1994 Crime Bill helped fuel the epidemic of mass incarceration. Today, there is growing consensus within both parties that the criminal justice system must change. Two Brennan Center experts detailed the law's harmful legacy and called on Congress to pass the Reverse Mass Incarceration Act.

As the 2020 field of candidates gets more crowded, Democrats have started weaponizing one of the most influential pieces of criminal justice legislation in the last 50 years — the 1994 Crime Bill. Joe Biden, a key author of the bill when he served in the Senate, has doubled down, while his primary opponents correctly point to how it helped contribute to mass incarceration.

The debate is important, but an exclusive focus on the past underplays two crucial questions: Moving forward, how will the country end mass incarceration that decades of federal funding helped create? And what are presidential candidates' plans to reverse failed policies?

The size of the U.S. prison system is unparalleled. If each state were its own country, 23 states would have the highest incarceration rates in the world. People of color are vastly overrepresented. African Americans make up 13 percent of the country's population but almost 40 percent of the nation's prisoners.

In response, Senators Cory Booker (D-NJ) and Richard Blumenthal (D-CT), along with Rep. Tony Cárdenas (D-CA), have just reintroduced the Reverse Mass Incarceration Act. The bill, which they first introduced last Congress, provides financial incentives to states (which house 87 percent of America's prison population) to reduce imprisonment rates. It starts to unwind the web of perverse incentives set in motion by the Crime Bill and other laws.

To receive federal funding awards under the act, states must reduce the imprisonment rate by 7 percent every three years and keep crime at current record lows. States can choose their own path to achieve those goals, since the legislation sets targets instead of dictating policy.

If each state were its own country, 23 states would have the highest incarceration rates in the world.

Using federal money to spur local change is an approach that has been proven to work in the past. In 1984, President Ronald Reagan signed a law requiring states to raise the drinking age to 21. Ones that didn't comply would have their federal highway funding cut by 10 percent. Every state in the union made the change.

The federal government has a long history of using federal funds to shape the criminal justice landscape. For example, a bill passed in 1968 — amid concerns over rising crime

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rates — set up grant programs that allocated money to states to be used for any purpose associated with reducing crime. Over two years, it authorized $400 million (roughly $2.7 billion in today's dollars) in grants. Two decades later, the Anti–Drug Abuse Act of 1986 played a central role in government policy in the war on drugs by reinstating mandatory minimum sentences for drug possession and establishing $230 million (nearly $500 million today) in grants to fund drug enforcement while not permitting funding of drug prevention programs.

The 1994 Crime Bill extended that trend. It promised $8 billion ($13 billion in today's dollars) to states if they adopted "truth-in-sentencing" laws, which required incarcerated individuals to serve at least 85 percent of their sentences.

A study by the Urban Institute found that between 1995 and 1999, nine states adopted truth-in-sentencing laws for the first time, and 15 states reported the Crime Bill was a key or partial factor in changing their truth-in-sentencing laws. By 1999, a total of 42 states had such laws on the books. New York was one of them, receiving more than $216 million under the bill. By 2000, the state had added more than 12,000 prison beds, incarcerating 28 percent more of its citizens than a decade before.

While the precise impact of the grant program is hard to quantify, the law's passage and the concurrent or subsequent passage of at least 20 state truth-in-sentencing laws marked a turning point in the length of sentences served nationwide.

From 1990 to 2005, there was a 43 percent increase in the number of prisons across the country. States were already building prisons, but money from Washington galvanized the construction boom. By the mid-90s, a new prison opened on average every 15 days.

Over the past decade, states have taken steps to move away from harsh sentencing laws. And Congress has made reforms to sentencing at the federal level, including the First Step Act, passed last year.

Certainly, one piece of federal legislation alone will not end mass incarceration, just as the 1994 Crime Bill was not solely responsible for causing it. Innovative changes at the local level must continue, like Brooklyn District Attorney Eric Gonzalez's decision to make incarceration an alternative sanction or state legislatures eliminating mandatory minimum sentences that keep people behind bars for far too long.

America is the world's largest jailer. Ridding us of that shameful distinction will not happen overnight. But the Reverse Mass Incarceration Act is one of the strongest steps the federal government can take to end mass incarceration. By providing financial incentives to help power important changes at the local level, it's a national bill that will help set a tone across the country. It will encourage states to orient criminal justice strategies across the country toward more just and fair outcomes.

States Reduce Crime and Incarceration in Tandem

Cameron Kimble and Ames Grawert

Between 1960 and 1980, national crime rates doubled, driving punitive measures that fueled the rise of mass incarceration. Opponents of criminal justice reform have long argued that shorter sentences and other changes to our current system will lead to more crime. We now have data to show otherwise.

It's now been several decades since states around the country began experimenting with criminal justice reform — specifically, by reducing the number of people behind prison bars. Now we can start to take stock of the results.

They're encouraging — but with the prison population still sky-high, there's a lot more to do.

Between 2007 and 2017, 34 states reduced both imprisonment and crime rates simultaneously, showing clearly that reducing mass incarceration does not come at the cost of public safety (for sources and definitions for crime data, see our latest crime report). The total number of sentenced individuals held in state prisons across the U.S. also decreased, by 6 percent, over the same decade. And these drops played out across the country.

Broad Regional Gains in Safety and Fairness

While it's tempting to focus on the southern states — which were some of the most notable early adopters of reform — reductions in the last decade occurred across the board. The Northeast saw the largest average decline in imprisonment rate (24 percent), with only Pennsylvania recording an increase (3 percent). Crime rates also dropped fastest in the Northeast region, falling by just over 30 percent on average.

By contrast, the Midwest saw imprisonment rates drop by only 1 percent on average, and that modest reduction was driven by Michigan (20 percent), where recent criminal justice reforms are focused on reducing recidivism. With returns to prison down 41 percent since 2006, the state is home to one of the most comprehensive statewide reentry initiatives in the country.

Notably, Massachusetts recorded the steepest decline in crime rate in the country in this period (about 40 percent) while reducing the number of people convicted of nonviolent drug crimes in prison by 45 percent from 2008, cutting its overall imprisonment rate roughly in half. In fact, across the country, where the crime rate did fall, it fell faster, however slightly, in states with decreased imprisonment rates.

Some States Bucked the Trend

It's tough to say why some states successfully reduced their prison population while others failed. One possible commonality relates to socioeconomic well-being. Over half of the states where imprisonment rates grew had poverty rates above the national average as well. Those states

This piece appeared on the Brennan Center website, August 6, 2019.

were also some of the hardest hit by the opioid epidemic. West Virginia typifies this experience: crime rates dropped, but incarceration rose amid the state's struggles with opioid abuse and poverty.

Opioid addiction may also explain a relative lack of progress in Rust Belt states. In 2017, for example, Ohio and Pennsylvania experienced overdose death rates of 46 and 44 per 100,000, respectively. Both saw prison rates remain stagnant, as did nearby Kentucky, another state with high overdose deaths. The trend is not clear, though, as other states struggling with addiction, such as Alaska, were able to successfully cut their prison population.

Instead, the problem in the Rust Belt may be a combination of rising opioid addiction and a mistakenly overly punitive response. Kentucky, for example, recently increased penalties for heroin trafficking and doubled penalties for crimes involving fentanyl.

Louisiana is also an interesting case. The state recently tried to transcend its grim distinction as the nation's leading per capita incarcerator. Two years ago, Governor John Edwards signed into law a sweeping package of criminal justice reform bills with the goal of reducing prison populations by 10 percent over 10 years. Despite that, Louisiana remains the nation's leading incarcerator per capita. And despite declines in its prison population, the state's crime rate also remains high.

Between 2007 and 2017, 34 states reduced both imprisonment and crime rates simultaneously.

Cause for Optimism

The data clearly demonstrates that the United States' prison population can be reduced without sacrificing the public safety gains of recent decades. Thirty-four states seem to have accepted this notion, as reflected by their (often) sharp declines in rates of imprisonment.

Others lag far behind.

To this day, the United States imprisons its citizens at a higher rate than any other Western democracy. Though recent progress is surely encouraging, at the current rate of decarceration it would take nearly 40 years to return to imprisonment rates observed in 1971 — the last time the national crime rate was this low. And some aspects of justice reform are moving backward. According to one recent study, jail reform is a purely urban phenomenon, as rural incarceration rates are actually increasing.

There's no single solution to mass incarceration. Instead, states must continue making efforts to reduce imprisonment. And the minority of states that have not embraced decarceration need not look far to see that overreliance on incarceration is an ineffective and expensive means of keeping the public safe.

Examining Prison Contracts Overseas

Lauren-Brooke Eisen

Use of private prisons is expanding across the globe, a trend that poses challenges to the movement to reduce incarceration. But not all private prisons resemble those in the United States, where companies are often incentivized to house more incarcerated people. With support from the Pulitzer Center for Crisis Reporting, the Brennan Center's Lauren-Brooke Eisen visited facilities in New Zealand and Australia. While the world could benefit from far fewer prisons, Eisen explored whether the United States can learn from public–private partnerships in corrections overseas.

New Zealand and Australia are home to some of the world's fastest-growing prison populations. Australia now has nearly 43,000 adults behind bars, an almost 50 percent increase in the last decade. New Zealand's prison population recently reached an all-time high of more than 10,600.

Those skyrocketing numbers have led private prison operators to the countries seeking new opportunities. Australia started to contract with private prisons in the mid 1990s, and today more than 18 percent of the country's prisoners are housed in private prisons; all Australian immigration detention centers are managed by the private industry. New Zealand has turned to prison privatization more recently, with its first private prison opening in 2000.

With recidivism rates approaching 40 percent in New Zealand and 45 percent in Australia, two relatively new private prisons operate under contracts that incentivize the prison operator to ensure that fewer people return to prison. The Auckland South Corrections Facility in the northern part of New Zealand and the Ravenhall Correctional Facility outside Melbourne, Australia, are part of a new experiment using performance-based contracts.

Both are examples of how we can look to better structure prison contracts with the private sector. In my book, *Inside Private Prisons: An American Dilemma in the Age of Mass Incarceration,* I point out the ways private prison firms have historically lacked accountability and transparency, and how governments in any nation have never pushed them to innovate.

The world could benefit from far fewer prisons. I emphatically do not endorse the use of or expansion of private prisons. But given political realities, and the fact that governments are continuing to contract with them, it's important to try to improve the for-profit prison industry. We can change it from one that rewards more incarceration to one that instead rewards fewer prisoners, better conditions and programs, and lower recidivism rates.

These overseas prison contracts stipulate that if they can cut recidivism rates better than government-run prisons, they receive an annual bonus. There are additional dollars on the table if they beat the government at reducing recidivism for indigenous people (who, like African Americans and Latinos in the United States, are overrepresented in prison populations).

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I visited Ravenhall in July, and according to their government contract, they can receive a cash payment of up to $2 million if they reduce recidivism rates by 12 percent. And if the rate of recidivism for indigenous prisoners is 14 percent lower than the rate for the same population in the government's prison system, they will receive an additional bonus. Another prison I visited, the Auckland South Corrections Facility in New Zealand — the country's first public–private partnership, led by that country's Department of Treasury and Department of Corrections in partnership with a company called Serco — will net bonuses of up to $1.5 million if the formerly incarcerated men return to prison at lower rates than at other prisons in the country. Fiona Mules, the former head of the public–private partnership program for the New Zealand Department of Treasury, told me that they came up with the bonus figure based on how much they thought not having another prisoner in the system could save.

That incentive structure has encouraged these companies to try to prepare incarcerated people for a better future. Ravenhall is a medium-security prison that was built in a campus style. Soccer fields and clay basketball courts, which the YMCA helped design, dot the facility.

Instead of bars on the cell windows, Ravenhall's architects designed 22 millimeters of thick glass windows to let in more natural light. And to humanize the prison even further, many of the men cook their own meals, all have televisions that double as computers, and all cells are air-conditioned (with a temperature gauge that automatically triggers a fine to the private prison operator if the temperature climbs too high).

