DEMOCRACY & JUSTICE

COLLECTED WRITINGS

BRENNAN CENTER FOR JUSTICE

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The Brennan Center for Justice at NYU School of Law

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

About Democracy & Justice: Collected Writings 2018

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 2018. All Brennan Center events were produced by Mellen O'Keefe, Adrienne Yee, and Jeanine Plant-Chirlin.

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

— Justice William J. Brennan Jr.

Introduction from the President

Dear Friends,

In the great fight for the future of constitutional democracy, 2018 was a breakthrough year.

Around the world, amid economic and demographic change, broken democratic systems have produced a backlash. We see the rise of autocracy and a normalization of nativism, misogyny, and abuse. Our politics have realigned in ways that challenge the very constitutional order. We are always on the edge, one tweet away from a crisis.

But at this time of unease, something big has begun to stir. Citizens have made it clear that the best way to respond to attacks on democracy is to strengthen democracy.

At this moment, the Brennan Center for Justice at NYU School of Law stepped forward as a leading national force for change. Independent and rigorous, we fight fear with facts. We generate solutions and bold reforms. The reports, briefs, articles, and talks in this annual volume reflect the energy and scope of our work. And our partnerships with the impressive thought leaders you'll read in these pages is a key part of what we do to advance change.

So much of this work came to a head in the November election. Despite harsh voter suppression, turnout was the highest since 1914. Ballot measures ended gerrymandering in Michigan, Utah, Missouri, and Colorado. In the biggest expansion of the franchise in decades, Florida restored voting rights to 1.4 million people with past felony convictions. Michigan and Nevada enacted automatic voter registration. The Brennan Center was proud to have written many of these measures. Weeks later, federal criminal justice reform became law, with our strong support and partnership with a broad coalition of unlikely allies.

It marked the start of a true democracy movement in America – launched not by lawyers or politicians, but by millions of citizens taking matters into their own hands.

Now we're fighting to seize this opportunity, in Congress and in the states. This "ideas primary" will help shape the upcoming presidential race and build momentum for change.

Justice William J. Brennan Jr. once said: "The Constitution will endure as a vital charter of human liberty as long as there are those with the courage to defend it, the vision to interpret it, and the fidelity to live by it." The Brennan Center is proud to bear his name and to carry on its work in that spirit. Thank you for your support at this time of testing for our country.

Michael Waldman
President

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THE DEMOCRACY MOVEMENT

Democracy Is on the Ballot

Michael Waldman

In 2018, voters around the country considered ballot measures to enact strong, often transformative democracy reforms. Amid the dramatic contest for congressional control, this article outlined the trend. Less than two weeks later, citizens passed every single one of the measures discussed. The Brennan Center played a key role in this effort. It helped draft the Florida voting rights restoration amendment and two of the redistricting reform proposals, and it first advanced automatic voter registration over a decade ago.

The midterm elections have been marred by controversy over alleged voter suppression in Georgia, North Dakota, and elsewhere. Once again, partisans want to make it harder for fellow citizens to cast their ballots. It's ugly.

But amid the dispiriting bid to curb voting, something else is happening: For the first time in years, citizens have responded with a robust push to expand democratic rights. Breakthrough ballot measures across the country would expand voting rights and improve representation. If enacted, they could add up to a democracy wave, regardless of which party prevails.

Start with Florida, where the presidential recount in 2000 launched the recent voting wars. The state has an extraordinarily harsh felony disenfranchisement law, one that dates to the Jim Crow era and bars citizens with any kind of felony conviction from voting for a lifetime. A drug-possession conviction at 18 means a 60-year-old can't cast a ballot. Today, 1.6 million otherwise eligible Floridians are disenfranchised, including one in five black people of voting age.

A measure on the ballot this November would restore rights for most people with criminal convictions. The proposal must win 60 percent of the vote to pass, but recent polling shows nearly three-fourths of voters support it. Notably, the measure has united religious communities and skirted ideological splits. (The Koch-backed organization Freedom Partners gave a ringing endorsement.) Formerly incarcerated people have led the drive, going door to door to drum up support.

Then there's partisan gerrymandering. Politicians have manipulated district lines since the country's founding, but computers have transformed gerrymandering into a precision mechanism to blunt the voice of voters. This year, the Supreme Court declined to make a major constitutional ruling to restrict extreme partisan gerrymandering. With Justice Brett M. Kavanaugh replacing Anthony M. Kennedy, hopes have dimmed for a legal breakthrough at the court.

For the first time in years, citizens have responded with a robust push to expand democratic rights.

Here, too, while courts dither, citizens have acted. The best reform would have district lines drawn by a nonpartisan, independent commission, as in Arizona and California. In Michigan, despite a rebuff at first from party leaders and labor unions, activists are on track to garner 400,000 signatures for a ballot measure to create a nonpartisan panel to draw future districts. Similar reforms are on

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the ballot in Utah and Colorado. Missouri voters will decide on a different but strong approach. Earlier this year, Ohio voters backed a measure to block the legislature from redistricting on a partisan basis.

This is all quite extraordinary. Gerrymandering was an arcane topic beloved only by political science professors and tobacco-stained party bosses. Last decade, similar reform efforts failed in states including Ohio and California. It speaks volumes about our electoral breakdown that ordinary citizens now seem to understand how badly the system is tilted.

Voters are also tackling one of the biggest barriers to effective elections: our ramshackle voter registration system. Today voters can fall off the rolls when they move or if there's a typo in their state's records. Some people never manage to sign up to vote in the first place. We are alone among major democracies in running our system this way.

At least 13 states, though, have approved a version of automatic voter registration that uses data supplied at their departments of motor vehicles or other agencies to securely and accurately update registration information. This paradigm shift would add tens of millions of people to the rolls, reduce costs, and bolster election security. Next month, Nevada and Michigan voters will decide whether to adopt strong versions of the plan.

Will elected officials heed this shout from the electorate? Some signs are positive. House Democrats announced they will make democracy reform the basis of their first piece of legislation — the auspiciously named H.R. 1 — should they win. It would include national rules on automatic voter registration, redistricting reform, and small-donor public financing of campaigns to curb the role of big money. Dozens of new members may form a reform caucus akin to the class of "Watergate babies" who won in 1974 and transformed Congress.

But don't trust incumbents to act, regardless of what they say. In the weeks after the midterms, we need to press lawmakers to put their votes where their tweets are. We also need to keep an eye out for legal challenges against these measures from forces that stand to lose from a fairer system. Conservative activists could try to convince the Supreme Court's new conservative majority that ballot measures instituting electoral reform are unconstitutional. If the Supreme Court tries to choke off the voice of the voters, it would demolish public confidence and provoke a constitutional crisis.

For now, all eyes are on election night. This is not just an important midterm cycle politically speaking; it's also a chance for democracy itself to prevail at the ballot box.

The Voters Spoke — Now Congress Must Act

Wendy R. Weiser and Daniel I. Weiner

The newly elected Congress included dozens of new lawmakers who ran on a platform of political reform. The Democratic leadership indicated that sweeping democracy reform would be a first order of business. The bill would become H.R. 1, the For the People Act, introduced January 4, 2019. Its key proposals include campaign finance reform, automatic voter registration, redistricting reform, and a commitment to restore the Voting Rights Act.

One of the clearest takeaways from election night: Voters want democracy reform. Across the country, citizens voted on a record number of ballot initiatives on issues like redistricting, voting, money in politics, and ethics. More than we have seen in decades, candidates themselves put reform at the center of their campaigns. In the end, voters handed a decisive win to democracy itself. Now that the election is over, Congress must get to work to pass the sweeping changes its members promised and that the American people voted for.

Support for democracy reform — making our system of government more representative and responsive — was overwhelming and bipartisan. Redistricting reform won in four states, increased voting access in four, and measures to strengthen ethics and money in politics regulations in six states and more than a dozen localities, all by large margins. Florida, for example, featured some of the closest statewide races in the nation, but a historic measure to restore voting rights to citizens with past criminal convictions won more than 60 percent of the vote. And in Michigan, where voters were firmly split on candidates for governor and U.S. Senate, 60 percent voted for redistricting reform and 65 percent for voting reform.

To a remarkable degree, calls for reform animated the Democrats' successful push to retake the House of Representatives. The Democrats' promise to make government more "responsive, representative, effective, and transparent" was the centerpiece of their election agenda.

More than 100 House candidates ran on change platforms. Of the 30 Democratic challengers who flipped seats, 25 ran on reforming the system. Most signed a letter calling on Congress to enact "bold" and "sweeping" reforms to address voting rights, money in politics, redistricting, election infrastructure, and government ethics as its first agenda item. Some Republicans campaigned on these issues too, including members of the Congressional Reformers Caucus, who have advocated "bipartisan solutions to make our government more accountable to its citizens."

Before Tuesday, Democratic leadership in the House promised to take up a comprehensive democracy reform package "in the very first days" of the new Congress. As the midterm results make clear, voters will demand that they make good on their promise.

What should be in it?

One key change would be automatic voter registration. This streamlining of voter registration won big in Michigan and Nevada, as it did in Alaska in 2016 (among voters who also supported Trump).

According to Election Protection, a nonpartisan national voter assistance hotline, voter registration issues were the second most common problems reported by voters, as they were last election. Automatic registration would fix most of that. Eight states and D.C. ran elections with automatic

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registration in place this year, and it led to big gains in voter registration, increasing registration rates by as much as 34 percent in Vermont and 92 percent in Rhode Island.

Now that the election is over, Congress must get to work to pass the sweeping changes its members promised and that the American people voted for.

Nationwide early voting is now a must. The historic rise in voter turnout this year was facilitated by record-breaking surges in early voting across the country. Most states now offer some form of early voting, and it works, offering greater voter convenience and reducing the stress of Election Day. A number of states that do not offer early voting, like New York, Michigan, Pennsylvania, and South Carolina, or had cutbacks in early voting, like North Carolina, experienced major problems at the polls like long lines and delays that could have been cut by early voting.

Some of the election's long lines were a consequence of outdated voting machines. Congress must also upgrade and secure our aging voting infrastructure. Voting machine breakdowns caused unconscionably long lines in Georgia, Maryland, and elsewhere. That is not surprising, with 41 states using machines that are so old they are no longer manufactured. And with Russia and other foreign adversaries stepping up efforts to meddle in our elections, there is no time to spare.

After an election marred by some of the most brazen, intense, and widespread voter suppression in the modern era, legislation must include restoring the full protections of the Voting Rights Act that the Supreme Court disabled in *Shelby County v. Holder*. The whack-a-mole of lawsuits under the Act's remaining provisions is simply not a sufficient way to prevent racially targeted manipulation of the voting rules. And now that Floridians have voted to restore voting rights to 1.4 million fellow citizens with past criminal convictions, joining the 20 states that have taken action in recent years to allow more returning citizens to vote, there should be a national rule restoring voting rights to citizens released from incarceration.

Campaign finance reforms to address the legacy of *Citizens United* must also be high on the next Congress's agenda. The success of such measures on Tuesday adds to reams of existing data on the public's desire for stronger safeguards.

It's no surprise. Super PACs and dark-money groups spent almost $1 billion on federal races in this cycle, raised mostly from a tiny class of mega-donors. The best way to address this challenge is to lift up other voices through small-donor public financing — where public funds supplement and amplify private giving.

Stronger disclosure rules so that the public can at least know who is trying to influence them (and so that the government can detect illegal campaign spending by foreign governments and nationals) are also essential.

Gerrymandering reform is also critical. Voters of all political stripes overwhelmingly cast their ballots to change the way we draw legislative districts in four states (Michigan, Colorado, Utah, and Missouri). The election made clear not only that reform is wildly popular but also that it is badly needed. The results made clear that the system is too easy to rig. Democratic House candidates won a landslide victory, but only a fraction of the seats won in past wave elections. In states that were still extremely gerrymandered, almost no seats changed partisan hands. By contrast, in states where courts or independent commissions drew the lines, there were far more competitive races.

Ethics rules also need an overhaul. That includes shoring up protections for the executive branch (including to address presidential conflicts of interest), but Congress must also do more to hold itself to the same standards it sets for the rest of the federal government.

In short, voters demanded a stronger democracy on Tuesday. Now it is up to Congress to deliver.

The Change America Needs Won't Come From the Supreme Court

John Kowal

Justice Anthony Kennedy's retirement from the Supreme Court prompted despair from many liberals. The Court, it seemed certain, would lurch to the right for a generation. In fact, on most issues, Kennedy had been a reliable conservative vote. His retirement, and replacement by Brett Kavanaugh, may wake up a generation to a fundamental truth: Real change also comes from the people, not just Supreme Court decisions.

The end of the Supreme Court term brought a flurry of dispiriting decisions, from the justices' failure to seize the opportunity to put some limit on extreme partisan gerrymandering by politicians, to their unwillingness to acknowledge the glaring bigotry behind the president's Muslim ban. Justice Anthony Kennedy, who announced his retirement this week, was on the wrong side in every case, ending a 31-year tenure on the Court with a whimper.

Whenever the courts have gotten in the way of needed change, Americans have had to rise up to take their country back through popular mobilization and democratic action.

With Kennedy's retirement, the prospects for an end to conservative dominance on the Supreme Court — now in its fourth decade — seem remote at best. President Trump has the opportunity to fill that vacancy with a younger, more ideologically conservative jurist. In a rally Wednesday night, he pledged, "We have to pick one that's going to be there for 40 years, 45 years."

Of course, replacing a very conservative justice with an even more conservative one won't change the outcome in most cases. Kennedy may have set himself apart through the moderating role he played on a few social issues — most notably affirmative action, reproductive freedom, and the rights of LGBT people. Those cases secured a distinctive legacy. But in so many decisions that mattered, decided by the narrowest of margins, Kennedy marched in lockstep with the Court's other Republican appointees. He was the deciding vote in some of the worst rulings of our age. And our democracy is the weaker for it.

Kennedy was one of five Republican appointees in *Bush v. Gore* who intervened in a presidential election, on a dubious legal theory, to hand victory to George W. Bush, essentially disenfranchising thousands of Florida voters. He wrote the opinion in *Citizens United* that gave corporations the right to spend unlimited sums in elections, ushering in today's dystopian world of

This piece appeared on the Brennan Center website, June 29, 2018.

dark money and super PACs. And he signed on to the ruling in Shelby County, which eviscerated the Voting Rights Act's most powerful protection against this country's epidemic of racially motivated voter suppression on the glib theory that racism in the South is more or less a thing of the past.

So let's not be deluded: On many if not most issues, the president would be hard pressed to find a more reliably conservative vote than Anthony Kennedy's.

And yet, it's hard not to feel a sense of despair. Our nation's democratic institutions are all in the hands of a minority faction pushing a radical and unpopular agenda. Their victory was made possible by the distorted democracy Kennedy and his cohort made possible — a democracy where partisan legislators are free to rejigger legislative districts to fence out the other side, a democracy where the interests of big-money donors crowd out all others, a democracy where lawmakers barely disguise their glee as they enact restrictions on voting meant to shrink the electorate. With a firmer hold on the judiciary, their power will be that much harder to break.

But it's important to remember that nine justices were never going to save us from the current crisis engulfing our democracy. Throughout our history, they seldom have. The justices did not step up during the moral crisis of slavery. They did nothing to prevent the South's odious Jim Crow regime from taking root. And for decades, they blocked progressive efforts to address the great social crises of the Gilded Age and the Depression.

Whenever the courts have gotten in the way of needed change, Americans have had to rise up to take their country back through popular mobilization and democratic action. The abolitionists and Radical Republicans led a moral movement that changed the Constitution, ending slavery and extending citizenship to African Americans. The heroes of the civil rights movement toiled for decades to dismantle Jim Crow, prodding Congress and the courts to finally act. And from the Progressive Era to the New Deal, social movements modernized our national charter — democratizing the Senate, instituting the income tax, extending the vote to women — and leveraged government as a force for social change.

When the current darkness lifts, as it will, America will be ready for a new era of reform. But it won't be led by the courts.

THE PRESIDENCY AND THE RULE OF LAW

State of Emergency: What Can a President Do?

Elizabeth Goitein

What would happen if a major terrorist attack hit an American city? What if a crisis were concocted or exaggerated? It turns out a president has vast powers, conferred by little-known statutes, to suspend the laws and threaten liberties. A yearlong investigation produced a valuable guide to the frightening ways a president could seize power. It was published weeks before Donald Trump threatened to declare a national emergency to build his proposed wall on the border with Mexico.

In the weeks leading up to the 2018 midterm elections, President Donald Trump reached deep into his arsenal to try to deliver votes to Republicans.

Most of his weapons were rhetorical, featuring a mix of lies and false inducements — claims that every congressional Democrat had signed on to an "open borders" bill (none had), that liberals were fomenting violent "mobs" (they weren't), that a 10 percent tax cut for the middle class would somehow pass while Congress was out of session (it didn't). But a few involved the aggressive use — and threatened misuse — of presidential authority: He sent thousands of active-duty soldiers to the southern border to terrorize a distant caravan of desperate Central American migrants, announced plans to end the constitutional guarantee of birthright citizenship by executive order, and tweeted that law enforcement had been "strongly notified" to be on the lookout for "ILLEGAL VOTING."

In the past several decades, Congress has provided what the Constitution did not: emergency powers that have the potential for creating emergencies rather than ending them.

These measures failed to carry the day, and Trump will likely conclude that they were too timid. How much further might he go in 2020, when his own name is on the ballot — or sooner than that, if he's facing impeachment by a House under Democratic control?

More is at stake here than the outcome of one or even two elections. Trump has long signaled his disdain for the concepts of limited presidential power and democratic rule. During his 2016 campaign, he praised murderous dictators. He declared that his opponent, Hillary Clinton, would be in jail if he were president, goading crowds into frenzied chants of "Lock her up." He hinted that he might not accept an electoral loss. As democracies around the world slide into autocracy, and nationalism and anti-democratic sentiment are on vivid display among segments of the American populace, Trump's evident hostility to key elements of liberal democracy cannot be dismissed as mere bluster.

This article was published by *The Atlantic* in its January/February 2019 print issue.

It would be nice to think that America is protected from the worst excesses of Trump's impulses by its democratic laws and institutions. After all, Trump can do only so much without bumping up against the limits set by the Constitution and Congress and enforced by the courts. Those who see Trump as a threat to democracy comfort themselves with the belief that these limits will hold him in check.

But will they? Unknown to most Americans, a parallel legal regime allows the president to sidestep many of the constraints that normally apply. The moment the president declares a "national emergency" — a decision that is entirely within his discretion — more than 100 special provisions become available to him. While many of these tee up reasonable responses to genuine emergencies, some appear dangerously suited to a leader bent on amassing or retaining power. For instance, the president can, with the flick of his pen, activate laws allowing him to shut down many kinds of electronic communications inside the United States or freeze Americans' bank accounts. Other powers are available even without a declaration of emergency, including laws that allow the president to deploy troops inside the country to subdue domestic unrest.

This edifice of extraordinary powers has historically rested on the assumption that the president will act in the country's best interest when using them. With a handful of noteworthy exceptions, this assumption has held up. But what if a president, backed into a corner and facing electoral defeat or impeachment, were to declare an emergency for the sake of holding on to power? In that scenario, our laws and institutions might not save us from a presidential power grab. They might be what takes us down.

1. "A LOADED WEAPON"

The premise underlying emergency powers is simple: The government's ordinary powers might be insufficient in a crisis, and amending the law to provide greater ones might be too slow and cumbersome. Emergency powers are meant to give the government a temporary boost until the emergency passes or there is time to change the law through normal legislative processes.

Unlike the modern constitutions of many other countries, which specify when and how a state of emergency may be declared and which rights may be suspended, the U.S. Constitution itself includes no comprehensive separate regime for emergencies. Those few powers it does contain for dealing with certain urgent threats it assigns to Congress, not the president. For instance, it lets Congress suspend the writ of habeas corpus — that is, allow government officials to imprison people without judicial review — "when in Cases of Rebellion or Invasion the public Safety may require it" and "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

Nonetheless, some legal scholars believe that the Constitution gives the president inherent emergency powers by making him commander in chief of the armed forces or by vesting in him a broad, undefined "executive Power." At key points in American history, presidents have cited inherent constitutional powers when taking drastic actions that were not authorized — or, in some cases, were explicitly prohibited — by Congress. Notorious examples include Franklin D. Roosevelt's internment of U.S. citizens and residents of Japanese descent during World War II and George W. Bush's programs of warrantless wiretapping and torture after the 9/11 terrorist attacks. Abraham Lincoln conceded that his unilateral suspension of habeas corpus during the Civil War was constitutionally questionable but defended it as necessary to preserve the Union.

The Supreme Court has often upheld such actions or found ways to avoid reviewing them, at least while the crisis was in progress. Rulings such as *Youngstown Sheet & Tube Company v. Sawyer*, in which the Court invalidated President Harry Truman's bid to take over steel mills during the Korean War, have

been the exception. And while those exceptions have outlined important limiting principles, the outer boundary of the president's constitutional authority during emergencies remains poorly defined.

The president has access to emergency powers contained in 123 statutory provisions.

Presidents can also rely on a cornucopia of powers provided by Congress, which has historically been the principal source of emergency authority for the executive branch. Throughout the late 18th and 19th centuries, Congress passed laws to give the president additional leeway during military, economic, and labor crises. A more formalized approach evolved in the early 20th century, when Congress legislated powers that would lie dormant until the president activated them by declaring a national emergency. These statutory authorities began to pile up — and because presidents had little incentive to terminate states of emergency once declared, these piled up too. By the 1970s, hundreds of statutory emergency powers and four clearly obsolete states of emergency were in effect. For instance, the national emergency that Truman declared in 1950, during the Korean War, remained in place and was being used to help prosecute the war in Vietnam.