The YMCA trains incarcerated men in construction work and helps transition the men from Ravenhall to employment using these skills once released. "I don't like prisons being built, but unfortunately prisons are being built," said Mick Cronin, a YMCA employee who works with incarcerated and formerly incarcerated men. "But while they are built, we want to be the people working in there so less people go back to prison."

In addition to improving the physical space, Ravenhall has focused programming to prepare people for life after prison, particularly indigenous people. The facility assigns six staff members to work primarily with indigenous prisoners and provides programming specifically targeted to assist that population with parenting support. While Aboriginal and Torres Strait Islanders represent about 2 percent of the adult population in Australia, they account for more than a quarter of the people in Australian prisons.

These overseas prison contracts stipulate that if they can cut recidivism rates better than government-run prisons, they receive an annual bonus.

Across the ocean, New Zealand's prison population is skyrocketing. The country is at a crossroads, acknowledging it can't incarcerate its way out of complex social issues. This summer, the New Zealand government launched a criminal justice summit to discuss overhauling its criminal justice system. At the summit, New Zealand Prime Minister Jacinda Ardern said, "I think we all realize that prisons are a moral and fiscal failure, and that staying on a trajectory which would see us building a new prison every two to three years is even more so."

Yet the public–private partnership that built the Auckland South Corrections Facility predates Ardern's role leading the country. The prison's outcome-based benchmarks focus on reducing recidivism rates of Maori prisoners by a 10 percent or greater improvement in recidivism rates compared to Maori prisoners in facilities run by the New Zealand Department of Corrections. And similar to Australia, Maori represent approximately 15 percent of the country's

population but half of its prisoners.

Walking around the grounds with the prison's director, Mike Inglis, I spoke to Maori men who had progressed from living in more traditional prison cells to six-room cottages where they operate their own laundry machines and cook their own dinners. The residences resemble dorm room suites with desks and bookshelves in the bedrooms, a living space replete with carpet on the floor, couches, windows on the wall (with no bars), microwave, refrigerator, cooking utensils, and a flat-screen TV. Almost a quarter of the incarcerated men live in these residential accommodations that aim to replicate what it's like to exist outside prison walls. The prison also partners with PlaceMakers, a construction firm that accepts men from the prison on work release (where they get paid the same wages as non-incarcerated fellow workers) and has so far hired 12 men who have been released from the prison.

It is not yet clear whether these prisons will be different enough to deliver better outcomes than government prisons. Just this week, New Zealand's chief ombudsman released a report about Auckland South after he inspected it this past summer, stating he was "particularly concerned" by the prison's reliance on locking prisoners in cells to manage staff shortages and finding that the facility's recordkeeping and paperwork relating to use-of-force incidents needed to be improved. Yet Serco has received a $1.1 million bonus for reducing recidivism at a greater rate for both Maori and non-Maori prisoners than the New Zealand government was able to achieve between 2016 and 2017.

Ravenhall has only been operational about 13 months, and the Victorian auditor general's office will audit it within the year, perhaps shedding light on more of the prison's operations.

Also, to be sure, neither country's use of private prisons has historically been without problems. In 2016, New Zealand canceled a contract with Serco at the 976-bed Mount Eden Corrections Facility after a Department of Corrections investigation uncovered prisoners staging organized fights and staff selling drugs, cell phones, and tobacco to prisoners. Meanwhile, Geo Group's maximum-security Arthur Corrie Correctional Center in Australia is under investigation for an atmosphere of violence allegedly exacerbated by overcrowding and poor management.

There are also many skeptics who have doubts that these prisons go far enough to accommodate the needs of indigenous people. "The massive overrepresentation of Aboriginal and Torres Strait Islander peoples in Australia, and Maori and Pacific Islanders in Aotearoa New Zealand prison systems is catastrophic, with the system continuing the devastating processes of colonization," said Elizabeth Grant, professor of architecture at the University of Canberra. "Eurocentric prison systems continue to fail indigenous peoples."

Even if these models show some promise, it's important to remember that recidivism rates are merely one metric and don't reveal a whole lot about someone's ability to thrive in the community. Equally, we can't forget that by the time individuals have reached these prison gates, many of them have already been affected by their governments' failure to provide resources to combat intergenerational poverty, systemic racism, and a lack of education and other social services. Despite the immense work that lies ahead to truly transform criminal justice systems across the globe and ensure fewer people end up in prison, it's important to study some of the more humanizing elements present at these prisons to see if they can be replicated elsewhere so that those who do find themselves behind bars are treated more humanely.

THE COURTS

The Nation's Top State Courts Face a Crisis of Legitimacy

Alicia Bannon and Laila Robbins

Courts have not kept up with the changing demographics of the country. In a first look at 60 years of data, the Brennan Center found that judges on state supreme courts, in particular, don't reflect the diversity of their communities. Since the study's release, three states — Washington, Delaware, and Oklahoma — have appointed justices of color to their supreme courts.

The nation's courts have a checkered history when it comes to doling out justice for people of color and women. We often focus on the egregious outcomes — racial disparities in sentencing, over-incarceration of Black men, courts that ignore survivors of sexual violence. Less often do we consider which factors might contribute to these injustices, including the race and gender of the justices who sit on the top state courts.

We reviewed 60 years of data and found that those who preside over these often overlooked but powerful institutions continue to be overwhelmingly white and male. This lack of diversity creates a legitimacy crisis for the justice system.

While national attention is often focused on the U.S. Supreme Court, the top courts in each state typically are the final word on interpreting state law and making decisions that more than 23,000 lower state court judges are to follow. Ninety-five percent of all cases filed in the United States are heard in state courts.

Those courts decide some of the most pressing issues affecting our lives. In recent years, state supreme courts have reversed billion-dollar verdicts in consumer protection cases, authorized executions using experimental drugs, barred localities from regulating fracking, and struck down restrictive abortion laws.

But seldom do these courts look anything like an increasingly diverse America.

We found that nearly half of all states do not have a single justice sitting on their high courts who is Black, Asian, Latino, or Native American — even though people of color make up about 40 percent of the population. In 8 of the 24 states with all-white high courts, people of color make up at least a quarter of the population. Thirteen states have not seated a single justice of color since at least 1960. Eighteen states have never seated a Black justice.

The dearth of gender diversity is also appalling. Women hold only 36 percent of the seats on top state courts. Seventeen states have only one female justice. (State supreme court benches have five to nine justices.)

We also found that not only are state high court judges overwhelmingly homogeneous, but also, by some measures, state courts are becoming less reflective of the nation's diversity than they were a generation ago. While there are more lawyers of color than ever before, we found that the gap between the proportion of people of color on the bench and their representation in the American population was higher in 2017 than it was in 1996.

The public legitimacy of our entire judicial

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system is under threat if the judges making crucial decisions about the law don't reflect the diversity of the communities affected. As former justice Yvette McGee Brown of the Ohio Supreme Court observed, the public's perception of justice suffers "when the only people of color in a courthouse are in handcuffs."

What's more, research has shown that diversity on the bench enriches judicial deliberations. Studies of federal courts found that when a female justice or a justice of color sits on a panel, her male or white colleagues are more likely to side with plaintiffs in civil rights cases.

The lack of racial and gender diversity on the bench is driven by a host of factors — including the underrepresentation of women and people of color in leadership positions within the law, implicit and explicit biases, and low judicial salaries that can make it difficult to attract top candidates. These are areas that deserve further study.

But our research also found another contributor: judicial elections. Twenty-two states use contested elections to choose their justices. Some advocates of reform have suggested elections may give underrepresented candidates a fairer shot at winning a seat on the bench. But our study shows that elections, as compared with judicial appointments, have rarely been a path to a top state court for people of color.

Instead, candidates of color face hurdles. We found they raise less money, win less frequently, are challenged more often as incumbents and receive less support from special interest groups.

What's more, candidates of color in some states have reported a "surname challenge," where having a surname associated with a particular racial or ethnic group can make it harder to win. For instance, Elsa Alcala, a Latina judge who was appointed to the Texas Court of Criminal Appeals by Governor Rick Perry, a Republican, has said she chose not to run for reelection in 2018 in part because she thought her Hispanic surname would be seen as a vulnerability and possibly draw a primary challenger.

Nearly half of all states do not have a single justice sitting on their high courts who is Black, Asian, Latino, or Native American.

But we can mitigate these inequities. States don't have to elect their high court justices. If they choose to do so, there are proven approaches, like public financing, that can help open the door for diverse candidates. Lawmakers, the legal profession, and law schools can and should dedicate meaningful resources toward building pipelines for diverse judicial candidates.

For the courts to command legitimacy, they must first reflect the richness of America's diversity.

How to Save the Supreme Court

Frederick A. O. Schwarz Jr.

Supreme Court nominations have become viciously political. Senator Mitch McConnell's yearlong refusal to hold even a hearing on Merrick Garland's nomination is the most egregious, visible example. In a polarized country, vacant Court seats have become a prize worthy of any amount of obstruction and harm to one's political opponents. The Brennan Center's chief counsel, an experienced litigator before the high court, sketches how to make the Court more accountable and put an end to strategic retirements.

Two fundamental flaws in the Constitution's appointment system must be fixed. First, there is no regularized system for Supreme Court appointments. Because presidents can appoint new justices only when a sitting justice resigns or dies, justices are appointed unevenly, so that some presidents have many appointments, while others have few or even none. In addition, because justices now serve longer on average than their predecessors, there are significantly fewer appointment opportunities. These developments fray the only formal link between the Court and the people — nomination by an elected president and confirmation (or not) by elected senators. In the early days of the republic, when the Court was viewed as weak, such defects caused little harm. But today, with the Court holding immense power, the lottery appointment system undermines the Court's constitutional legitimacy and erodes the Court's connection to our democracy.

Second, life tenure permits justices themselves to strategically time their retirements so that an ideologically like-minded president can appoint their successor. Recently, this has become the norm. In addition, some justices have remained on the Court after a severe decline in their mental or physical capacities, in hopes of lasting until a president who shares their legal and policy preferences takes office. Such ideological control of a Supreme Court seat was never contemplated by the founders when they wrote the Constitution.

Fixing these flaws requires a constitutional amendment with two related provisions. First, Supreme Court appointments should be regular. Every president, in the first and third year of each term, would nominate a justice, subject to Senate confirmation. Second, each new Supreme Court justice would serve a single 18-year term — still "during good behavior." (This term limit would not apply to current justices.) And if a new justice did not serve a full term due to retirement or death, his or her successor would be nominated only to complete the remainder of the 18-year term. The successor would not get a new 18-year term.

Regular appointments work only if accompanied by term limits — which have independent benefits as well. Without a term limit, regular appointments, coupled with increasing longevity, would lead to a Court that was huge. Moreover, an 18-year limit fits with a nine-member Court. Eventually, two justices will end their 18-year term in each four-year presidential term, just as two new justices are appointed.

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These two amendments are supported by a close analysis of what the framers did — and, more important, did not do — in formulating the Constitution. Moreover, the amendments are necessary because of how the Supreme Court and the country have changed since the founding. An appointment system designed for a Court that was originally characterized as "feeble" does not fit a Court that has become immensely powerful.

At the Constitutional Convention, the framers emphasized the importance of judicial independence, not wanting the justices to be dominated by the other branches of government. (Hence the Constitution's "good behavior" clause and the ban on Congress reducing sitting justices' pay.) But little attention was paid to the system by which justices would be appointed. Indeed, the proposed system that was adopted — nomination by a president subject to the advice and consent of the Senate — was included in the Proposal of the Committee on Unfinished Parts, an omnibus proposal for all presidential appointments. The committee did not explain its proposal, and the Convention as a whole adopted the proposal without any discussion. Alexander Hamilton did not address this nomination system in the Federalist Papers as part of the ratification debates. He did, however, defend life tenure for justices — no surprise since at the Constitutional Convention, Hamilton had urged life tenure for presidents and for members of the Senate. But Hamilton supported life tenure for justices because the judiciary was "in continued jeopardy of being overpowered, awed or influenced" by Congress and the president. Indeed, Hamilton contended the judiciary needed special protection because of its "natural feebleness," in part because it had "no influence over the sword or the purse." But nobody now considers the Supreme Court to be feeble. Nor would anyone now adopt the critique of John Jay, the first chief justice, that the Court lacked "energy, weight, and dignity."