Aiming to rein in this proliferation, Congress passed the National Emergencies Act in 1976. Under this law, the president still has complete discretion to issue an emergency declaration — but he must specify in the declaration which powers he intends to use, issue public updates if he decides to invoke additional powers, and report to Congress on the government's emergency-related expenditures every six months. The state of emergency expires after a year unless the president renews it, and the Senate and the House must meet every six months while the emergency is in effect "to consider a vote" on termination.

By any objective measure, the law has failed. Thirty states of emergency are in effect today — several times more than when the act was passed. Most have been renewed for years on end. And during the 40 years the law has been in place, Congress has not met even once, let alone every six months, to vote on whether to end them.

As a result, the president has access to emergency powers contained in 123 statutory provisions, as recently calculated by the Brennan Center for Justice at NYU School of Law, where I work. These laws address a broad range of matters, from military composition to agricultural exports to public contracts. For the most part, the president is free to use any of them; the National Emergencies Act doesn't require that the powers invoked relate to the nature of the emergency. Even if the crisis at hand is, say, a nationwide crop blight, the president may activate the law that allows the secretary of transportation to requisition any privately owned vessel at sea. Many other laws permit the executive branch to take extraordinary action under specified conditions, such as war and domestic upheaval, regardless of whether a national emergency has been declared.

This legal regime for emergencies — ambiguous constitutional limits combined with a rich well of statutory emergency powers — would seem to provide the ingredients for a dangerous encroachment on American civil

liberties. Yet so far, even though presidents have often advanced dubious claims of constitutional authority, egregious abuses on the scale of the Japanese American internment or the post-9/11 torture program have been rare, and most of the statutory powers available during a national emergency have never been used.

But what's to guarantee that this president, or a future one, will show the reticence of his predecessors? To borrow from Justice Robert Jackson's dissent in *Korematsu v. United States*, the 1944 Supreme Court decision that upheld the internment of Japanese Americans, each emergency power "lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

2. AN INTERNET KILL SWITCH?

Like all emergency powers, the laws governing the conduct of war allow the president to engage in conduct that would be illegal during ordinary times. This conduct includes familiar incidents of war, such as the killing or indefinite detention of enemy soldiers. But the president can also take a host of other actions, both abroad and inside the United States.

These laws vary dramatically in content and scope. Several of them authorize the president to make decisions about the size and composition of the armed forces that are usually left to Congress. Although such measures can offer needed flexibility at crucial moments, they are subject to misuse. For instance, George W. Bush leveraged the state of emergency after 9/11 to call hundreds of thousands of reservists and members of the National Guard into active duty in Iraq for a war that had nothing to do with the 9/11 attacks. Other powers are chilling under any circumstances: Take a moment to consider that during a declared war or national emergency, the president can unilaterally suspend the law that bars government testing of biological and chemical agents on unwitting human subjects.

If the government were to take control of U.S. internet infrastructure, Trump could accomplish directly what he threatened to do by regulation: ensure that internet searches always return pro-Trump content as the top results.

One power poses a singular threat to democracy in the digital era. In 1942, Congress amended Section 706 of the Communications Act of 1934 to allow the president to shut down or take control of "any facility or station for wire communication" upon his proclamation "that there exists a state or threat of war involving the United States," resurrecting a similar power Congress had briefly provided Woodrow Wilson during World War I. At the time, "wire communication" meant telephone calls or telegrams. Given the relatively modest role that electronic communications played in most Americans' lives, the government's assertion of this power during World War II (no president has used it since) likely created inconvenience but not havoc.

We live in a different universe today. Although interpreting a 1942 law to cover the internet might seem far-fetched, some government officials recently endorsed this reading during debates about cybersecurity legislation. Under this interpretation, Section 706 could effectively function as a "kill switch" in the United States — one that would be available to the president the

moment he proclaimed a mere threat of war. It could also give the president power to assume control over U.S. internet traffic.

The potential impact of such a move can hardly be overstated. In August, in an early-morning tweet, Trump lamented that search engines were "RIGGED" to serve up negative articles about him. Later that day the administration said it was looking into regulating the big internet companies. "I think that Google and Twitter and Facebook, they're really treading on very, very troubled territory. And they have to be careful," Trump warned. If the government were to take control of U.S. internet infrastructure, Trump could accomplish directly what he threatened to do by regulation: ensure that internet searches always return pro-Trump content as the top results. The government also would have the ability to impede domestic access to particular websites, including social media platforms. It could monitor emails or prevent them from reaching their destination. It could exert control over computer systems (such as states' voter databases) and physical devices (such as Amazon's Echo speakers) that are connected to the internet.

To be sure, the fact that the internet in the United States is highly decentralized — a function of a relatively open market for communications devices and services — would offer some protection. Achieving the level of government control over internet content that exists in places such as China, Russia, and Iran would likely be impossible in the United States. Moreover, if Trump were to attempt any degree of internet takeover, an explosion of lawsuits would follow. Based on its First Amendment rulings in recent decades, the Supreme Court seems unlikely to permit heavy-handed government control over internet communication.

But complacency would be a mistake. Complete control of internet content would not be necessary for Trump's purposes; even with less comprehensive interventions, he could do a great deal to disrupt political discourse and hinder effective, organized political opposition. And the Supreme Court's view of the First Amendment is not immutable. For much of the country's history, the Court was willing to tolerate significant encroachments on free speech during wartime. "The progress we have made is fragile," Geoffrey R. Stone, a constitutional law scholar at the University of Chicago, has written. "It would not take much to upset the current understanding of the First Amendment." Indeed, all it would take is five Supreme Court justices whose commitment to presidential power exceeds their commitment to individual liberties.

3. SANCTIONING AMERICANS

Next to war powers, economic powers might sound benign, but they are among the president's most potent legal weapons. All but two of the emergency declarations in effect today were issued under the International Emergency Economic Powers Act, or IEEPA. Passed in 1977, the law allows the president to declare a national emergency "to deal with any unusual and extraordinary threat" — to national security, foreign policy, or the economy — that "has its source in whole or substantial part outside the United States." The president can then order a range of economic actions to address the threat, including freezing assets and blocking financial transactions in which any foreign nation or foreign national has an interest.

In the late 1970s and '80s, presidents used the law primarily to impose sanctions against other nations, including Iran, Nicaragua, South Africa, Libya, and Panama. Then, in 1983, when Congress failed to renew a law authorizing the Commerce Department to control certain exports, President Ronald Reagan declared a national emergency in order to assume that control under IEEPA. Subsequent presidents followed his example, transferring export control from Congress to the White House. President Bill

Clinton expanded IEEPA's usage by targeting not just foreign governments but foreign political parties, terrorist organizations, and suspected narcotics traffickers.

President George W. Bush took matters a giant step further after 9/11. His Executive Order 13224 prohibited transactions not just with any suspected foreign terrorists, but with any foreigner or any U.S. citizen suspected of providing them with support. Once a person is "designated" under the order, no American can legally give him a job, rent him an apartment, provide him with medical services, or even sell him a loaf of bread unless the government grants a license to allow the transaction. The Patriot Act gave the order more muscle, allowing the government to trigger these consequences merely by opening an investigation into whether a person or group should be designated.

Designations under Executive Order 13224 are opaque and extremely difficult to challenge. The government needs only a "reasonable basis" for believing that someone is involved with or supports terrorism in order to designate him. The target is generally given no advance notice and no hearing. He may request reconsideration and submit evidence on his behalf, but the government faces no deadline to respond. Moreover, the evidence against the target is typically classified, which means he is not allowed to see it. He can try to challenge the action in court, but his chances of success are minimal, as most judges defer to the government's assessment of its own evidence.

Americans have occasionally been caught up in this Kafkaesque system. Several Muslim charities in the United States were designated or investigated based on the suspicion that their charitable contributions overseas benefited terrorists. Of course, if the government can show, through judicial proceedings that observe due process and other constitutional rights, that an American group or person is funding terrorist activity, it should be able to cut off those funds. But the government shut these charities down by freezing their assets without ever having to prove its charges in court.

In other cases, Americans were significantly harmed by designations that later proved to be mistakes. For instance, two months after 9/11, the Treasury Department designated Garad Jama, a Somalian-born American, based on an erroneous determination that his money-wiring business was part of a terror financing network. Jama's office was shut down and his bank account frozen. News outlets described him as a suspected terrorist. For months, Jama tried to gain a hearing with the government to establish his innocence and, in the meantime, obtain the government's permission to get a job and pay his lawyer. Only after he filed a lawsuit did the government allow him to work as a grocery store cashier and pay his living expenses. It was several more months before the government reversed his designation and unfroze his assets. By then he had lost his business, and the stigma of having been publicly labeled a terrorist supporter continued to follow him and his family.

Despite these dramatic examples, IEEPA's limits have yet to be fully tested. After two courts ruled that the government's actions against American charities were unconstitutional, Barack Obama's administration chose not to appeal the decisions and largely refrained from further controversial designations of American organizations and citizens. Thus far, President Trump has followed the same approach.

That could change. In October, in the lead-up to the midterm elections, Trump characterized the caravan of Central American migrants headed toward the U.S. border to seek asylum as a "National Emergency." Although he did not issue an emergency proclamation, he could do so under IEEPA. He could determine that any American inside the United States who offers material support to the asylum seekers — or, for that matter, to undocumented immigrants inside the United States — poses "an unusual and extraordinary threat" to national security, and authorize the Treasury Department to take action against them.

Such a move would carry echoes of a law passed recently in Hungary that criminalized the provision of financial or legal services to undocumented migrants; this has been dubbed the "Stop Soros" law, after the Hungarian American philanthropist George Soros, who funds migrants' rights organizations. Although an order issued under IEEPA would not land targets in jail, it could be implemented without legislation and without affording targets a trial. In practice, identifying every American who has hired, housed, or provided paid legal representation to an asylum seeker or undocumented immigrant would be impossible—but all Trump would need to do to achieve the desired political effect would be to make high-profile examples of a few. Individuals targeted by the order could lose their jobs and find their bank accounts frozen and their health insurance canceled. The battle in the courts would then pick up exactly where it left off during the Obama administration — but with a newly reconstituted Supreme Court making the final call.

4. BOOTS ON MAIN STREET

The idea of tanks rolling through the streets of U.S. cities seems fundamentally inconsistent with the country's notions of democracy and freedom. Americans might be surprised, therefore, to learn just how readily the president can deploy troops inside the country.

How far could the president go in using the military within U.S. borders? The Supreme Court has given us no clear answer to this question.

The principle that the military should not act as a domestic police force, known as "*posse comitatus*," has deep roots in the nation's history, and it is often mistaken for a constitutional rule. The Constitution, however, does not prohibit military participation in police activity. Nor does the Posse Comitatus Act of 1878 outlaw such participation; it merely states that any authority to use the military for law enforcement purposes must derive from the Constitution or from a statute.

The Insurrection Act of 1807 provides the necessary authority. As amended over the years, it allows the president to deploy troops upon the request of a state's governor or legislature to help put down an insurrection within that state. It also allows the president to deploy troops unilaterally, either because he determines that rebellious activity has made it "impracticable" to enforce federal law through regular means, or because he deems it necessary to suppress "insurrection, domestic violence, unlawful combination, or conspiracy" (terms not defined in the statute) that hinders the rights of a class of people or "impedes the course of justice."

Presidents have wielded the Insurrection Act under a range of circumstances. Dwight Eisenhower used it in 1957 when he sent troops into Little Rock, Arkansas, to enforce school desegregation. George H. W. Bush employed it in 1992 to help stop the riots that erupted in Los Angeles after the verdict in the Rodney King case. George W. Bush considered invoking it to help restore public order after Hurricane Katrina but opted against it when the governor of Louisiana resisted federal control over the state's National Guard. While controversy surrounded all these examples, none suggests obvious overreach.

And yet the potential misuses of the act are legion. When Chicago experienced a spike in homicides in 2017, Trump tweeted that the city must "fix the horrible 'carnage'" or he would "send in the Feds!" To carry out this threat, the president could declare a particular street gang —say, MS-13 — to be an "unlawful combination" and then send troops to the nation's cities to police the streets. He could characterize sanctuary cities — cities that refuse to provide assistance to immigration enforcement officials — as "conspiracies" against federal authorities and order the military to enforce immigration laws in those places. Conjuring the specter of "liberal mobs," he could send troops to suppress alleged rioting at the fringes of anti-Trump protests.

How far could the president go in using the military within U.S. borders? The Supreme Court has given us no clear answer to this question. Take *Ex parte Milligan*, a famous ruling from 1866 invalidating the use of a military commission to try a civilian during the Civil War. The case is widely considered a high-water mark for judicial constraint on executive action. Yet even as the Court held that the president could not use war or emergency as a reason to bypass civilian courts, it noted that martial law — the displacement of civilian authority by the military — would be appropriate in some cases. If civilian courts were closed as a result of a foreign invasion or a civil war, for example, martial law could exist "until the laws can have their free course." The message is decidedly mixed: Claims of emergency or necessity cannot legitimize martial law … until they can.

Presented with this ambiguity, presidents have explored the outer limits of their constitutional emergency authority in a series of directives known as Presidential Emergency Action Documents, or PEADs. PEADs, which originated as part of the Eisenhower administration's plans to ensure continuity of government in the wake of a Soviet nuclear attack, are draft executive orders, proclamations, and messages to Congress that are prepared in advance of anticipated emergencies. PEADs are closely guarded within the government; none has ever been publicly released or leaked. But their contents have occasionally been described in public sources, including FBI memorandums that were obtained through the Freedom of Information Act as well as agency manuals and court records. According to these sources, PEADs drafted from the 1950s through the 1970s would authorize not only martial law but the suspension of habeas corpus by the executive branch, the revocation of Americans' passports, and the roundup and detention of "subversives" identified in an FBI "Security Index" that contained more than 10,000 names.

Less is known about the contents of more recent PEADs and equivalent planning documents. But in 1987, the *Miami Herald* reported that Lt. Col. Oliver North had worked with the Federal Emergency Management Agency to create a secret contingency plan authorizing "suspension of the Constitution, turning control of the United States over to FEMA, appointment of military commanders to run state and local governments and declaration of martial law during a national crisis." A 2007 Department of Homeland Security report lists "martial law" and "curfew declarations" as "critical tasks" that local, state, and federal government should be able to perform in emergencies. In 2008, government sources told a reporter for *Radar* magazine that a version of the Security Index still existed under the code name Main Core, allowing for the apprehension and detention of Americans tagged as security threats.

Since 2012, the Department of Justice has been requesting and receiving funds from Congress to update several dozen PEADs first developed in 1989. The funding requests contain no indication of what these PEADs encompass or what standards the department intends to apply in reviewing them. But whatever the Obama administration's intent, the review has now passed to the Trump administration. It will fall to Jeff Sessions's successor as attorney general to decide whether to rein in or expand some of the more frightening features of these PEADs. And, of course, it will be up to President Trump whether to actually use them — something no previous president appears to have done.

5. KINDLING AN EMERGENCY

What would the Founders think of these and other emergency powers on the books today, in the hands of a president like Donald Trump? In *Youngstown*, the case in which the Supreme Court blocked President Truman's attempt to seize the nation's steel mills, Justice Jackson observed that broad emergency powers were "something the forefathers omitted" from the Constitution. "They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation," he wrote. "We may also suspect that they suspected that emergency powers would tend to kindle emergencies."

What would the Founders think of these and other emergency powers on the books today, in the hands of a president like Donald Trump?

In the past several decades, Congress has provided what the Constitution did not: emergency powers that have the potential for creating emergencies rather than ending them. Presidents have built on these powers with their own secret directives. What has prevented the wholesale abuse of these authorities until now is a baseline commitment to liberal democracy on the part of past presidents. Under a president who doesn't share that commitment, what might we see?

Imagine that it's late 2019. Trump's approval ratings are at an all-time low. A disgruntled former employee has leaked documents showing that the Trump Organization was involved in illegal business dealings with Russian oligarchs. The trade war with China and other countries has taken a significant toll on the economy. Trump has been caught once again disclosing classified information to Russian officials, and his international gaffes are becoming impossible for lawmakers concerned about national security to ignore. A few of his Republican supporters in Congress begin to distance themselves from his administration. Support for impeachment spreads on Capitol Hill. In straw polls pitting Trump against various potential Democratic presidential candidates, the Democrat consistently wins.

Trump reacts. Unfazed by his own brazen hypocrisy, he tweets that Iran is planning a cyber operation to interfere with the 2020 election. His national security adviser, John Bolton, claims to have seen ironclad (but highly classified) evidence of this planned assault on U.S. democracy. Trump's inflammatory tweets provoke predictable saber rattling by Iranian leaders; he responds by threatening preemptive military strikes. Some Defense Department officials have misgivings, but others have been waiting for such an opportunity. As Iran's statements grow more warlike, "Iranophobia" takes hold among the American public.

Proclaiming a threat of war, Trump invokes Section 706 of the Communications Act to assume government control over internet traffic inside the United States in order to prevent the spread of Iranian disinformation and propaganda. He also declares a national emergency under IEEPA, authorizing the Treasury Department to freeze the assets of any person or organization suspected of supporting Iran's activities against the United States. Wielding the authority conferred by these laws, the government shuts down several left-leaning websites and domestic civil society

organizations, based on government determinations (classified, of course) that they are subject to Iranian influence. These include websites and organizations that are focused on getting out the vote.

Lawsuits follow. Several judges issue orders declaring Trump's actions unconstitutional, but a handful of judges appointed by the president side with the administration. On the eve of the election, the cases reach the Supreme Court. In a 5–4 opinion written by Justice Brett Kavanaugh, the Court observes that the president's powers are at their zenith when he is using authority granted by Congress to protect national security. Setting new precedent, the Court holds that the First Amendment does not protect Iranian propaganda and that the government needs no warrant to freeze Americans' assets if its goal is to mitigate a foreign threat.

Protests erupt. On Twitter, Trump calls the protesters traitors and suggests (in capital letters) that they could use a good beating. When counterprotesters oblige, Trump blames the original protesters for sparking the violent confrontations and deploys the Insurrection Act to federalize the National Guard in several states. Using the Presidential Alert system first tested in October 2018, the president sends a text message to every American's cellphone, warning that there is "a risk of violence at polling stations" and that "troops will be deployed as necessary" to keep order. Some members of opposition groups are frightened into staying home on Election Day; other people simply can't find accurate information online about voting. With turnout at a historical low, a president who was facing impeachment just months earlier handily wins re-election — and marks his victory by renewing the state of emergency.

This scenario might sound extreme. But the misuse of emergency powers is a standard gambit among leaders attempting to consolidate power. Authoritarians Trump has openly claimed to admire—including the Philippines' Rodrigo Duterte and Turkey's Recep Tayyip Erdoğan—have gone this route.

Of course, Trump might also choose to act entirely outside the law. Presidents with a far stronger commitment to the rule of law, including Lincoln and Roosevelt, have done exactly that, albeit in response to real emergencies. But there is little that can be done in advance to stop this, other than attempting deterrence through robust oversight. The remedies for such behavior can come only after the fact, via court judgments, political blowback at the voting booth, or impeachment.

By contrast, the dangers posed by emergency powers that are written into statute can be mitigated through the simple expedient of changing the law. Committees in the House could begin this process now by undertaking a thorough review of existing emergency powers and declarations. Based on that review, Congress could repeal the laws that are obsolete or unnecessary. It could revise others to include stronger protections against abuse. It could issue new criteria for emergency declarations, require a connection between the nature of the emergency and the powers invoked, and prohibit indefinite emergencies. It could limit the powers set forth in PEADs.

Congress, of course, will undertake none of these reforms without extraordinary public pressure — and until now, the public has paid little heed to emergency powers. But we are in uncharted political territory. At a time when other democracies around the world are slipping toward authoritarianism — and when the president seems eager for the United States to follow their example — we would be wise to shore up the guardrails of liberal democracy. Fixing the current system of emergency powers would be a good place to start.

Turning Soft Norms Into Hard Law

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

A democracy depends on checks and balances and limits on unaccountable power. Often these come in the form of unwritten norms, shared values, and invisible guardrails that curb abuse. Since taking office, President Trump has repeatedly broken these norms and traditions, mostly without consequence. In January 2018, the Brennan Center formed the National Task Force on Rule of Law and Democracy, a bipartisan group of former public officials, to review the informal rules of our democracy and propose reforms to strengthen them.

In short, time and again abuse by presidents produced a response. Reform follows abuse — but not automatically, and not always.

The values that undergird American democracy are being tested. As has become increasingly clear, our republic has long relied not just on formal laws and the Constitution, but also on unwritten rules and norms that constrain the behavior of public officials. These guardrails, often invisible, curb abuses of power. They ensure that officials act for the public good, not for personal financial gain. They protect nonpartisan public servants in law enforcement and elsewhere from improper political influence. They protect businesspeople from corrupting favoritism and graft. And they protect citizens from arbitrary and unfair government action. These practices have long held the allegiance of public officials from all political parties. Without them, government becomes a chaotic grab for power and self-interest.

Lately, the nation has learned again just how important those protections are — and how flimsy they can prove to be. For years, many assumed that presidents had to release their tax returns. It turns out they don't. We assumed presidents would refrain from interfering in criminal investigations. In fact, little prevents them from doing so. Respect for expertise, for the role of the free press, for the proper independent role of the judiciary, seemed firmly embedded practices. Until they weren't.