An appointment system designed for a Court that was originally characterized as "feeble" does not fit a Court that has become immensely powerful.

Beyond asserting that the Court would be feeble, Hamilton gave a second "weighty reason for the permanency" of judicial offices: only a "few men" would have "sufficient skill." In addition, a "temporary duration in office" would discourage those few fit characters "from quitting a lucrative line of practice" (the law), to which they might fear being too old to return. The result would be to "throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity." (When Hamilton wrote, there were few lawyers and far fewer law schools. As our population has expanded by 77 times from the first census in 1790 to the most recent census in 2010, the proportion of lawyers has also grown substantially. For example, in Massachusetts in 1790, there was one lawyer for every 4,240 residents. Fifty years later, it was one for every 1,150 residents. And by 2019, the American Bar Association's tally of nationally active lawyers was one for every 243 people.)

There was early evidence to support Hamilton's concerns and Jay's disparagement of the Court. Some justices quickly left the

Court or publicly disdained its role. It decided far fewer cases than today, only 60 in its first 10 years. And, in the 70 years before the Civil War, the Supreme Court held only two federal statutes unconstitutional. Even after *Marbury v. Madison*, where the Court ruled it had the power to declare federal statutes unconstitutional, the Court held only one other federal law unconstitutional before the end of the Civil War. But that case was *Dred Scott,* which, as we shall see, was one of the triggers for the Civil War.

But, starting after the Civil War when governments grew, the economy exploded, and new rights were claimed and created, the Court's powers steadily increased. Now the Court regularly decides what governments can and cannot do. The Court regularly affects the lives of the people, such as determining where they can go to school, and intimate issues such as whom they can marry, and their reproductive choices. The Court regularly influences the political system, and sometimes decides who controls it, including determining who was elected as president in 2000 and how much money can be spent in elections. Changes in the country have also rendered obsolete Hamilton's second argument favoring the current system. There are now plenty of people able and willing to serve on the Court. And they are not only white men. Moreover, the job has become much more desirable. Justices' financial security has been protected through pensions, and their working lives have improved. For example, even though justices today decide about one-quarter the number of cases the Court decided in the latter part of the 19th century, the clerks supporting each justice have increased from one at the end of the 19th century to four today. So today, for many reasons, there certainly is no shortage of highly qualified people who would be proud to serve as a Supreme Court justice.

There has also been a massive change in the scope and size of government. When George Washington became president, more people worked at his Virginia plantation than in the entire federal government. America was smaller, less complex, less interconnected, less diverse, less free, less economically vigorous. As the nation's population and territory multiplied and the economy grew and changed, laws governing the country exploded. People today expect more of government. Individuals have more rights, and governments at all levels take many more actions impacting those rights, as well as the nation's economy and culture. All this leads to more cases and controversies for the Court to resolve.

Since Washington's time, the Court has moved from the margins of our everyday lives to deciding crucial issues affecting the country. Truly important decisions — such as the shameful 1857 *Dred Scott* decision, in which the Court ruled that Black people could never be citizens and that it was unconstitutional to ban slavery in any state — were rare in the republic's first decades. Since *Dred Scott,* the Court has sometimes been a force for progress on race, and sometimes a force against. As the economy expanded in the late 19th century, so too did regulation and the accompanying legal battles decided by the Court. In the 20th century, the Court began playing a crucial role on social issues, and also extended its power to decide how the American political system operates. In all these areas, the Court's actions have sometimes pleased conservatives and frustrated liberals. And, at other times, the Court's actions have pleased liberals and frustrated conservatives. But the consistent story has been that the Court's power, as well as its independence, has increased.

To appreciate the reach of today's Supreme Court, consider just a few questions decided in the 21st century: Who was elected president. How much money can be spent in elections and by whom. Who can marry whom. The scope of the right to bear arms. The legitimacy of affirmative action in universities. The legality of the Affordable Care Act. The unconstitutionality of part of the Voting Rights Act that had protected minority voting rights for decades. That the Court cannot touch political gerrymandering. Moreover, all these landmark cases were decided by a 5–4 vote, dramatizing the power held by each individual justice, a power also shown by the

fact that, at times, the dissent of just one justice eventually became the majority view.

With the Court deciding so many consequential questions, who gets appointed to the Court, and how often appointments are made, is of great importance not only to constitutional scholars, but to the public as well. Not surprisingly, given the stakes, reactions to the Court have become much more political and partisan. For a while, both Democrats and Republicans at times echoed Franklin Roosevelt's rather tepid critique that justices should "act as justices and not as legislators." But more recently, parties and presidential candidates have expressly promised to appoint justices who would uphold, or strike down, particular decisions such as *Roe v. Wade* or *Citizens United*. Media coverage has also become much more politicized. In the 1950s, for example, articles in *The New York Times* used the terms "liberal justices" or "conservative justices" only eight times. From 2000 to 2010, the paper used those terms 160 times.

As rhetoric surrounding the Court has polarized, confirmations of justices themselves have become more partisan, and in our century, every nomination has been hotly contested. From the start, there were occasional controversies. For example, Washington's nomination of John Rutledge as his second chief justice was defeated because senators disagreed with Rutledge's position on a treaty with Great Britain. Thereafter, from time to time, there continued to be bitter fights over particular nominations, sometimes based on character or competence, and sometimes centering on a point of view. Nonetheless, until our time, these fights were rare. Indeed, the Senate once approved most justices by a "voice vote," when no senator pushed for a recorded vote and there was no meaningful controversy. In the era from George Washington through Abraham Lincoln, 38 of 48 successful Supreme Court nominees were approved by voice vote. From Ulysses Grant through Lyndon Johnson, it was 41 of 67. Thus, over the nation's first 18 decades, two-thirds of successful nominations were approved by voice vote. But, in the 50 years after Lyndon Johnson's presidency, there have been zero voice vote approvals.

Over the nation's first 18 decades, two-thirds of successful nominations were approved by voice vote. But, in the 50 years after Lyndon Johnson's presidency, there have been zero voice vote approvals.

Until the 21st century, moreover, bitter fights over nominees were always followed by a calm period, including overwhelming, sometimes unanimous, bipartisan support for new nominees. This was true for three Nixon nominees and one Ford nominee after the rejection of Nixon's nominees Clement Haynsworth and G. Harrold Carswell; for Reagan's nominee Anthony Kennedy after the Robert Bork defeat; and for Clinton's two nominees after the bitter fight over H. W. Bush's nomination of Clarence Thomas. In the 21st century, however, for the first time in history, every nomination that has reached the Senate (there have been six) has been an ideological battlefield with sharp political divisions and numerous "no" votes.

When the Court had less power than today, presidents were also less rigid in proposing justices who fit an ideological profile. For example, Woodrow Wilson's first two nominees were James

McReynolds, a conservative, a racist, and an anti-Semite, and Louis Brandeis, a progressive and the Court's first Jewish justice. Presidents Hoover, Truman, Eisenhower, and Kennedy also nominated an ideological mix. Today, however, presidents run promising to nominate justices who will hew to a rigid ideological, partisan view.

Procedural changes relating to the Senate have also contributed to increases in controversy and partisanship. The Seventeenth Amendment, ratified in 1913, to provide that senators would be elected by the people (instead of state legislatures), and the Senate changing its rules in 1929 to make all confirmation hearings public, made senators more concerned about the impact of confirmation hearings on their constituents. And then in 2013, the Senate, under Democrat Harry Reid, eliminated the filibuster for all federal judges except Supreme Court nominees. In 2017, Republican Mitch McConnell retaliated by eliminating the filibuster for Supreme Court justices. Filibusters (or the threat of filibusters), which required 60 votes to overcome, had perhaps been a force against overly partisan nominations, since to get to 60, a nominee usually had to win some votes of senators from the other party.

Public interest groups have also played a role in tension around Supreme Court nominations. In 1930, the Republican-controlled Senate, on a bipartisan basis, rejected Republican President Herbert Hoover's nomination of John Parker, who had initially been considered a sure shot. Lobbying by the AFL and the NAACP was crucial to Parker's defeat. In the Bork controversy, opposition nonprofit groups outmatched his supporters. Since then, public interest groups have played an increasingly big role on both sides, on all nominations. Indeed, in 2016, candidate Trump committed to select his nominees from lists provided from a conservative interest group. As president, he picked his two nominees — Neil Gorsuch and Brett Kavanaugh — from those lists.

More powerful. More divided. More controversial. None of these things is necessarily bad. But when some presidents appoint an outsize number of justices, when justices far outlive the elected officials whose views they once reflected, and when justices themselves play a role in determining the ideology of their successor, it is not surprising that more people question the Court's democratic legitimacy.

There is a connection between that frustration and how we have been appointing justices to the Supreme Court. First, as mentioned, because presidents can nominate a justice only when one retires or dies, some presidents get many appointments, others few, or occasionally none. FDR appointed eight justices in less than six years during his second and third terms. William Howard Taft and Warren G. Harding appointed nine in their six and a half years in the Oval Office. But Woodrow Wilson, in the eight years of his two intervening terms, appointed only three. Earlier, in their combined 12 years as president in the mid 19th century, Andrew Jackson and Martin Van Buren (who had been Jackson's vice president) appointed eight justices. But during the following 20 years, the next seven presidents appointed only six. There are many other examples of such unevenness. In addition to the unfairness of these wild swings, the randomness ratchets up the stakes, and the controversy, for every Supreme Court nomination.

Second, while vacancies have always been unpredictable, they have also become increasingly rare. Because justices now serve longer on average, there are significantly fewer opportunities for appointments. For 125 years starting in 1850, after the Court generally had nine members, an average of 14 justices was appointed each quarter century. But since 1975, that average has dropped to eight.

The unevenness, and the increasing rarity of appointments, fray the link between Court and country, reducing the intended legitimacy of the Constitution's Court-appointment system where officials elected to represent the people's interest — the president and the Senate — are meant to "democratically screen" justices.

Third, lifetime tenure now increasingly leads to generations of service. In the 19th century, death rather than retirement was the normal end of a justice's service. Of the 38 justices who left the Court in the 19th century, 27 died and only 11 resigned. That ratio switched in the 20th century. Indeed, after 1950, of 26 justices who left the Court, only 4 did so by death. This shift helped open the door to the burgeoning "strategic retirement" practice of justices acting politically to time their retirements so that a president who shares their legal-policy preferences gets to propose their successor.

And unlike when Hamilton foresaw that only a few "men" would consider joining the Court, today in our much more populous country, there are many qualified lawyers, and they are no longer only white, Protestant men. However, because of the current system of increasingly rare — and random — vacancies, and because of increased polarization, today the Court is becoming less diverse in terms of experience. For decades, almost every new justice — all except for Sandra Day O'Connor and Elena Kagan — has come from a job on a circuit court of appeals. Not one since O'Connor has been an elected official. This is a huge change from George Washington's appointees, all of whom had political experience, as well as from the many political jobs that had been held by the great Chief Justice John Marshall, and from the varied experience of the justices who decided *Brown v. Board of Education*.

The change to relying on the courts of appeals to feed the Supreme Court is part of a trend to appoint ideologically reliable justices. This trend is one of many reasons why the wide swings in appointment opportunities from one president to another, coupled with the overall reduction in appointment opportunities, adds to nomination anxiety and increases political characterizations of the Court.

Unlike much of the Constitution, our Supreme Court judicial appointment and tenure system has not been emulated at home or abroad. Of the 50 states, none uses the same system. And no other democratic nation follows our model. Moreover, the Constitution has been amended to address how presidents and senators are elected and to limit how long a president can serve. This confirms that the selection method, and the terms, of justices are appropriate subjects to explore.