Presidents have overreached before. When they did so, the system reacted. George Washington's decision to limit himself to two terms was as solid a precedent as ever existed in American political life. Then Franklin D. Roosevelt ran for and won a third and then a fourth term. So, we amended the Constitution to formally enshrine the two-term norm. After John F. Kennedy appointed his brother to lead the Justice Department and other elected officials sought patronage positions for their family members, Congress

Excerpted from *Proposals for Reform,* a report by the Brennan Center's National Task Force on Rule of Law & Democracy, published October 2, 2018.

passed an anti-nepotism law. Richard Nixon's many abuses prompted a wide array of new laws, ranging from the special prosecutor law (now expired) to the Budget and Impoundment Control Act and the War Powers Act. Some of these were enacted after he left office. Others, such as the federal campaign finance law, were passed while he was still serving, with broad bipartisan support, over his veto. In the wake of Watergate, a full-fledged accountability system — often unspoken — constrained the executive branch from lawless activity. This held for nearly half a century.

In short, time and again abuse by presidents produced a response. Reform follows abuse — but not automatically, and not always. Today the country is living through another such moment. Once again, it is time to act. It is time to turn soft norms into hard law. A new wave of reform solutions is essential to restore public trust. And as in other eras, the task of advancing reform cannot be for one or another party alone.

A new wave of reform solutions is essential to restore public trust.

Hence, the National Task Force on Rule of Law and Democracy. The Task Force is a nonpartisan group of former public servants and policy experts. We have worked at the highest levels in federal and state government, as prosecutors, members of the military, senior advisers in the White House, members of Congress, heads of federal agencies, and state executives. We come from across the country and reflect varying political views. We have come together to develop solutions to repair and revitalize our democracy. Our focus is not on the current political moment but on the future. Our system of government has long depended on leaders following basic norms and ground rules designed to prevent abuse of power. Unless those guardrails are restored, they risk being destroyed permanently — or being replaced with new, anti-democratic norms that future leaders can exploit.

We have examined norms and practices surrounding financial conflicts, political interference with law enforcement, the use of government data and science, the appointment of public officials, and many other related issues. We have consulted other experts and former officials from both parties. Despite our differences, we have identified concrete ways to fix what has been broken.

Ethical Conduct and Government Accountability

To ensure transparency in government officials' financial dealings:

- Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for government officials, including closing the loophole for family businesses and privately held companies and reducing the burdens of disclosure.
- Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.
- Congress should require a confidential national security financial review for incoming presidents, vice presidents, and other senior officials.

To better ensure that government officials put the interests of the American people first:

- Congress should pass a law to enforce the safeguards in the Constitution's foreign and domestic emoluments clauses, clearly articulating what payments and benefits are and are not prohibited and providing an enforcement scheme for violations.
- Congress should extend federal safeguards against conflicts of interest to the president and vice president, with specific exemptions that recognize the president's unique role.

To ensure that public officials are held accountable for violations of ethics rules where appropriate:

- Congress should reform the Office of Government Ethics (OGE) so that it can better enforce federal ethics laws, including by:
    - granting OGE the power, under certain circumstances, to conduct confidential investigations of ethics violations in the executive branch,
    - creating a separate enforcement division within OGE,
    - allowing OGE to bring civil enforcement actions in federal court,
    - specifying that the OGE director may not be removed during his or her term except for good cause,
    - providing OGE an opportunity to review and object to conflict of interest waivers, and
    - confirming that White House staff must follow federal ethics rules.

The Rule of Law and Evenhanded Administration of Justice

To safeguard against inappropriate interference in law enforcement for political or personal aims:

- Congress should pass legislation requiring the executive branch to articulate clear standards for, and report on how, the White House interacts with law enforcement, including by:
    - requiring the White House and enforcement agencies to publish policies specifying who should and should not participate in discussions about specific law enforcement matters, and
    - requiring law enforcement agencies to maintain a log of covered White House contacts and to provide summary reports to Congress and inspectors general.
- Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

To ensure that no one is above the law:

- Congress should require written justifications from the president for pardons involving close associates.
- Congress should pass a resolution expressly and categorically condemning self-pardons.
- Congress should pass legislation providing that special counsels may be removed only "for cause" and establishing judicial review for removals.

Reading the Mueller Tea Leaves

Daniel S. Goldman, Anne Milgram, and Lisa Monaco

Special Counsel Robert Mueller's investigation into Russia's interference in the 2016 election has consumed the public and the president for more than a year and a half. In previous scandals, public testimony provided a narrative. Here, the country grew used to waiting for actions by an otherwise silent prosecutor. Does the special counsel bear too much oversight responsibility over our elections and democracy? Three former prosecutors weighed in on these questions.

ANNE MILGRAM, former NJ Attorney General: A big question in the Mueller investigation is, who can Manafort cooperate against? When people cooperate, there are a couple of important pieces. The first is that the government thinks they're being truthful in the information that they're going to provide. The second is that they provide valuable information that furthers an investigation. The huge piece still missing here is collusion, which I would call conspiracy. The whole question of whether Trump or anyone acting on Trump's behalf conspired or worked with the Russian government to influence the election is central to that question.

The president is not above the law, whether or not he can be charged criminally.

LISA MONACO, former White House counterterrorism adviser: I find the Manafort piece interesting, particularly because of the first indictments that came down. There was a bank fraud case and a money-laundering case. At first glance it seems like those have nothing to do with the real "collusion" we're focused on. But in fact, as has been said, Manafort was part of that Trump Tower meeting and he worked on behalf of pro-Russian interests abroad. He worked for no fee on the campaign, and then there was a change in the Republican platform with regard to Ukraine. There is a lot to be plumbed there.

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There's a lot of detail the special counsel's team has been speaking quite clearly through court documents. One place I would point to is the indictment that came down in February. That was the indictment against 13 Russian individuals and entities including something called the Internet Research Agency. This is a troll farm and network of bots from Russia to influence the 2016 election. The overarching legal theory in that case is not collusion, but conspiracy. In that indictment is reference to conduct by unnamed U.S. persons. I think it provides a very interesting map for where we might see

Excerpted from remarks given at *Politics and Prosecutors: Where Will the Special Counsel Investigation Lead Us?* at New York University, October 24, 2018. Daniel Goldman is a Brennan Center fellow.

this case go. Who are those U.S. persons? Might they be added in to that conspiracy framework? And I think you'll see, as has been written, that Roger Stone and others are potentially in the sights of the special counsel.

DANIEL S. GOLDMAN, former Assistant U.S. Attorney: The Office of Legal Counsel sets the policy for the Department of Justice about indicting a sitting president — it's not a regulation, it's not a statute. It is simply a policy of the Department of Justice that a sitting president should not be indicted. And it can be reversed. But I think the expectation is that, in order to indict the president, Mueller would most likely have to go to the Deputy Attorney General and the Office of Legal Counsel and request that they reverse the policy.

MONACO: The Office of Legal Counsel is the gold standard for the executive branch's legal view on a particular issue. Going back, both Republican and Democratic administrations, with their different Offices of Legal Counsel, have both come down in the same place on this question that a sitting president can't be indicted. The remedy for that is, of course, a political one in the impeachment process.

MILGRAM: No one has ever indicted a sitting president. And this is where the Office of Legal Counsel becomes particularly important, because their view controls for the United States Department of Justice. It's also very clear from Mueller's appointment letter that he is required to follow existing Department of Justice policies. Also, knowing him just a little bit, he's going to follow the rules of the Department. This is not a space where you would expect him to push the envelope.

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Right now, it's been publicly reported that Mueller's team has agreed to written responses from the President, which never happens in criminal law, only in civil cases. That's extraordinary. I think it's a concession by the special counsel to move the investigation along with a belief that there's a lot to be done. But he and his team did not agree to it on the obstruction of justice charges.

GOLDMAN: What I perceive to be the most unsettling and disturbing aspect of the last couple years is not Russian interference in the election, as bad as that is, but the reaction to this investigation. And the attacks on our institutions, our system, our law enforcement, and what many people commonly refer to as the rule of law.

MILGRAM: The president is not above the law, whether or not he can be charged criminally while in office. We're going to agree that there's an Office of Legal Counsel opinion that would prohibit that, but there's huge value in talking about the possible commission of a crime. Without that kind of public airing or conversation, the president would almost effectively be above the law.

Trumpocracy

David Frum and Trevor Morrison

How big a threat does the Trump presidency pose to American democracy? David Frum, a leading conservative author and former speechwriter for President George W. Bush, has been a prominent voice warning of the risks of presidential corruption and creeping authoritarianism. He was interviewed by the dean of NYU School of Law.

TREVOR MORRISON: The title of your new book is attention-getting — *Trumpocracy*. What is its definition?

DAVID FRUM: Trumpocracy is a term that is designed to focus attention on a system of power, rather than an individual. Like every journalist in Washington, I read the Michael Wolf book with fascination. I learned a lot from it, and I recommend it to people, but it risks misleading us in ways that actually are detrimental, like focusing us on the personality of the president and also on his gaps. He is a wilier survivor than he's given credit for. And around him there is a system of power that enables him.

Trump isn't the heart attack of democracy. He is the gum disease of democracy.

The United States government is a big, bureaucratic institution in a highly legalistic country. The president can't just issue edicts and expect them to be followed. He works with others, and I am fascinated by those others — the people behind the shoulders of the president.

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The analogy I keep using is that Trump isn't the heart attack of democracy. He is the gum disease of democracy. You can die from gum disease if it's left untreated, but you have some time. This book is a toothbrush.

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MORRISON: Many of our democratic norms have been not just threatened, but ripped apart. How do those get rebuilt?

FRUM: This is where my instinctive pessimism kicks in. These norms were really hard to build, and they have been very imperfect. They've been better for the president than for Congress, better at the federal level than at the state level, better at the state level than at the local level, but

Excerpted from remarks given at *Trumpocracy: David Frum in Conversation With Trevor Morrison* at NYU School of Law, February 21, 2018.

always very imperfect. They can be smashed really easily, and once smashed, it's hard to put them back together.

MORRISON: American history and law suggest that moments of extravagant new exercises of executive power are often responded to, at some later moment, with legislation. So, some of these shattered norms may well return — releasing tax returns, for example — in the form of legislation. That, however, is its own question about whether the best way to impose a norm like that is through a law.

FRUM: The system responds in self-defense in ways that are very dangerous. We will pass laws, but one of the things to be aware of when we pass laws is that, in a highly legalistic country, Americans tend to think if it's not illegal, then it's OK.

Every time you pass a law, yes, you prohibit certain activities. But, in effect, you give a blessing to others. One of the things I really dread is the coming debate over collusion. As the facts come into view, if it turns out that lower-level people did things that broke laws, but higher-level people did things that did not break laws but are just shocking, we are going to end up, in effect, legitimating those things. Laws extinguish norms because they create an implicit permission for behavior on the other side of the legal line.

...

Things that happen every day become normal. You can say, "Don't normalize this," but they do become normal. People who lived through the Blitz found that the Blitz became normal. This is our normality. This is the way we live now. At some level, you can't let it make you crazy, and you also have to avoid reacting to every little thing, because you will become, literally, crazy.