Continued reliance on a 232-year-old system for appointing justices harms the Court and the country. We need a new system that cures the harms but preserves judicial independence. This requires a constitutional amendment. Constitutional amendments must clear a high hurdle — approval by two-thirds of both the Senate and the House, and then by three-quarters of the state legislatures. Almost 12,000 amendments have been proposed, and only 27 adopted. But, as James Madison taught, amendments will be "suggested by experience" to address "discovered faults." Our experience has demonstrated the faults of the appointment system for Supreme Court justices.

So much has changed since the founding. No longer can you imagine a chief justice saying the Court lacked "energy, weight, and dignity." Nobody today would join Hamilton in describing the Court as "feeble." Gone are the days when most Supreme Court nominations were promptly approved by a voice vote. Gone are the days when Court decisions were usually unanimous.

Instead of a constitutional amendment, some now suggest "packing" the Court, perhaps to avenge the Senate Republicans' refusal to grant Merrick Garland a hearing. But, even if this were politically possible (it requires control of the presidency and both houses of Congress), it is a short-term partisan legislative step, not a bipartisan constitutional solution. It cures nothing. Instead, it would exacerbate the Court's politicization. Moreover, the history of Court packing is not glittering. The most famous attempt, Franklin Roosevelt's in 1937, was a dismal failure. Despite FDR having won 98.4 percent of the Electoral College vote in 1936, his plan was soundly defeated — opposed in Congress by both Democrats and Republicans, and even by the justices

who had been on FDR's side in cases addressing the New Deal.

There are bits of it in earlier history. In 1801, the lame-duck John Adams Congress "unpacked" the Court from six to five members to limit president-elect Jefferson's opportunities to appoint justices. When they took office, the Jeffersonians repealed the change. Later, in 1861, the Civil War Congress increased the Court to 10 members to give Lincoln more appointments. (After Lincoln was assassinated, Congress reduced the Court to seven to prevent Andrew Johnson from having any appointment opportunities. The number was restored to nine when Ulysses Grant became president.)

Any possible Court packing would be correctly perceived as a partisan power grab.

Nothing in our nation's history supports Court packing today, however. Any possible Court packing would be correctly perceived as a partisan power grab. And when party fortunes change, the party that lost the first packing vote would proceed to pack the Court in its favor.

In any event, to address fundamental problems — those that fray the Court's link to our democracy, and that add to the polarization of the Court — we need a constitutional amendment. Given the high hurdles for amendments, this cannot be achieved without bipartisan support. This should be achievable. In the past, both parties have been harmed at different times by the bunching of Supreme Court appointments. And at different times in the future, both parties will be harmed again. Both parties are also being harmed by the overall reduction in vacancies.

But the proposed amendment is neither Republican nor Democratic. It is rooted in the most fundamental American values. The founder of the Federalist Society, Steven Calabresi, as well as liberal icon Sanford Levinson, have written in favor of similar constitutional changes. Both parties understand the importance of a regular opportunity to connect the Court to the country. Both parties would benefit from a return to the norms of appointments from the shrinking numbers starting in 1975. While each party has obtained short-term advantages from time to time from strategic retirements, neither party can endorse a system where justices themselves can make political decisions on when to retire so as to help mold the Court's future. Similarly, while both parties can now increasingly see benefits in appointing younger justices — with a bias against appointing justices over 60 — neither party has a principled reason to support a system that creates that bias.

The 18-year term limit should not apply to current justices. To do so would not seem fair. (As a point of precedent, the Twenty-Second Amendment limiting the president to two terms did not apply to Harry Truman, the president in office when the amendment was proposed to Congress.) So for a while, the Court will have more than nine members, and at times an even number. But Supreme Courts in many nations are larger than ours. And, at the founding, the Court had six members; under President Lincoln it had ten; and after Justice Scalia's death in 2016, it had eight. (Indeed, an even number might well encourage more consensus opinions.)

However one feels about either the Court's historical or current ideological direction, it should not affect one's support for the proposed constitutional amendment. The Court will continue to evolve sometimes in a liberal and sometimes in a conservative direction. All believers in equity and in there being a connection between the Court and the country — where a potential justice is "screened by the democracy" — should decry the current system of wildly uneven and increasingly rare numbers of appointments. All should welcome regular appointments as more consistent with our constitutional vision. All should recognize that bunching of appointments and gaps in appointments have hurt both parties in the past and will hurt both parties in the future unless the Constitution is amended. And all should welcome an end to strategic retirement decisions and to the political appearance of such decisions.

So much that has changed about Court and country drives the need for a constitutional amendment. But our most fundamental ideals have not changed. We remain a nation based upon the truth that, in the words of the Declaration, "Governments deriv[e] their just powers from the consent of the governed." We remain a nation that, in the words of the Preamble to the Constitution, was "ordain[ed] and establish[ed]" by "We the People." And we continue to strive to assure that, in the words of the Gettysburg Address, "[T]his nation, under God, shall have a new birth of freedom — and that government of the people, by the people, for the people shall not perish from the earth."

Adoption of a constitutional amendment to make the Court more democratically accountable through regular appointments, a return to the traditionally larger number of appointments, and the end of strategic retirements will be a next step on this nation's journey to try to live up to these lasting truths.

Court Packing Is Not the Solution

Walter Shapiro

First came the blockade of Merrick Garland's nomination. Then, President Trump's two picks for the Court, taken from a list offered by the Federalist Society and approved almost entirely along party lines. In response, some have called for Democrats to "pack the courts" should they retake the White House and Senate, a move once attempted by President Franklin Delano Roosevelt. That would be a grave mistake.

On a sparkling Saturday morning earlier this month, Pete Buttigieg stood on an elevated back porch in Des Moines pitching his notions on changing the structure of the Supreme Court. As the 37-year-old mayor of South Bend, Indiana, put it, "I'm trying to get everyone thinking about the fact that structural reforms are an option."

Once Democrats limited themselves to talking about appointing Supreme Court justices who would uphold *Roe v. Wade* and overturn *Citizens United.* Now 2020 Democrats are openly discussing term limits for Supreme Court justices, increasing the number of justices on the Court, and other reforms designed to thwart the conservative judicial vision.

At a mid-May town meeting in Nashua, New Hampshire, California Senator Kamala Harris said in response to a question, "I'm open to this conversation about increasing the number of people on the United States Supreme Court." And Beto O'Rourke, the former three-term congressman who narrowly lost a Texas Senate race in 2018, has been pumping for his democracy agenda that includes a constitutional amendment mandating 18-year term limits for Supreme Court justices.

When *The New York Times* asked the 2020 Democrats about whether they favored expanding the size of the Supreme Court, Massachusetts Senator Elizabeth Warren said that she was "open" to the notion. Warren, a former Harvard law professor, pointed out, "The number of people on the Supreme Court is not constitutionally constricted." Amy Klobuchar, who serves on the Senate Judiciary Committee, also said that she has an open mind on the question.

Call it the revenge of Merrick Garland, who never even received a Senate Judiciary Committee hearing when Barack Obama nominated him to fill Antonin Scalia's seat in 2016.

Buttigieg, while speaking to about 150 voters in an affluent Des Moines neighborhood, made the Garland connection explicit. "Not only has the makeup and the size of the Court changed about half a dozen times in American history," he said, "but I would argue that it also changed in 2015 when the Republicans changed the number of justices on the Supreme Court temporarily to eight. And then they changed it back to nine when they took power."

The South Bend mayor is correct that the number of Supreme Court justices, which can be altered by legislation, has varied from 6 to 10 at various points during the 18th and 19th centuries. But that number has been fixed at nine justices since 1869.

Rather than getting caught up in the merits of specific reform proposals, the real question is whether the Democrats, if victorious in 2020, should try to tinker with the structure of the Court.

The obvious parallel is Franklin Roosevelt's effort, shortly after his 46-state landslide

This piece appeared on the Brennan Center website, June 24, 2019. Walter Shapiro is a Brennan Center fellow.

reelection to a second term, to pack the Supreme Court.

Frustrated by a string of conservative Supreme Court decisions that endangered the future of the New Deal, FDR startled the political world in early 1937 by proposing a radical reshaping of the Court. Under Roosevelt's complicated legislative plan, the size of the Court would increase each time a sitting justice reached his 70th birthday and failed to retire. What this meant in practice was that, if the legislation passed, Roosevelt would have the power to immediately appoint six new justices to augment the six who were then over 70.

FDR's court-packing plan has been remembered as a case study in how even popular presidents can fall victim to the arrogance of power and overextend their political mandates.

But the scheme, which was opposed by leading Senate New Dealers, also fell apart for other reasons. A conservative justice, Owen Roberts, suddenly decided that Roosevelt's ambitious measures were constitutional after all and abandoned his reactionary allies. Another conservative jurist (Willis Van Devanter) retired, opening up a seat for liberal Hugo Black. And, finally, Senate Majority Leader Joseph Robinson died suddenly, depriving FDR of his most loyal ally in the Court fight.

At a time when Donald Trump and Senate Majority Leader Mitch McConnell are shredding the norms of democracy on almost a daily basis, it is difficult to argue that Democrats should be constrained by Roosevelt's failed legislative maneuver more than eight decades ago.

But the lasting moral from the court-packing fight is that, in a functional democracy, structural problems often solve themselves. Even without legislation in the late 1930s, five Supreme Court justices either died or retired during Roosevelt's second term, allowing him to at last create a liberal majority.

The lasting moral from the court-packing fight is that, in a functional democracy, structural problems often solve themselves.

The problem with 21st-century efforts to reshape the Supreme Court is that, while legal, they seem like a banana-republic attempt to change the rules in the middle of the game. Yes, McConnell has trampled Senate traditions in the rush to confirm conservative judges. But if there is any hope to restore a less politicized judiciary after Trump leaves office, it will not be achieved by imitating McConnell's bully tactics.

It is also plausible that elections could deprive McConnell of the ability to thwart Democrats' attempts to fill vacancies on the courts. If, for example, a Democrat wins the presidency in 2020, it is not hard to imagine a 50–50 Senate with the Democratic vice president casting the deciding vote. Also, the dwindling band of Senate GOP moderates like Alaska's Lisa Murkowski (who is not up for reelection until 2022) may temper McConnell's dreams of guaranteeing a permanent right-wing Supreme Court majority.

The principled argument against 21st-century court packing is that it is dangerous to tamper with the mechanisms of democracy to thwart a single political figure — in this case, McConnell. For times change while power eventually ebbs. But restructuring the Supreme Court could have lasting repercussions long after the current crisis is as forgotten as the mid-1930s conservative decisions that jeopardized the New Deal.

The Supreme Court Needs a Code of Ethics

Johanna Kalb and Alicia Bannon

Judge Brett Kavanaugh's partisan testimony during his confirmation hearings violated the code of ethics for appellate and district court judges. The Supreme Court, however, has no such code, and complaints filed against him were dismissed after he was confirmed. This episode and others, including biased public comments from justices and their appearance at partisan fundraisers and events, have raised the question of whether the nation's highest court needs its own ethics code.

Today, the nine justices on the Supreme Court are the only U.S. judges — state or federal — not governed by a code of ethical conduct. But that may be about to change. Justice Elena Kagan recently testified during a congressional budget hearing that Chief Justice John Roberts is exploring whether to develop an ethical code for the Court. This was big news, given that the chief justice had previously rejected the need for a Supreme Court ethics code.

In fact, however, the Supreme Court regularly faces challenging ethical questions, and because of their crucial and prominent role, the justices receive intense public scrutiny for their choices. Over the last two decades, almost all members of the Supreme Court have been criticized for engaging in behaviors that are forbidden to other federal court judges, including participating in partisan convenings or fundraisers, accepting expensive gifts or travel, making partisan comments at public events or in the media, or failing to recuse themselves from cases involving apparent conflicts of interest, either financial or personal. Congress has also taken notice of the problem. The For the People Act, which was passed in March 2019 by the House of Representatives, included the latest of a series of proposals by both Republican and Democratic legislators to clarify the ethical standards that apply to the justices' behavior.

Much of the Supreme Court's power comes from the public's trust in the integrity and fairness of its members. Controversies over the justices' ethical choices threaten this trust at a time when faith in our democratic institutions is already low. In this era of hyperpartisanship, when confidence in the Supreme Court is imperiled by the rancor of recent confirmation battles and ongoing criticism from the president, the Court's decision to adopt its own ethical reforms would send a clear and powerful message about the justices' commitment to institutional integrity and independence. Moreover, voluntarily adopting a code (rather than waiting for Congress to impose one) could actually enhance the Court's power by building its credibility and legitimacy with the public, thereby earning support for its future decisions.

Excerpted from the Brennan Center report *Supreme Court Ethics Reform,* published September 24, 2019.

There are three changes the Court could adopt right now to bring clarity and transparency to the ethical standards governing the nation's most powerful jurists:

- adopting its own Code of Conduct;
- establishing a regular practice of explaining its recusal decisions; and
- strengthening its rules governing gifts and financial disclosures.

The justices' embrace of these reforms would end the long-standing debate about why the nation's highest court lacks the kind of written ethical code that is increasingly ubiquitous, not only for government officials but also in schools, private corporations, and many other organizations. It would also reestablish the U.S. Supreme Court as a beacon of accountability and rule of law at a moment when these core democratic principles are under attack, domestically and around the world.

EQUALITY

Myth, Culture, and Policy

Ta-Nehisi Coates and Melissa Murray

Ta-Nehisi Coates has been lauded as the James Baldwin of our time. His work to diagnose the root causes of America's social ills has been a critical contribution to today's movement for racial justice. Before an audience of 500, Coates joined NYU professor Melissa Murray for a discussion on race, criminal justice, the 2020 presidential election, and more.

Prof. Melissa Murray: Legal scholar James Foreman has hypothesized that one of the reasons middle-class Black people are comfortable talking about policing and enforcement, and why it's part of the national conversation, is because that is the most immediate threat to them. They could imagine themselves, or their sons and their daughters, being stopped by the police on the street. The prospect of mass incarceration feels much more remote. But your writing suggests that it's actually much closer than we perhaps appreciate.

Ta-Nehisi Coates: The majority of Black people I know, class aside, do not have to reach very far to find somebody in prison. You don't have to go that far. If you go to the family reunion, even if you're middle class, there usually is somebody who's been incarcerated there. For me, it would be multiple people.

...

Murray: There are various technologies of discipline that get imposed on the weak. As you know, the weak are often the underclass. Mass incarceration is one scourge, the foster care system and the child welfare system is surely another. Truancy might be a species of that. There are all of these technologies of discipline. But I would suggest that these technologies are not just about disciplining the weak, but about also casting a shadow that in turn disciplines everyone else, or at least everyone who might be associated with the weak.

...

Coates: I think the power of journalism is how it can turn ideas into reality and can confront you to make you realize something, something that maybe you kind of knew as an idea or as a notion, but did not understand as a reality. When I published "Case for Reparations" in 2014, I would be places, and white people would come up to me and they would say, "I read that article. I really had no idea about redlining. I had no idea at all." And they meant it. They were serious. It was clear to me at that time, in the way that they approached me, that it actually would have been deeply malicious to be like, "How didn't you know?" It was clear these were good, well-

Excerpted from remarks given at *A Conversation with Ta-Nehisi Coates and Melissa Murray* at NYU School of Law, January 31, 2019. Melissa Murray is a member of the Brennan Center Board of Directors.

meaning folks who just literally did not know about something that, if you're Black, you just sort of take for granted.

...

I would argue that myth is ultimately the source, for instance, of this question about punitive justice that's so often directed toward Black people. About why punishment is often seen as a solution. If you believe somebody's less human, that becomes a lot easier to do. How do we decide who's human? How do we reify those beliefs? Where does the dialogue happen? It happens in the world of narrative. It happens in the world of story.

Prisons are an HR program in a lot of communities in America.

Those Marvel movies are defining for people who is going to be human and who is not. So, if you give me the opportunity to offer some of the source material for that, as somebody who's concerned about the humanity of Black people, about the humanity of all people, about the policy that comes out of that, why would I not take it? It's right in line with the mission. This is the root of it. The comics and the creative, ultimately, I actually feel might be more important than the journalism. With journalism, I'm dealing with end results. I'm dealing with the decision already having been made that somebody isn't human. But where you're at the level of myth, you're actually fighting the battle of who is human. That's why this diversity, why *Black Panther,* was so significant.

...

Prisons are an HR program in a lot of communities in America. In places that have been deindustrialized, you build a prison. This provides jobs. You're dealing with a social problem, and people have decided to address it by being punitive toward Black people. It's difficult for me to see something that is that enmeshed. One of the reasons they say people fought so hard against Obamacare is that once it got in, it would be extremely hard to pull it out. I think the same thing goes for mass incarceration.

...

Murray: I'm left with how the weight of Black exceptionalism is so real. You have to be twice as good to get half as far, as you say. Even then, when you get there, you are constantly avoiding being torn down entirely. It makes me wonder, maybe the greatest marker of success for Black people would be to have all of the markers of success while also being utterly mediocre.

The Government Has the Power to Fight Far-Right Violence. It Must Use It.

Michael German and Emmanuel Mauleón

The last three years have seen an alarming spike in the number of hate crimes and incidents of white supremacist violence. But the federal government is failing in its response. A former undercover FBI agent who twice infiltrated neo-Nazi hate groups explains what went wrong.

On April 27, 2019, a white supremacist armed with a high-powered rifle walked into a San Diego synagogue and shot four people, one fatally, before fleeing and finally surrendering to police. A letter the gunman allegedly posted online shortly before the shooting claimed credit for a previous arson attack on an Escondido mosque, spewed racist "white genocide" conspiracy theories, cited earlier white supremacist attacks against a synagogue in Pittsburgh and mosques in New Zealand, and urged like-minded white Christians to commit further acts of violence.

Was this crime an act of terrorism, a hate crime, or just another homicide? Under current Justice Department policies, how far-right violence targeting people based on race, religion, national origin, gender, sexual orientation, gender identity, or disability gets categorized is often arbitrary. But it has significant consequences for how federal officials label these crimes in public statements, how they prioritize and track them, and whether they will investigate and prosecute them. As a result, the Justice Department doesn't know how many people far-right militants attack each year in the United States, which leaves intelligence analysts and policymakers in the dark about the impact this violence inflicts on our society and how to best address it. More important, the failure to properly label and respond to far-right violence deprives victimized communities of basic human dignity and equal protection of the law.

Developing more effective federal policies to address far-right violence requires a new approach that better protects vulnerable communities from all forms of violence and utilizes restorative justice practices to remediate the communal injuries that these crimes inflict.

Attacks like the San Diego synagogue shooting often fit the federal definitions of both domestic terrorism and hate crimes, as well as state violations like murder. Laws governing these crimes all carry substantial penalties, but how the Justice Department initially labels them becomes important chiefly because its policies de-prioritize hate crimes investigations. Terrorism investigations are the FBI's number one priority and are well resourced. These investigations tend to look broadly to determine if an ongoing criminal organization may have supported the attack or be planning new ones. In contrast, civil rights violations like hate crimes rank fifth out of eight priorities, and investigations tend to focus narrowly on a particular attack or attacker. To make matters worse, the Justice Department defers the vast majority of hate crimes investigations to state and local law enforcement without any federal evaluation to determine if

Excerpted from the Brennan Center report *Fighting Far-Right Violence and Hate Crimes*, published July 1, 2019.

the perpetrators are part of a larger violent far-right group. State and local law enforcement are often ill equipped or unwilling to properly respond to these crimes.

The Justice Department also regularly treats white supremacist violence not as domestic terrorism or hate crimes, but as gang crimes, which rank sixth on the FBI's priority list. The Justice Department has made no effort to comprehensively account for all incidents of far-right violence across these different program categories to reveal the full scope of their impact on American society.

Though far-right attacks represent just a tiny proportion of the violence that takes place in the U.S. each year, they require specific attention because they pose a persistent threat to vulnerable communities, particularly communities of color, immigrants, LGBTQ people, women, the disabled, and religious minorities. These communities are already disproportionately victimized by other violent crimes, including police violence, much of which is never prosecuted. Moreover, the organized nature of far-right groups that often commit this violence allows them to quickly replace any member who is incarcerated and to carry out further acts of violence after any individual crime is successfully prosecuted. Finally, since far-right attacks are intended to inflict injuries beyond the direct victims by threatening and intimidating entire communities of people who share similar attributes, they demand a more comprehensive and strategic government response. Simply increasing criminal penalties for these perpetrators does little to redress the broader social injuries that result.

The Justice Department doesn't need new laws, it needs new policies.

Current and former Justice Department officials have been calling for a new domestic terrorism statute to combat far-right violence, but there are already dozens of federal statutes carrying severe penalties that are available to investigators and prosecutors pursuing these crimes, as detailed in our earlier white paper, *Wrong Priorities on Fighting Terrorism.* Which of these statutes prosecutors ultimately charge in a particular case is far less important than how Justice Department officials label these attacks in public statements when they occur, and how they prioritize, resource, and track the investigation and prosecution of these crimes. Under current policies, when Justice Department officials call far-right attacks hate crimes or gang crimes and place them far down their priority list, they are sending victimized communities the unmistakable message that the government values their lives less. The Justice Department doesn't need new laws, it needs new policies. Moreover, the Justice Department has repeatedly abused its domestic terrorism authorities to target environmental activists, peace advocates, and civil rights protesters, raising appropriate concerns about how it would use any new powers Congress might provide.

Justice Department policies regarding far-right violence undermine our nation's security by discounting the safety concerns of American communities victimized by this reactionary violence and official indifference. The federal government's failure to ensure

equal protection of the law erodes community resilience and social cohesion. While a full assessment of the true nature, scope, and impact of far-right violence is necessary to develop sound strategies to address it, as our first white paper argued, this does not mean policymakers must wait passively until this data is fully collected. We must explore new approaches to the problem of far-right violence, not only to address the present policy failures but to determine whether our traditional legislative approach to hate crimes — increasing criminal penalties — is effective in reducing the harms from far-right violence.

The Racist Tilt of the Electoral College

Wilfred U. Codrington III

Twice in 16 years, the Electoral College handed the presidency to a candidate who lost the popular vote. The system's critics note that even when the results match the electorate's votes, it forces campaigns to focus on a narrow group of swing states while ignoring most voters. Few have noted the racial imbalance built into the Electoral College by the elevation of slavery during the drafting of the Constitution.

Is a color-blind political system possible under our Constitution? If it is, the Supreme Court's evisceration of the Voting Rights Act in 2013 did little to help matters. While Black people in America today are not experiencing 1950s levels of voter suppression, efforts to keep them and other citizens from participating in elections began within 24 hours of the *Shelby County v. Holder* ruling and have only increased since then.

In *Shelby County*'s oral argument, Justice Antonin Scalia cautioned, "Whenever a society adopts racial entitlements, it is very difficult to get them out through the normal political processes." Ironically enough, there is some truth to an otherwise frighteningly numb claim. American elections have an acute history of racial entitlements — only they don't privilege Black Americans.

For centuries, white votes have gotten undue weight, as a result of innovations such as poll taxes and voter-ID laws and outright violence to discourage racial minorities from voting. (The point was obvious to anyone paying attention: as William F. Buckley argued in his essay "Why the South Must Prevail," white Americans are "*entitled* to take such measures as are necessary to prevail, politically and culturally," anywhere they are outnumbered because they are part of "the advanced race.") But America's institutions boosted white political power in less obvious ways, too, and the nation's oldest structural racial entitlement program is one of its most consequential: the Electoral College.

Commentators today tend to downplay the extent to which race and slavery contributed to the framers' creation of the Electoral College, in effect whitewashing history: of the considerations that factored into the framers' calculus, race and slavery were perhaps the foremost.