Presidential Ethics, Not an Oxymoron

Daniel I. Weiner

The Brennan Center has called for applying federal ethics law to the president. Some raise a constitutional objection: Wouldn't this encumber chief executives with rules and give other branches too much power? In fact, other presidents have followed federal ethics rules without breaking a sweat.

A year into his administration, it's become clear that President Donald Trump won't voluntarily address the conflicts between his private business dealings and his role as commander in chief. His refusal to follow norms set by his predecessors and divest from his real estate empire, opting to maintain ownership of his businesses but hand operational control over to his sons, continues to raise questions about how his official actions impact his and his family's bottom line.

Though many find this alarming, they tend to assume that there's not much we can do about it. While some in Washington have posed reforms that touch on the president's conflicts, many of the proposals tinker around the edges without addressing the heart of the problem. This has to do, in part, with the powerful and unique role the presidency plays: There's a fear that any serious intervention from Congress would trample all over the separation of powers.

However, it's time to reevaluate those assumptions. If we can no longer rely on the president to voluntarily address potential conflicts of interest, Congress can and must step in and make this president — and his successors — subject to at least some of the same rules as the millions of federal employees under them.

Before he took office, President Trump justified his refusal to divest from his businesses by noting that the commander in chief "can't have" conflicts of interest — which is true in a legal sense, since the president (along with the vice president and certain other officials) is exempt from federal conflict of interest rules.

The fact that so many previous commanders in chief managed to govern while avoiding conflicts of interest is a strong indication that making it a requirement would not functionally cripple the president.

The thinking behind the exemption traces back to a 1974 Justice Department letter arguing any law limiting personal conflicts of interest for a president would be constitutionally suspect. Acting Attorney General Laurence Silberman wrote that such laws would "disable [the president] from performing some of the functions prescribed by the Constitution" and would impose additional qualifications on presidential candidates beyond those specified in the text of the Constitution. Silberman's view caught on without significant public debate, and Congress went on to codify it in 1989.

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Nevertheless, every president since the 1970s (until the current one) took significant voluntary steps to avoid even the appearance of impropriety.

President Trump's choice to abandon this tradition should worry all of us. While many of his supporters praise his willingness to break through conventions they find obsolete or elitist, preventing abuse of public office for private gain ought to be a point of common ground. After all, instead of a populist real estate developer, our next billionaire president could be a left-leaning tech titan or media mogul. The same constraints placed on President Trump would also apply to President Mark Zuckerberg or President Oprah Winfrey.

Moreover, Silberman's concern that conflict of interest rules could "disable" the president feels overblown. It assumes that the president cannot refrain from participating in specific matters that, constitutionally, fall under his or her responsibility. But presidents are already uninvolved in a great deal of government decisions. And other high-ranking officials like Cabinet secretaries routinely recuse themselves from matters within their departments without disabling their authority.

Selling conflict-prone assets, as President Trump's predecessors did, is also an option. The fact that so many previous commanders in chief managed to govern while avoiding conflicts of interest is a strong indication that making it a requirement would not functionally cripple the president.

It is also wrong to think that conflict of interest law would impose an additional qualification on the presidency beyond the text of the Constitution — that is, requirements beyond age and citizenship status. Presidents are members of society and are generally subject to the same rules as the rest of us, including those prohibiting gross misuse of public office. Few would argue, for example, that the president can legally take bribes. And commentators across the ideological spectrum have pushed back on suggestions that the president cannot legally obstruct justice. A law requiring the president, like most other officials, to avoid engaging in matters where he or she has a direct financial interest would be no different.

None of which goes to discount the uniqueness of the president's role. The president may not be above the law, but the Supreme Court has held that efforts to regulate his or her personal conduct in office must be "justified by an overriding need to promote objectives within the constitutional authority of Congress."

Conflict of interest rules plainly serve these objectives. They deter official self-dealing, which the Court itself has called "an evil which endangers the very fabric of a democratic society." That is especially true with respect to the president. More than any other official, the president must put the interests of the American people first. The Framers understood this, which is why the Constitution requires the president alone to be paid a government salary and bars the president from receiving certain other payments in the foreign and domestic "emoluments clauses." Placing legal limits on presidential conflicts of interest is consistent with the ideals underlying those principles.

This doesn't mean that the president should be subject to the exact same rules as the employees at your local Social Security office, or even a Cabinet secretary. We at the Brennan Center have proposed several specific exceptions for the president, including for conflicts arising from legislation the president signs and those involving relatively small sums of money.

But the need for exceptions does not mean that we should continue to give the president a free pass from core ethical standards. Fixing this pressing gap in the law is an excellent starting point to restore safeguards that have long prevented abuse of the office's immense power. It should be a bipartisan priority.

Guarding Against Abuses of Executive Power

Faiza Patel, Elizabeth Goitein, and Michael Price

Resistance to abuse is vital, but not enough. In response to attacks on constitutional rights and the rule of law, activists and lawmakers must push for stronger guardrails against autocratic behavior. In this part of its 2018 series of affirmative policy agendas, the Brennan Center makes recommendations on how to protect constitutional freedoms, vulnerable communities, and the integrity of our democracy amid new threats.

Americans need not choose between security and freedom. But the politics of fear and racial bias have too often supplanted sound policies. Instead of narrowly targeting actual threats to our safety and security, some law enforcement and intelligence policies broadly target entire communities, compromising the rights of law-abiding citizens and immigrants.

Practices such as racial profiling, warrantless spying, and callous immigration enforcement are key examples. They do nothing to keep us safe. Yet they erode the nation's values and sow division. National security is used as a flimsy pretext to keep important details about such policies secret. In the meantime, efforts to thwart real threats to our security — such as Russia's interference in our democratic process — are falling victim to politics.

As Americans, we can, and must, do better. This report offers five solutions to reform corrosive national security and law enforcement practices that fail to address actual threats to public safety. These proposals will rebuild public trust to enhance security, a goal that all lawmakers should support. A commonsense framework for national security for the 21st century would consist of the following actions:

- **End targeting of minority communities.** Congress should pass the End Racial Profiling Act, which would prohibit profiling based on race, religion, national origin, gender, gender identity, or sexual orientation.

- **Stop funding the "Muslim ban" and "extreme vetting."** Congress should cut all funding associated with President Donald Trump's "Muslim ban" and "extreme vetting" policies, including the National Vetting Center.

Excerpted from the Brennan Center proposal *Liberty & National Security: An Election Agenda for Candidates, Activists, and Legislators,* published April 23, 2018.

- **End warrantless spying on Americans.** Congress should refresh privacy rules enacted before the World Wide Web to ensure Americans' most private communications are protected. It should also enact reforms to ensure that warrantless surveillance ostensibly directed at foreigners isn't used to spy on Americans.

- **Protect whistleblowers and the press.** Robust legal protection is especially important in an era when the president has dubbed broadcast networks "the enemy of the American people." Congress should pass a reporter "shield law" to protect journalists, along with meaningful safeguards for national security whistleblowers.

- **Protect investigations into Russian meddling in the 2016 election.** Congress should pass legislation to ensure that Special Counsel Robert Mueller cannot be fired without cause and judicial review. Lawmakers should also conduct robust fact-finding inquires to adequately address the threat of foreign interference in U.S. elections.

These proposals are practical solutions that reject the false choice between liberty and security. They promote the values and constitutional principles that define America. And they offer principles and policies that candidates of any party can and should support.

VOTING RIGHTS

Abusive Voter Purges

Myrna Pérez

In 2018, the worst voter suppression came not from harsh new laws but from government officials who deleted hundreds of thousands of citizens from the rolls. This form of disenfranchisement is often invisible until Election Day. A major Brennan Center study illuminated what MSNBC called "a frenzy of purges." In Southern states previously covered by Section 5 of the Voting Rights Act, 2 million fewer voters would have been purged from 2012 to 2016 had the Supreme Court not gutted the Act in its decision in Shelby County v. Holder. *The issue heated into a major controversy as it became clear that some officials were using voter purges in a way that could sway the outcome of the midterm elections.*

This fall, millions of Americans may head to the polls only to find their names aren't on voter registration lists anymore. These voters may have to cast provisional ballots. Or worse, they could be turned away.

The cause? Voter purges, an often-flawed method of cleaning up voter registration lists by deleting names from voter rolls.

Purges aren't necessarily a bad thing. Election officials have a real need to ensure voting lists are up-to-date. People move. People change their names. And inevitably, people die. Voter rolls should reflect those changes.

But purges are a growing threat that may imperil the right to vote for millions of Americans in the midterm elections in November.

In the past decade, attacks on the vote have included discriminatory voter ID laws and cutbacks in early voting that emerged from bad laws or policies formulated weeks or even months before Election Day.

For the most part, we could see those attacks coming, because of public debate in state legislatures or high-profile lawsuits challenging these bad policies.

Unlike anti-voter legislation, bad purges often happen in an office with the stroke of keyboard.

But state and local efforts to remove supposedly ineligible people from voter rolls are more insidious. They are too often based on bad information, like "ineligible" lists that include the names of eligible voters, or matching processes that confuse two different people for the same one.

Purges are on the rise across the country, and particularly in a cluster of Southern states no longer under certain protections of the Voting Rights Act. And unlike anti-voter legislation, bad purges often happen in an office with the

This op-ed was published by *The New York Times,* July 19, 2018. Pérez co-authored the report *Purges: A Growing Threat to the Right to Vote* with Jonathan Brater, Christopher Deluzio, and Kevin Morris.

stroke of keyboard — so voters knocked off the rolls may not realize what's happened until it's too late.

Over the past year, my organization, the Brennan Center, pored over data from 6,600 jurisdictions and found the median rate of purging across the country has risen from 6.2 percent of voters to 7.8 percent since 2008. That jump may seem small, but it's statistically significant and cannot be explained by population growth. It amounts to an additional 4 million people being struck off voting lists.

Much of that rise reflects purges in many of the places once subject to the preclearance requirements of the Voting Rights Act. Those requirements meant that places with a history of discrimination had to seek approval from the federal government or courts before they could make changes to voting laws.

But in 2013, the Supreme Court knocked down the preclearance provision of the Voting Rights Act. Two million more people were booted from registration lists between 2012 and 2016 in jurisdictions once covered by preclearance than would have been kicked off if purge rates in those areas continued at the same rate as jurisdictions that hadn't been subject to preclearance.

And as regions that used to be covered by the preclearance provisions increased their purge rates, we found, so too did the number of people who showed up to vote at their polling place but were unable to cast a regular ballot. This suggests that voters had been wrongly removed from the rolls.

Our concern isn't limited to Southern states. We found that over the past five years, four states have engaged in illegal purges (Florida, New York, North Carolina, and Virginia), and another four states (Alabama, Arizona, Indiana, and Maine) have written policies that violate the National Voter Registration Act, which helps protect against wrongful purges.