Of course, the framers had a number of other reasons to engineer the Electoral College. Fearful that the president might fall victim to a host of civic vices — that he could become susceptible to corruption or cronyism, sow disunity, or exercise overreach — the men sought to constrain executive power consistent with constitutional principles such as federalism and checks and balances. The delegates to the Philadelphia convention had scant conception of the American presidency — the duties, powers, and limits of the office. But they did have a handful of ideas about the method for selecting the chief executive. When the idea of a popular vote was raised, they griped openly that it could result in too much democracy. With few objections, they quickly dispensed with the notion that the people might choose their leader.

This article was published by *The Atlantic,* November 17, 2019. Wilfred U. Codrington III is the Bernard and Anne Spitzer Fellow at the Brennan Center.

But delegates from the slaveholding South had another rationale for opposing the direct election method, and they had no qualms about articulating it: doing so would be to their disadvantage. Even James Madison, who professed a theoretical commitment to popular democracy, succumbed to the realities of the situation. The future president acknowledged that "the people at large was in his opinion the fittest" to select the chief executive. And yet, in the same breath, he captured the sentiment of the South in the most "diplomatic" terms:

> There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to fewest objections.

Three-quarters of Americans live in states where most of the major parties' presidential candidates do not campaign.

Behind Madison's statement were the stark facts: The populations in the North and South were approximately equal, but roughly one-third of those living in the South were held in bondage. Because of its considerable, nonvoting slave population, that region would have less clout under a popular-vote system. The ultimate solution was an indirect method of choosing the president, one that could leverage the three-fifths compromise, the Faustian bargain they'd already made to determine how congressional seats would be apportioned. With about 93 percent of the country's slaves toiling in just five southern states, that region was the undoubted beneficiary of the compromise, increasing the size of the South's congressional delegation by 42 percent. When the time came to agree on a system for choosing the president, it was all too easy for the delegates to resort to the three-fifths compromise as the foundation. The peculiar system that emerged was the Electoral College.

Right from the get-go, the Electoral College has produced no shortage of lessons about the impact of racial entitlement in selecting the president. History buffs and *Hamilton* fans are aware that in its first major failure, the Electoral College produced a tie between Thomas Jefferson and his putative running mate, Aaron Burr. What's less known about the election of 1800 is the way the Electoral College succeeded, which is to say that it operated as one might have expected, based on its embrace of the three-fifths compromise. The South's baked-in advantages — the bonus electoral votes it received for maintaining slaves, all while not allowing those slaves to vote — made the difference in the election outcome. It gave the slaveholder Jefferson an edge over his opponent, the incumbent president and abolitionist John Adams. To quote Yale Law's Akhil Reed Amar, the third president "metaphorically rode into the executive mansion on the backs of slaves." That election continued an almost uninterrupted trend of southern slaveholders and their dough-faced sympathizers winning the White House that lasted until Abraham Lincoln's victory in 1860.

In 1803, the Twelfth Amendment modified the Electoral College to

prevent another Jefferson-Burr–type debacle. Six decades later, the Thirteenth Amendment outlawed slavery, thus ridding the South of its windfall electors. Nevertheless, the shoddy system continued to cleave the American democratic ideal along racial lines. In the 1876 presidential election, the Democrat Samuel Tilden won the popular vote, but some electoral votes were in dispute, including those in — wait for it — Florida. An ad hoc commission of lawmakers and Supreme Court justices was empaneled to resolve the matter. Ultimately, they awarded the contested electoral votes to Republican Rutherford B. Hayes, who had lost the popular vote. As a part of the agreement, known as the Compromise of 1877, the federal government removed the troops that were stationed in the South after the Civil War to maintain order and protect Black voters.

The deal at once marked the end of the brief Reconstruction era, the redemption of the old South, and the birth of the Jim Crow regime. The decision to remove soldiers from the South led to the restoration of white supremacy in voting through the systematic disenfranchisement of Black people, virtually accomplishing over the next eight decades what slavery had accomplished in the country's first eight decades. And so the Electoral College's misfire in 1876 helped ensure that Reconstruction would not remove the original stain of slavery so much as smear it onto the other parts of the Constitution's fabric, and countenance the racialized patchwork democracy that endured until the passage of the Voting Rights Act of 1965.

What's clear is that, more than two centuries after it was designed to empower southern whites, the Electoral College continues to do just that. The current system has a distinct, adverse impact on Black voters, diluting their political power. Because the concentration of Black people is highest in the South, their preferred presidential candidate is virtually assured to lose their home states' electoral votes. Despite Black voting patterns to the contrary, five of the six states whose populations are 25 percent or more Black have been reliably red in recent presidential elections. Three of those states have not voted for a Democrat in more than four decades. Under the Electoral College, Black votes are submerged. It's the precise reason for the success of the southern strategy. It's precisely how, as Buckley might say, the South has prevailed.

Among the Electoral College's supporters, the favorite rationalization is that without the advantage, politicians might disregard a large swath of the country's voters, particularly those in small or geographically inconvenient states. Even if the claim were true, it's hardly conceivable that switching to a popular-vote system would lead candidates to ignore more voters than they do under the current one. Three-quarters of Americans live in states where most of the major parties' presidential candidates do not campaign.

More important, this "voters will be ignored" rationale is morally indefensible. Awarding a numerical few voting "enhancements" to decide for the many amounts to a tyranny of the minority. Under any other circumstances, we would call an electoral system that weights some votes more than others a farce — which the Supreme Court, more or less, did in a series of landmark cases. Can you imagine a world in which the votes of Black people were weighted more heavily because presidential candidates would otherwise ignore them, or, for that matter, for any other reason? No. *That* would be a racial entitlement. What's easier to imagine is the racial burdens the Electoral College continues to wreak on them.

Critics of the Electoral College are right to denounce it for handing victory to the loser of the popular vote twice in the past two decades. They are also correct to point out that it distorts our politics, including by encouraging presidential campaigns to concentrate their efforts in a few states that are not representative of the country at large. But the disempowerment of Black voters needs to be added to that list of concerns, because it is core to what the Electoral College is and what it always has been.

The Race-conscious establishment — and retention — of the Electoral College has supported an entitlement program that our 21st-century democracy cannot justify. If people truly want ours to be a race-blind politics, they can start by plucking that strange, low-hanging fruit from the Constitution.

Women and Democracy

Tanzina Vega, Lauren-Brooke Eisen, Chisun Lee, and Jennifer Weiss-Wolf

Women make up most of the U.S. population but less than a quarter of Congress. Their political power lags in state legislatures, the courts, and laws governing different areas of their lives. Three Brennan Center experts weighed in on those challenges and the barriers to change.

Tanzina Vega: We're heading into a very high-stakes election. Women turn out to vote at higher rates than men, but there are racial elements and demographic shifts that affect who of those women come out to vote. How will barriers to voting affect women, specifically women of color, in 2020?

Chisun Lee: This is a critical moment to be talking about that question — about women and our political power. We're in a moment where it seems like our political power is growing. It's strong. Women are the critical voters in certain elections. Our power as donors has grown in the past few years. Our power as candidates to run for office and win office has grown.

But all of that has happened, not because of the processes in our democracy, but oftentimes in spite of the processes — policies like restrictive voter ID laws, long lines, inequitable distribution of Election Day resources. Those factors and many others are going to affect communities of color more. And if you think about who can't afford to stand in line for a long time, who has multiple duties between job and home, all of these barriers add up.

The fact that we are turning out in such high numbers and mattering so much in certain elections is happening in spite of these obstacles. These policies don't call us out as women or women of color. They seem to be neutral. But they're not. We need to remove these barriers and improve our democratic process so that voting becomes easier for everybody and doesn't have the effect of excluding women and women of color and lower-income women more than other segments of society.

...

Vega: Another trend we've seen over the past few years has been partisan gerrymandering, which seems to affect Democratic areas more heavily. And, as we know, more women tend to be Democrats than Republicans. How do you see that playing out in 2020?

Lee: Since the 2010 cycle of redistricting — the redrawing of lines in who represents us — states that have safe, one-party majorities have tended to draw the lines to favor themselves. And extreme partisan gerrymandering has the effect of causing women incumbent officeholders to have to face off against other incumbents, and thus stand a greater risk of losing their seat. It has the effect of diluting the voting power of women.

Excerpted from remarks given at *Women and Democracy*, sponsored by WNYC and the Brennan Center, at the Greene Space, New York City, October 29, 2019. Tanzina Vega is host of *The Takeaway*.

Jennifer Weiss-Wolf: There is data to show that the states with the most heavily gerrymandered districts are the same states that passed the most restrictive abortion laws this past session. So, if there's any connecting the dots to be done, that's about as clear as it gets.

...

Lauren-Brooke Eisen: There are really two systems of punishment in this country, two systems of justice — one for people who are wealthy and one for people who aren't. We know that about 80 percent of people who cycle in and out of incarceration are indigent, and we know that because they qualify for public defenders. If you took a snapshot of who's in our county jails right now, about 60 percent of those people are there awaiting their trial. They haven't actually been convicted of a crime. And the majority of those people are there because they're too poor to pay bail. And if you are wealthy, you could be someone who maybe is more dangerous to society, but you have enough money to pay your bail and have a lawyer who can advocate for you.

We think about these issues a lot, and we're about to release a report in which we've examined the costs of assessing and collecting court-imposed fees and fines across three states: New Mexico, Texas, and Florida. We're really looking at it from the perspective of what does it cost counties to collect these fees and fines. We've discovered that counties are not collecting as much money as they think they are. And what's really significant is that so many people in this country are walking around with decades of criminal justice debt that they literally cannot pay off. About 40 million people in this country have a suspended driver's license, in many cases because of nonpayment of fees and fines. This is really criminalizing poverty, and that's at the core of a lot of the work that we do at the Brennan Center.

...

Weiss-Wolf: Our incarceration system is not created with women at the decision-making table or with women's bodies or needs in mind. I need to be very clear. The entire system was not built for women or around women. So, now that women are starting to be incarcerated at increasing levels, our system almost hasn't known what to do, other than to treat them as a sort of exception to the rule. The very question of menstruation behind bars is one that has become elevated in the public discussion, such that the provision of menstrual products was built into this historic criminal justice reform bill that passed this Congress and was signed by this president last year. That was almost unheard of five years ago — to be thinking about menstruation or women's bodies at the crossroads of what it means to demonstrate full and fair representation in our systems. Think about it: somebody who gets paid 17 cents an hour to do prison labor is being asked to spend $5 on tampons because pads aren't even provided by the prison. That's why menstruation matters.

PROTECTING FUNDAMENTAL RIGHTS

Stop Collecting Immigrants' Social Media Data

Faiza Patel

As part of its extreme vetting policy, the Trump administration is ramping up collection of social media handles from travelers and visa applicants. This policy is a threat to civil liberties and risks spurring discrimination, particularly against immigrants from Muslim countries. Last summer, the Brennan Center called for a halt to social media collection, and in December it filed a major lawsuit against the Trump administration.

Since the 2016 election, Congress has woken up to the consequences of allowing social media companies to hold vast stores of information about hundreds of millions of users and use it for their own purposes. But it continues to close its eyes to the dangers of allowing the Department of Homeland Security to tap into the same well of information for immigration decisions.

The centralization of highly personal information in the hands of this powerful agency is detrimental to privacy, opens the door to discrimination and abuse, and threatens freedom of speech and association.

An errant Facebook comment flagged by an algorithm can mark someone as a security risk, barring the door to a refugee fleeing war or a mother seeking to visit her American children. Despite claims of threats to national security, there is scant payoff. Empirical research shows that the likelihood of getting killed in a terrorist attack by an immigrant or visitor to this country is vanishingly small.

And posts and tweets are often unreliable. People posture, joke, speak in shorthand, and use cultural references that are hard for others to interpret. It's no surprise that the DHS's own pilot programs show that social media has not been useful in identifying threats.

As my colleagues and I have documented, the DHS is finding ways to use social media data in several programs. It makes its way into the agency's network of databases through searches of phones and laptops at the border and checks of people applying for visas and immigration benefits. It is used to vet Syrian and Iraqi refugees, as well as some asylum seekers. The DHS has several opaque multimillion-dollar contracts with private data analytics companies like Palantir.

The State Department, DHS's close partner in visa vetting, is building a registry of social media handles that will make it easier to track what people say online.

Since 2016, travelers from 38 (mostly European) visa waiver countries have been asked to voluntarily provide their social media handles. And since last month, the almost 15 million people who apply for visas to enter the United States each year must disclose all social media handles that they have used in the last five years on 20 major platforms, including Facebook, Instagram, and Twitter.

Americans are caught up in this net too. The DHS's databases aren't limited to foreign nationals. And even a foreign national's social media activity reveals that person's network of friends, relatives, and coworkers, some close and some distant, but all fair game for the DHS.

This op-ed was published by *The New York Times*, June 30, 2019.

Social media surveillance doesn't always stop when travelers reach American shores, where their web of local contacts are likely to expand. Last year, Immigration and Customs Enforcement awarded a $100 million contract for continuous monitoring of 10,000 people annually that it calls high risk, and DHS leadership has made it plain that it is looking for ways to monitor visitors and immigrants inside the United States.

Social media can reveal the most intimate aspects of our lives: whether we are gay or straight, whether we are a gun owner or a supporter of Planned Parenthood, whether we go to the mosque on Fridays or to church on Sundays.

While this type of information is not relevant to security, it can be used to go after people the authorities disfavor by refusing them entry to the country, deporting them, targeting them for investigation, sharing their information with a repressive foreign government, or just hassling them at the airport.

One of President Trump's first acts in office was to bar travelers from several Muslim countries. When the ban was struck down by federal courts, the State Department imposed additional vetting measures that just happened to cover about the same number of people as the ban. The following year, a draft DHS report proposed tagging young Muslim men as "at-risk persons" for intensive screening and continuous monitoring. The administration has gone after those opposing its draconian immigration policies too, using social media to track activists from the southern border to New York City.

The DHS's own tests show that social media content is an unreliable basis for making judgments about national security risk. A brief prepared for the incoming Trump administration explicitly questioned its utility: in pilot programs it was difficult to match individuals to their social media accounts, and even where a match was found, it was hard to judge whether there were "indicators of fraud, public safety, or national security concern."

False negatives were a problem too. One program for vetting refugees found that social media did not "yield clear, articulable links to national security concerns," even for applicants who were identified as potential threats based on other types of screening.

Given the volume of social media information, it's no surprise that the DHS is looking for algorithms to help. But computers are even worse than humans in making sense of what is said on social media, particularly when it comes to nuance and context. Even the best natural language processing program generally achieves 70 percent to 75 percent accuracy, which means more than a quarter of posts would be misinterpreted.

Tone and sentiment analysis, which DHS officials have floated as an option, is even less accurate. According to one study, it had a 27 percent success rate in predicting political ideology based on what people post on Twitter.

Accuracy takes a nosedive when the speech being analyzed is not standard English, which is used to train most tools. The post "Bored af den my phone finna die!!!!" was flagged by an algorithm as Danish with 99.9 percent confidence.

Algorithms simply cannot make the types of judgment calls required in many immigration settings: What information is derogatory? What suggests that someone is a national security threat? Last year, ICE backed away from one automated vetting program after data scientists declared a computer simply could not figure out who would be a "positively contributing member of society," "make contributions to the national interest," or commit a crime or terrorist act, and could instead easily resort to biased proxies.

It's all too easy to see how social media information can be used for the Trump administration's most egregious initiatives. It can tell the government who has criticized American foreign policy, so that person can be denied permission to travel here. It can reveal where a child goes to school, allowing ICE agents to lie in wait outside for an undocumented parent.

But we cannot lay blame at the feet of the Trump administration alone. Efforts

to leverage social media started during the Obama administration and have been cheered on by many in Congress. When administration officials tout social media monitoring efforts to congressional committees, they are rarely questioned on the implications of accumulating this data or even on the effectiveness of these efforts.

More recently, some members of Congress have raised concerns about particular programs based on media reports about the tracking of activists and protesters. And the hacking of license plate information collected by Customs and Border Protection has prompted calls for better information security. This nibbling at the edges doesn't grapple with the implications of allowing these data collection programs to proliferate.

It's time for Congress to conduct a full review of the use of social media in immigration decisions. It should start by requiring the DHS to account for all the ways in which it collects and uses this information, provide objective assessments of its usefulness, and explain how it plans to protect the privacy of the millions of people whose information is, or soon will be, in its databases.

Policing, Race, and Technology

Ruha Benjamin, Rashida Richardson, and Sherrilyn Ifill

New law enforcement technologies can have a positive and, at times, even a transformational impact. But new technologies can also reinforce, or magnify, existing inequalities. As with any major change in governmental practice or policy, there must be accountability and transparency. In December, policymakers, experts, and advocates convened to address one particular facet: the racial justice implications of new technology.

Ruha Benjamin, Associate Professor of African American Studies, Princeton University: I'd like us to think about how race and technology shape one another. More and more people are accustomed to thinking about the ethical and social impact of technology, but this is only half of the story. Social norms, values, and structures all exist prior to any given tech development, so it's not simply the impact of technology that we're going to talk about, but the social inputs that make some inventions appear inevitable and desirable.

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Electronic tracking and location systems are part of a growing suite of interventions dubbed techno-corrections. Indeed, these interventions come bubble wrapped in the rhetoric about correcting not just individuals but social disorders like poverty and crime. In the first-ever report to analyze the impact of electronic monitoring on youth in California, we learn that e-monitoring entails a combination of onerous and arbitrary rules that end up forcing young people back into custody for, quote, "technical violations." Attractive fixes, it turns out, produce new opportunities for people to violate the law, and thereby new grounds for penalizing them. But perhaps that is the point. GEO Group, the same company that profits from locking up immigrant families in detention centers with ICE — contracts worth hundreds of millions of dollars — also profits from their release with the increasing use of ankle monitors, which is one of many, quote, "alternatives" to detention that requires our sustained and critical attention.

We have to remember that racialized social control is not limited to obvious forms of incarceration and punishment, but entail what sociologist Carla Shedd calls a carceral continuum that scales over prison walls. And there is a sticky web of carcerality extending even further into the everyday lives of those of us that are purportedly free.

Rashida Richardson, Director of Policy Research, AI Now Institute: "Dirty data" is a term that comes from the data mining community, and it refers to flaws, skews, or other misrepresentations and inaccuracies in data. It's a pervasive problem in all government data and probably most problematic in policing. It can be numbers that were put in incorrectly, or even data that's just completely false, like falsified records for unconstitutional arrests or even

Excerpted from remarks given at *Policing, Race, and Technology* at NYU School of Law, December 3, 2019, hosted by the Brennan Center and the NAACP Legal Defense and Educational Fund.

planted evidence. And in a lot of ways, data just reflects the reality, so the biases embedded in the data are just reflecting the biases in police practices and policies. The problem is that when it's imported into data-driven technologies like predictive policing or any other type of predictive analytics, or tools that are attempting to take abstractions of reality and project something about the future, it both conceals and amplifies the biases that we see in the data. And then we are told that it's objective fact.

Sherrilyn Ifill, President and Director-Counsel, NAACP Legal Defense and Educational Fund: I always say that tech speeds up bias, speeds up discrimination, and that most of us who do this work know that speed is actually the enemy of fighting discrimination. That the faster you do things, the less thoughtful you are, the more you're willing to create shortcuts, the less you are willing to engage with the human issues that you have to deal with in order to address issues of discrimination.

What we have done in this country is decide that some things were too hard for us to figure out. We punted the ball on public safety, on poverty, on young people, on immigration, on a whole range of issues that are really hard and that really require us to engage and come together and seek solutions that, in my view, would have to be deeply embedded in a sense of commitment to public goods. And rather than do that, we decided, as a society, to do what we were already doing, but to really speed it up.

...

In 2013, the Supreme Court decided what I regard as one of the worst Fourth Amendment cases they have ever decided, a case called *Maryland v. King*. In that case, five members of the Court determined that police officers and police departments actually have the right to swab the cheek of arrestees for DNA. This is 2013. Swab the cheek of those not convicted, but simply arrested, for serious crimes — and in that case, burglary was considered a serious crime — for their DNA.The decision was so interesting. Even Justice Scalia dissented from the decision. Justice Breyer actually ruled with the majority.

And I've often thought, as we have grappled with so many issues around surveillance and privacy and policing, what could be more intrusive than to have your DNA swabbed by the police simply for being arrested? Especially when we layer over arrest everything we know about racial discrimination, everything we know about stop and frisk, everything we know about profiling, everything we know about walking while Black, breathing while Black, living while Black, everything we know about the likelihood of African Americans and Latinos being arrested, not for crimes. And yet we really don't talk very much about that decision. We just accepted that police departments can take your most private information, your DNA. And I'm not even sure we're fully tracking what they're doing with that DNA once they collect it.

I do think that in the discrimination landscape in particular, and in the conversation around policing reform and criminal justice reform, we are going to have to move the issues of tech even further up on our list and menu of issues that we're addressing. So, if we've had a First Step Act and we're going to have a Second Step Act, this needs to be prioritized within that second step. It will ultimately eat everything else that we try to do and so we've got to move it to the forefront.

We have to accelerate our understanding of how powerful and important these tools are, and how important these issues are, when we talk about things like criminal justice reform, and policing reform, and immigration reform. And largely we don't. We talk about those three things, but largely, we don't prioritize tech within those conversations. And I'm suggesting that we are going to have to do so.

Disrupt, Discredit, and Divide: How the New FBI Damages Democracy

Michael German and Kimberly Atkins

The attacks of 9/11 transformed U.S. law enforcement. After the attacks, the FBI, once focused on organized crime and corruption, aimed its focus on the disruption of terrorist activity. In a new book, a former FBI agent and Brennan Center fellow argues that the agency took the wrong approach while missing the rising threat of white supremacist violence.

Kimberly Atkins: Why do you think now is the time for this book to come out?

Mike German: I actually started writing and framing the book several years ago. In fact, it was early 2015 when I showed a proposal to a literary agent who said, "Mike, the problem is you're going to have a really tough time convincing the public that the FBI acts in a political manner."

Luckily, Jim Comey came around and made it a little easier to convince people that sometimes they do. But I thought it was important, having worked on issues related to my concerns about the way the FBI's power had been increased, and the lack of oversight, that a lot of the criticisms weren't laid out in a comprehensive way that pointed toward necessary reforms.

Then, the Trump campaign turned into the Trump presidency. And we arrived at a strange time of such polarization that Democrats who had normally been skeptical of the FBI's authorities were now championing the FBI. And the Republicans who used to champion the FBI were now skeptical. I hoped the book would come out at a time when reasonable people on both sides of the aisle could look at what's really wrong with the FBI and what really needs to be done to fix it.

...

Atkins: Throughout the book, you talk a lot about how the FBI uses race, religion, and national origin as a guide. How did you home in on those three criteria as you saw them?

German: After 9/11, it was suspicion of Muslim Americans, that there was some kind of dual loyalty, and that this community was particularly vulnerable to becoming a terrorist. The discussion was very one-sided and seemed to be focused on ideology rather than on criminal behavior. And right away there was a resurrection of these very troubling terms, where "radicalization" was now something that people were talking about. And from my studying, I recalled the Hoover era, when he created the Radicals Division in the early 1900s. They collected the information that was used to round up innocent immigrants during the Palmer Raids.

Excerpted from remarks given at *Disrupt, Discredit, and Divide: How the New FBI Damages Democracy* at NYU in Washington, D.C., September 12, 2019. Kimberly Atkins is a correspondent at WBUR. German's book, *Disrupt, Discredit, and Divide,* was published September 2019.

And that same radical concept was used to justify spying on civil rights activists in the civil rights era, and anti-war activists during the Vietnam War.