In particular, Alabama, Indiana, and Maine have policies that disregard the federal requirement to allow at least two elections of nonvoting before tossing voters from the rolls. Instead, all three states allow the use of a problematic multistate database called Crosscheck to conduct immediate purges. Crosscheck purportedly compares registration lists across states, but it might flag a voter if only name and date of birth match, which is not precise enough to prevent mistakes.

Crosscheck has led to unfair purges elsewhere. In 2013, Virginia used Crosscheck to purge some 39,000 voters. County officials received rosters of potential Crosscheck "matches" without checking for accuracy, nor did they have sufficient time to conduct a thorough review. In some counties, error rates were as high as 17 percent.

We need to stop bad laws and policies in their tracks. My organization sued Indiana to halt its sloppy voter purge law (and won a temporary injunction this spring). We are urging Alabama and Maine to change their policies. We also support automatic voter registration, which uses updates to names and addresses at motor vehicle or other government offices to keep registration rolls up to date.

Election officials have many tools at their disposal. They should pick the ones that make voting easier, not harder.

The Worst Voter Suppression in the Modern Era

Zachary Roth and Wendy R. Weiser

When the Supreme Court gutted the Voting Rights Act in 2013, civil rights advocates warned of a devastating backslide. This past year, the country saw the most aggressive effort since 1965 to disenfranchise voters and suppress turnout. The Supreme Court was wrong, and now Congress must act to protect voting rights.

Large-scale voter purges from Florida to Maine. Ultra-strict registration rules keeping voters off the rolls in Georgia and other states. Cuts to early-voting sites in North Carolina. A North Dakota voter ID law that could keep Native Americans from the polls. False voting information being spread online.

By our assessment, the range of voter suppression efforts has been more widespread, intense, and brazen this cycle than in any other since the modern-day assault on voting began.

Since the modern-day push to create barriers to voting got underway around a decade ago, the Brennan Center has been tracking restrictive voting laws and practices as closely as any organization in the country — as well as speaking out against them and challenging many in court. As Election Day 2018 approaches, citizens in 24 states are facing new laws making it harder for them to vote than it was in 2010. And in nine of those states, it's harder to vote than it was in 2016. By our assessment, the range of voter suppression efforts has been more widespread, intense, and brazen this cycle than in any other since the modern-day assault on voting began, especially when viewed in combination with the accumulated new hurdles to voting.

A number of factors have converged to turn up the volume on voter suppression. First, by consistently and falsely stoking fear about illegal voting for more than two years — including lying that he'd have won the popular vote if it weren't for millions of noncitizen voters — President Trump has helped make the issue central to the far right's agenda. Trump's short-lived voter fraud commission collapsed in January after drawing bipartisan outrage, but it nonetheless acted as a signal to supportive states that efforts to make voting harder would be welcomed at the highest levels. It's no coincidence that in the first few months of Trump's presidency, a slew of states proposed or passed new restrictions, after several years during which the pace had seemed to slow.

The courts also have played a key role. The Supreme Court's 2013 ruling in *Shelby County v. Holder*, which neutered the most effective plank of the Voting Rights Act, offered a green light to a host of election rule changes in parts of the country whose voting rules previously had been under

This piece appeared on the Brennan Center website, November 2, 2018.

federal supervision. The court's new staunchly conservative majority may be encouraging even states not directly affected by *Shelby* to lean forward on voter suppression, confident — we hope falsely — that the justices won't stop them. The Court recently declined to block North Dakota's voter ID law, despite evidence that thousands of Native Americans who live on reservations could be stymied by its requirement that their IDs include a residential mailing address.

Of course, courts have also been major players in stemming the growth of voting restrictions. The number of court decisions against new restrictions has ballooned in recent years, with several finding that officials had intentionally tried to keep minorities from voting. But despite these victories, another troubling reality has emerged: Even when courts rule against restrictive voting measures, it isn't enough to deter those looking to limit access to the ballot.

Litigation is typically time consuming, and so these harsh laws often stay in place, fully intact and disenfranchising voters, for one election or more before a court rules against them. And even if that ruling does come, it may only weaken the law rather than striking it down fully — as happened with Texas's and Wisconsin's strict voter ID laws, among other examples. That half-a-loaf outcome gives would-be vote suppressors little incentive to think twice about their strategy. And in the cases when a court scraps a law entirely, the confusion and misinformation surrounding the process can often still keep some voters from the polls.

Put bluntly: In the absence of a broad Supreme Court ruling enforcing voting rights — something that is now an uphill battle at best — or strong federal legislation expanding the legal tools available to voters, the courts simply aren't enough to combat voter suppression.

Equally troubling, those who seek to restrict access to voting do not seem to pay much of a political price. For example, the authors of North Carolina's sweeping voter suppression law, struck down by a federal court that found it "targeted African Americans with almost surgical precision," did not lose their political perches — indeed, one of its key legislative champions now sits in the U.S. Senate, and the lawyer who defended the law has been nominated to be a federal judge. Put bluntly: In the absence of a broad Supreme Court ruling enforcing voting rights — something that is now an uphill battle at best — or strong federal legislation expanding the legal tools available to voters, the courts simply aren't enough to combat voter suppression.

Then there's race. There's evidence that states in which the political clout of minorities is growing — where the ruling majority perceives a threat to its power — are more likely to see restrictive voting laws than are more demographically homogenous states. And as the salience of race in our politics has increased, so too has voter suppression.

A decade ago, there was a national spike in voter suppression efforts in the 2008 election cycle, when Barack Obama, backed by a multiracial coalition, was bidding to become the nation's first African American president. That spurred unfounded fears that ACORN, a community group serving mostly minority communities, and its allied voter registration group for which Obama once worked, was plotting to steal the election on his behalf. Two years later, this resulted in the first massive wave of new laws cutting back

on voting access. In the age of Trump, politicians have grown more comfortable openly playing to these fears. And this year, two of the highest-profile statewide races feature progressive African American candidates — one the founder of a voter registration group — running against white conservative Trump supporters.

Partisanship plays a role too. Voting restrictions have been promoted and supported almost exclusively by Republicans. As our country becomes more polarized, the partisan divide on voting rights has taken on greater import.

Causes aside, here's the grim reality: The scope and sophistication of efforts to make voting more difficult make clear that voting advocates can't respond solely by playing defensive whack-a-mole against the worst laws and practices. That crucial work will continue, but it must be paired with a positive reform agenda — one that is gaining momentum at the state level — that bolsters protections for the right to vote and expands access to the ballot. Adding to this momentum, on Tuesday voters in four states will consider ballot initiatives to expand access to voting (in addition to four ballot initiatives to improve the redistricting process). After Election Day, it will be up to the new Congress and state legislatures to take up voting rights.

We faced even worse voter suppression schemes before the 1965 Voting Rights Act, and we responded by making our democracy stronger. We should do so again.

What's the Matter With Georgia?

Jonathan Brater and Rebecca Ayala

Voter suppression in the Georgia gubernatorial election became a political flash point. The contest pitted former Democratic state representative Stacey Abrams against Republican Brian Kemp, the secretary of state. Many focused on the unfairness of a system where Kemp could manipulate election rules to benefit his own candidacy. But the barriers to participation were deeper, and far more pernicious. They extended past Election Day, when the Brennan Center successfully sued to ensure that provisional ballots were counted.

Reports that Georgia is keeping 53,000 voter registrations on hold because of minor discrepancies have received widespread attention since Monday. But in fact, the state has recently adopted a range of controversial voting practices. The combined effect is to put voters — especially racial minorities — at risk of disenfranchisement as the state's hotly contested governor's race approaches. Early voting begins Monday.

What are the four major voting issues that have contributed to problems in the Peach State?

A recent Brennan Center report on purges nationwide found Georgia to be one of the most aggressive purgers. Between the 2012 and 2016 elections, it purged 1.5 million voters — twice as many as in the 2008 and 2012 cycles.

"Exact Match" Policy: In 2017, Georgia passed legislation requiring that information on voter registration forms match exactly with existing state records. Even a single digit or a misplaced hyphen could be enough to prevent registration and instead put the application on "pending" status. Georgia previously had a different version of this exact match process but agreed in 2017 to discontinue the practice after civil rights groups brought suit — only to reinstate a different version of exact match later that year.

Reports indicate that approximately 53,000 people are now on pending status — and a vastly disproportionate number of them are African American: 70 percent of the pending list, compared with 32 percent of the population. Civil rights groups filed a lawsuit against the policy Thursday.

What does being on pending status mean for voters? If they do not provide the additional information needed to resolve the discrepancies within 26 months, their pending registrations will be canceled. Importantly, voters who show up on Election Day *should be allowed to vote a regular ballot* by providing ID at the polls and should not give up on voting just because their status is pending; however, the requirement could cause confusion on Election Day if voters are wrongly given provisional ballots or given other misinformation. The ID requirement could also cause problems for voters

This piece appeared on the Brennan Center website, October 12, 2018.

trying to vote by absentee ballot. Those voters who do not cast ballots in 2018 are at risk of removal prior to 2020 if they do not get off pending status within 26 months of registering.

Aggressive Voter Purges: A recent Brennan Center report on purges nationwide found Georgia to be one of the most aggressive purgers. Between the 2012 and 2016 elections, it purged 1.5 million voters — twice as many as in the 2008 and 2012 cycles. All but three of the state's 159 counties saw purge rates increase. And we recently released new data showing that the trend has continued over the past two years, during which the state has purged 10.6 percent of its voters.
Purge rates do not prove voters are being removed erroneously. But we also found that provisional ballots went up as the purge rate increased in Georgia, as well as in other jurisdictions that used to get extra scrutiny under the Voting Rights Act. This suggests more voters are showing up to the polls after having been purged because voters in those situations often get provisional ballots.

Voter Registration Drives Restricted: The governor's race — which pits Secretary of State Brian Kemp against former state legislator Stacey Abrams — also recalls a controversial episode involving the secretary of state's office and the New Georgia Project (NGP), a civic group founded by Abrams in 2013. Prior to the 2014 election, Kemp's office launched an investigation into voter registration forms submitted by NGP. After investigating approximately 87,000 forms, NGP was eventually cleared of wrongdoing — but not until after the group's voter registration drive was disrupted. The group filed a lawsuit against Kemp for failing to process approximately 40,000 voter registration forms submitted by the group. The lawsuit was dismissed in part because Kemp promised to ensure registration applications would be sent to counties.

Kemp, a Republican, was also criticized for political statements about voter registration drives. "[Y]ou know the Democrats are working hard, and all these stories about them, you know, registering all these minority voters that are out there and others that are sitting on the sidelines," he said at the time. "If they can do that, they can win these elections in November."

Polling Place Closures: Majority-Black Randolph County, Georgia, was sued for attempting to close seven of its nine polling sites. The county claimed a consultant had recommended the closures because of disability compliance issues. After a lawsuit, the county reversed course and kept the sites open.