I knew that language was problematic, and particularly when they resurrected this concept of a disruption strategy. The idea that well, if we suspect this person, but we don't have the evidence to prove they're doing something wrong, we shouldn't leave them alone. We should find some other means to disrupt their activities.

The FBI started to think of itself no longer as a law enforcement agency, but as a domestic intelligence agency and a national security agency.

Hearing that language come back was quite troubling for me. And seeing the reduction of the criminal predicates — no longer needing reasonable indications of criminality — along with the broadening of surveillance to the Patriot Act and other laws, created this influx of data that's impossible to manage.

When you have that kind of influx of data, and you don't have the management to handle it, the way they manage it is through profile. And those profiles particularly focus on Muslim Americans. And the FBI started to think of itself no longer as a law enforcement agency, but as a domestic intelligence agency and a national security agency. When you're working a criminal case, you have to follow the evidence. But when you're working on national security, all kinds of biases can come into it as defining who is the "other" we're protecting us from.

...

Atkins: So, help bring us on your journey going from an agent to a whistleblower, and then ultimately your decision to leave.

German: I saw something wrong. I worked at an agency that held people accountable to the rule of law, and here was a violation of law. Of course, my superiors would want to know this information about internal dysfunction. The director of the FBI, Robert Mueller, at the time came out and said, "If there are agents who know about a mishandled counterterrorism investigation, I want to know about it." He didn't want to know about it, because when I raised the problems with the case I was working on, I was immediately taken off of it and told I would never work an undercover case again. I suffered continuing retaliation until finally realizing that my career at the FBI was over. So, after two years, I decided I would bring the matter to Congress, and I resigned from the FBI.

Rethinking Reproductive Rights and Health

Melissa Murray, Kate Shaw, Reva Siegel, and Rebecca Traister

Women's reproductive rights are under attack. Last year, nine states passed laws to outlaw abortion or forbid the procedure past a certain point in pregnancy. The new laws are intentionally incompatible with *Roe v. Wade.* The Supreme Court will hear a challenge to one of these laws this term, possibly leading to a reversal of the landmark decision. At an event at NYU School of Law, experts discussed moving our understanding beyond restrictions on abortion to larger questions of reproductive rights and justice.

Rebecca Traister: Reproductive rights and justice is a relatively new legal field. How did it come to be, and why is it important to designate it as an area of study and consideration?

Melissa Murray: The idea of reproductive rights and justice is not necessarily new. It's something that's been around since the 1970s. A Black feminist really pioneered this. Sister Song and organizations like that had a lot to do with it. But in the law school world and the world of red-covered and blue-covered case books, it was really an anomaly.

If we talked about reproduction, it was really in the context of abortion. It was usually stuck in the realm of constitutional law, possibly family law. But there's more to this question of reproduction and reproductive capacity than how to prevent pregnancy or how to terminate a pregnancy. There has been, I think, a movement that's been percolating for a while among feminist legal scholars to think more broadly about what a field that thinks about women's reproduction and about people's reproductive capacity might look like.

In 2013, my colleague at Berkeley, Kristin Luker, came to me and said, "We have to write a case book. We have to make this part of the field of law. And the only way we can bring it into the legal world, into the academy, is to write a case book."

By having a case book, it legitimizes the field and makes it possible for the field to be taught in law school. And it allows the next generation of advocates to be trained. So we really focused on this. And the book that we wrote in 2014, and then the book that Reva and Kate and I put together in 2019, thinks about it. Not just abortion, not just contraception. But all of the decisions that go into the organization and arrangement and creation of intimate life.

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Excerpted from remarks given at *Blessed Be the Fruit: Threats to Reproductive Rights in 2019* at NYU School of Law, November 14, 2019. Melissa Murray, a professor at NYU School of Law, is a member of the Brennan Center Board of Directors. Kate Shaw is a professor at Cardozo School of Law. Reva Siegel is a professor at Yale Law School. Rebecca Traister is a writer for *New York* magazine.

There's more to this question of reproduction and reproductive capacity than how to prevent pregnancy or how to terminate a pregnancy.

It's not just how to prevent a pregnancy, it's actually how to have a healthy pregnancy. And it's how to raise your children in conditions of safety. It is necessary because it is broad and intersectional, so we're not just thinking about the women who can afford contraception or abortion. We are explicitly thinking about those who can't. Those who have other axes of oppression and discrimination that impact their ability to exercise their reproductive capacities to the extent that they would like.

...

Kate Shaw: We traditionally think about reproductive rights as freedom from certain kinds of government control. Reproductive justice has kind of a more capacious, but also a more affirmative, orientation. This vision asks about possibly even government facilitation of access to safe and healthy pregnancy, and childbirth, and child care. And that is, of course, attentive to dynamics of race, class, sexuality, language, disability, and all of the impediments to full access to the range of necessary means to this fulfilling kind of intimate and family life. It is a kind of "freedom to" rather than just a "freedom from" framework.

Reva Siegel: We must look at something like the life cycle and ask, "What are all the ways that law empowers or disempowers people in their intimate and family lives?" And really begin to notice the many kinds of law that empower or disempower people in the ways that they connect with others, form relationships, and bear and raise families. When you start noticing all of that, then you can begin to ask questions about what it would mean to have something like an equality law in this area, and to think about that question in a genuinely intersectional way that makes a difference in lots of people's lives or communities.

Taxing Tampons Isn't Just Unfair, It's Unconstitutional

Erwin Chemerinsky and Jennifer Weiss-Wolf

Menstrual products are essential to women's health, yet they're subject to sales tax in a majority of states. And in most state capitals, efforts to exempt them have stalled. But the inequitable tax poses constitutional and equal protection challenges — and courts should step in.

If the government were to require that only men or only women had to pay a tax of several hundred dollars a year solely because of their sex, that would be an unconstitutional denial of equal protection under the Fourteenth Amendment. Yet that is exactly the effect of the so-called tampon tax.

Currently, residents of 35 states must pay sales tax on purchases of tampons and pads because they are not deemed necessities worthy of an exemption. And that's in addition to the roughly $5 to $10 for these products that women have to shell out each month. States collectively profit upward of $150 million a year from taxing menstrual products. In California alone, women pay $20 million annually.

Although many states considered creating tax exemptions this spring, only one permanent exemption was approved. Over the holiday weekend, Rhode Island Governor Gina Raimondo signed a new state budget, which included a provision approved by the Legislature to make menstrual products sales tax exempt starting in October.

The issue also became a matter of fiscal negotiations in California. Back in May, Governor Gavin Newsom wrote the cost of implementing a tax exemption for menstrual products into his proposed budget. The catch: it would last only for the duration of the budget, for two years. That move was backed by the Legislature, which had been trying unsuccessfully to pass a permanent exemption into law since 2016. The governor signed the budget on June 27.

Temporary expenditure lines — subject to the whim of the state's leadership — are not enough. The sales-tax-exempt status of menstrual products must be made permanent in California and adopted into law in every state.

The issue is gaining traction globally. Back in 2015, Canada eliminated its national goods and services tax on menstrual products. Similar exemptions have since passed in diverse nations and economies, including Australia, India, Malaysia, and South Africa.

In the United States, where sales taxes are levied by each state, bills have been introduced in 32 legislatures since 2016 to exempt menstrual products from sales tax. Five succeeded: Connecticut, Florida, Illinois, and New York passed laws. Additionally, citizens of Nevada approved a 2018 ballot measure to accomplish the same. Another 10 states don't tax menstrual products — either because they collect no sales tax at all, or because they're included under general exemption categories.

In 2019, tampon tax bills were introduced in 22 states with bipartisan and overwhelming public support. And yet, the legislative sessions ended with a dismal scorecard. In

This op-ed was published by the *Los Angeles Times,* July 11, 2019. Jennifer Weiss-Wolf is the Brennan Center's vice president for development and its inaugural Women and Democracy Fellow. Erwin Chemerinsky is dean of Berkeley Law School.

Tennessee, legislators added insult to injury: after a tampon tax bill died there this year, a subsequent budget surplus was used to eliminate a gun ammunition tax, enabling the state to save its "hunters and shooters $500,000 annually across the state," as one state representative explained to his constituents.

The sales-tax-exempt status of menstrual products must be made permanent in California and adopted into law in every state.

As a matter of policy, compassion, and common sense, most states explicitly exempt "necessities of life" from sales tax, with food and medicine at the top of the list. In some states, necessity exemptions include things such as bingo supplies, cotton candy, erectile dysfunction pills, gun club memberships, and tattoos. Menstrual products certainly rank as a necessity for most women, for much of their lives. They are essential for attending school, working, and functioning in society.

But as a matter of law, the argument extends far deeper. The tampon tax amounts to sex-based discrimination in violation of the equal protection clause, under both state and federal constitutions — making it more than merely unfair or inequitable, but unconstitutional and therefore illegal.

In 2016, five plaintiffs brought a class-action lawsuit against the New York State Department of Taxation making these arguments. The case was withdrawn after the Legislature and Governor Andrew Cuomo quickly responded to public outcry and passed legislation.

But the central argument advanced in that case is valid, and it is one increasingly being made by legal scholars. It should be raised again in the courts. A law that affects only one sex — or one race, or one religion — is inherently discriminatory. U.S. Supreme Court Justice Antonin Scalia once famously remarked that a tax on yarmulkes is a tax on Jews (interestingly, in a case about abortion clinic blockades). In the same vein, a tax on a product used only by women, and used by all (or the vast majority of) women for much of their lives, is a tax on women.

At the very least, equal protection requires that all actions that treat some differently from others have a rational basis. There is no reasonable justification to tax menstrual products given the exemptions that exist in every state for the necessities (and even non-necessities) of life.

Eliminating the discriminatory tampon tax isn't a legislative nicety or a budgetary option. It is a legal mandate. Period.

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The Brennan Center for Justice was founded in 1995 by the family and former law clerks of Justice William J. Brennan Jr. (1906–97) as a living memorial to his ideals. In celebration of more than two decades in the fight to reform and revitalize our systems of democracy and justice, we launched three special initiatives to lay the groundwork for an even stronger future.

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We created this $5 million fund to ensure the Center has the resilience and resources to rise to urgent challenges and opportunities. We are pleased to recognize the following supporters for their generosity:

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With the generous support and vision of The WhyNot Initiative, we formed the Inez Milholland Endowment for Democracy. Inez Milholland (1886–1916) was the bold, vibrant face of the women's suffrage movement in the United States, an ardent fighter for equality and social justice, and a graduate of New York University School of Law. The Endowment supports the Center's Democracy Program.

Brennan Legacy Circle

The Brennan Legacy Circle recognizes leaders who have included the Center in their estate planning – a meaningful way to ensure their memory lives on in the fight for democracy and justice.

To make a contribution to the Brennan Legacy Fund or the Inez Milholland Endowment for Democracy or to join the Brennan Legacy Circle, please contact Jennifer Weiss-Wolf, vice president for development, at weiss-wolfj@brennan.law.nyu.edu or (646) 292-8333.

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Remembering Gail Furman (1942–2019)

Dr. Gail Furman was a lifelong advocate for equality, civil rights, and social justice. A native of Queens, she studied at the University of Michigan and received a doctorate in psychology from New York University. She went on to become a talented and successful child psychologist, deeply committed to helping young people unlock their full potential. In addition to her private practice, Gail worked at the Dalton and Fieldston Schools and helped create one of the first full-service alternative schools in Harlem.

Gail joined the Brennan Center's Board of Directors in 2005 and was an annual chair of the Brennan Legacy Awards Dinner. In addition to her work with the Center, she was a devoted supporter of many causes, having served on the boards of Auburn Seminary, Democracy Alliance, Human Rights First, Leadership Enterprise for a Diverse America, NYU Child Study Center, and Women's Refugee Commission, among others.

With a generous bequest from Gail's estate, the Brennan Center announced a new initiative at the 2019 Brennan Legacy Awards Dinner that will carry on the values she brought to her work: a commitment to justice for all, the strength of diversity, and the power and voice of young people.

Over the years, Gail helped build a community for the Brennan Center, connecting us to others with a shared vision of American democracy.

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