The proposed polling place closures in a minority county were particularly concerning because in the past, similar tactics had been used to suppress minority votes. Prior to 2013, polling place changes in Georgia (and other areas with a history of discrimination) had to be precleared by the Department of Justice or a federal court to make sure they did not result in a rollback of minority voting rights. But after the Supreme Court's 2013 *Shelby County* decision, that protection no longer exists.

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The competitive governor's race will strain Georgia's election system. Election officials should be transparent about what voters need to do to ensure their votes are counted — particularly those voters who are on pending status.

The Voter Fraud Hoax Isn't Funny

Michael Waldman

To justify his claim of millions of illegal voters, President Trump launched a federal commission to try to find widespread fraud. It met only twice. Its work quickly was met with both litigation and ridicule. Early in 2018, the White House shut it down. As the Guardian *reported, "The Brennan Center was at the forefront of resistance to the commission's work."*

On Wednesday night, President Trump abruptly announced he was disbanding his Presidential Advisory Commission on Election Integrity. This was the panel charged with finding proof of Trump's absurd claim of millions of illegal voters, and it went downhill from the beginning. But while the panel has vanished, its spurious arguments remain widespread. Claims of voter fraud still form the basis of efforts to suppress the vote across the country. Now can we call a stop to that effort, too?

First, let's marvel at the curious story of the commission. On the campaign trail in 2016, Trump warned supporters, "The election is going to be rigged." Then, as president-elect, he tweeted, "I won the popular vote if you deduct the millions of people who voted illegally." He told startled members of Congress that 3 million to 5 million had cast illegal ballots.

This was widely recognized as false. Statistically, you are more likely to be struck by lightning than to commit in-person voter fraud. Law enforcement officials, election administrators from both parties and scholars all agree voter fraud is incredibly rare.

Challenged to back up his spurious claim, Trump launched the voting commission. In contrast to similar earlier panels, which strove for bipartisanship, this one was chaired by Vice President Pence and guided by Vice Chair Kris Kobach, the secretary of state of Kansas, both Republicans. The panel was crammed with members, including Kobach, well known for spurious warnings of fraud.

Claims of voter fraud still form the basis of efforts to suppress the vote across the country.

Immediately the panel began to flail. It first asked states to provide voters' individual data, including the last four digits of their Social Security numbers, illegal under the laws of many states. Twenty-one states declined to provide any data, citing legal restrictions, privacy concerns, and uncertainty about how the information would be used.

Things only got worse. Voting rights groups, including the Brennan Center for Justice, which I lead, pelted the panel with lawsuits. Ahead of a

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session in New Hampshire, Kobach claimed voter fraud there because voters used out-of-state driver's licenses as IDs. In fact, many were likely college students voting legally. By November, Maine Secretary of State Matt Dunlap, a commissioner, had actually sued his own panel for violating open government rules and cutting him out of the flow of information. Perhaps the White House's announcement was an act of mercy.

The panel's overreaching may have had an unexpected positive consequence, though: State officials of both parties roundly denounced its premise.

It's tempting to shake our heads and move on. But the ideas that undergirded the commission in the first place, unfortunately, still have malevolent potency.

Bogus claims of misconduct remain a campaign trail staple. Roy Moore claimed voter fraud in refusing to accept his defeat in the recent U.S. Senate race in Alabama, filing a suit that was quickly tossed out of court. Cynical voters are prone to credit allegations. After the 2016 election, one poll found that 62 percent of Trump voters believed his claims.

Worse, states across the country still have laws that make it harder to vote specifically due to the supposed specter of voter fraud. In Wisconsin, the best recent study suggested that as many as 23,000 eligible voters could have been blocked by a harsh ID law that purported to deter fraud. Next Wednesday, the Supreme Court will hear a case challenging Ohio's practice of purging voters from the rolls who have not cast ballots in federal elections. One proffered rationale: to prevent fraud. The result, however, is to block many eligible citizens who simply choose not to vote. Watchdogs worry that improper purges will be the method of choice to prune minority, poor, and Democratic voters from the rolls, often without the highly visible controversy that attends state legislative action.

The panel's overreaching may have had an unexpected positive consequence, though: State officials of both parties roundly denounced its premise.

That's good, because real problems mar the way we run elections in the United States, and those problems will need bipartisan solutions. Voter registration lists are, in fact, often rife with duplication and error, even as they omit tens of millions of eligible citizens. Happily, even amid partisan wrangling over voting, states have moved to enact automatic registration. In nine states and the District, the government will automatically register voters (unless they choose to opt out) when they interact with the departments of motor vehicles or (in some cases) other agencies. Most recently, such a measure passed the Illinois legislature unanimously and was signed by Republican Gov. Bruce Rauner. Automatic registration adds citizens to the rolls, costs less, and bolsters election security.

We also cannot forget Russia's attempts to threaten the integrity of our elections. We now know that Moscow's interference in 2016 went well beyond stealing campaign emails. Hackers probed state databases and voting machine software companies. There's no evidence that they switched tallies, but there's every reason to think Russia — or China, or North Korea, or a homegrown partisan — will be back in 2018. A bipartisan group of senators just introduced a bill to help states buy new secure machines and harden their systems from attack.

Yes, Trump's commission began as a tragedy and ended as a farce. But the "voter fraud" hoax really is not funny. The next federal effort should find ways to protect the right to vote, not spread scare stories.

Bold Voting Reform Comes to New Jersey

Myrna Pérez

A decade ago, the Brennan Center put forward a proposal to dramatically shift how elections are run in the United States. Automatic voter registration, fully implemented, would add 50 million people to the rolls and bolster election security. By the end of 2018, it had been enacted in 15 states and the District of Columbia. In New Jersey, a state with low voter participation, the election of a new governor was a critical opportunity for automatic voter registration to become law.

With Phil Murphy taking the oath of office, it's important to remember that he was put in that position by the will of the voters in New Jersey. And this change to a new administration allows the electorate and politicians alike to take stock of where things stand and to outline goals for the coming years.

Murphy's election made it clear that expanding democratic participation is itself one area that's ripe for reform in the Garden State. Only 39 percent of registered voters turned out to cast a ballot in November. Too few of our fellow citizens are exercising one of their most fundamental and powerful rights, and it's time to make some simple fixes that will allow more New Jerseyans to participate in shaping the future of our state.

The policy has been shown to increase both registration rates and turnout without compromising election integrity.

One way to increase the number of voices in our local democracy is to adopt automatic voter registration. The policy is a commonsense reform that will increase accuracy of the voter rolls and improve voter participation.

Right now, when you visit the Motor Vehicle Commission to update your license or change your address, you have to opt in to have your information automatically used to register to vote. Under automatic voter registration, that process occurs unless someone opts out. Agents would automatically transfer the voter's relevant information to state election officials and push through information any time details are updated. It simply changes that presumption and makes the current system more efficient.

The policy has been shown to increase both registration rates and turnout without compromising election integrity. Oregon was the first state to implement automatic voter registration, and the rate of new registrations at state motor vehicle agencies has since quadrupled. The overall registration rate has jumped by nearly 10 percent. In the 2016 presidential election, more than 98,000 votes were cast by new voters signed up through Oregon's automatic voter registration.

It's a reform that would also increase the accuracy and security of the voter rolls. Errors often occur when voters move and forget to update their registration information. But election officials need those details to safeguard election integrity. With timely and accurate data from MVC, jurisdictions will be able to reduce those errors.

This op-ed was published by the *Newark Star-Ledger,* January 17, 2018.

Automatic voter registration has been approved in nine states and Washington, D.C., and gained broad bipartisan backing in the process. The bill that passed the Illinois legislature, for example, had unanimous support. It was signed into law by Republican Gov. Bruce Rauner in August 2017.

The possibility of movement on automatic voter registration is more promising than it's been in a while. Murphy has declared that as governor, he plans to expand access to voting and introduce policies that add more voices to the process. We trust that the incoming governor will fulfill his promise to New Jersey voters.

The fight for a more inclusive and representative democracy began long before Murphy's inauguration, and it will continue long after. But these simple changes, which he can work with the state legislature to make, will bring New Jersey one step closer to the ideal that President Abraham Lincoln articulated more than 150 years ago: a government of the people, by the people. and for the people.

Voting Rights, Then and Now

Bill Moyers, Myrna Pérez, Kristen Clarke, and Michael Waldman

The social movements of the 1960s focused on guaranteeing African Americans the right to vote. This struggle for the ballot came to a head with the bloody confrontation between civil rights activists and police on the Edmund Pettus Bridge in Selma, Alabama. Six months later, the Voting Rights Act of 1965 became law. As part of Carnegie Hall's citywide festival on the 1960s, President Lyndon Johnson's top aide, Bill Moyers, spoke with Brennan Center president Michael Waldman and current voting rights leaders.

BILL MOYERS: The moral force of human rights sometimes meets a responsive political power, and the combination and the combustion of those two forces create a transformation in history. I was privileged to be present at two of those moments of transcendence and transformation in my lifetime. One was the Civil Rights Act of 1964, when I was in the White House as the orchestrator and conductor for Lyndon Johnson's domestic policy. The other was when we passed the Voting Rights Act of 1965. They are inseparable — one would not have happened without the other.

As the nation watched, there was a revulsion. The moral courage of those demonstrators in Selma was astonishing.

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No one thought Lyndon Johnson would ever champion civil rights. When he was elected to Congress in 1937, his first vote was cast to protect lynching. He fought every Civil Rights Act through his career in Congress up until 1957 when he was majority leader of the Senate.

I don't think he actually changed as much as circumstances and constituencies changed. He was never a racist in what I understood to be his spirit, his soul. He was a practical racist by using politics, by using race, to advance his career when he was a young man. But as history caught up, he changed.

He saw 1964 as a moment for the first historic breakthrough. The Kennedy Civil Rights Bill had been paralyzed. He had become president. There was a feeling of national grief which made a desire for some redemption to happen, and Johnson exploited that to move a number of pieces of stalled legislation, but primarily the Civil Rights Act, forward. He saw this was the opportunity.

MICHAEL WALDMAN: What was it like during that period in the run-up to Bloody Sunday and then in the days after?

Excerpted from remarks given at *Carnegie Hall Festival on the 1960s: Voting Rights Then and Now,* March 6, 2018.

MOYERS: We had just passed the Civil Rights Act nine months earlier. The president thought Congress was exhausted. We were exhausted. It was night and day, and he felt that the Justice Department, the White House, and the Congress were not up to another major brawl over civil rights, quite frankly.

It was Martin Luther King and his movement that brought about the real change because King, in January of '65, began a series of demonstrations in Selma. Everything in Selma was segregated, including the ballot box.

I can't describe the violence to you. When the marchers got to the Edmund Pettus Bridge, as you've seen in all of the movies and all the documentaries, Jim Clark and George Wallace set the troopers forward on their horses. They rode down the demonstrators. They dismounted, started beating the demonstrators with their sticks and stomping on them. ABC happened to be there with its cameras rolling. Sunday night, they interrupted showing *Judgment at Nuremberg* with a long report from Selma, which we watched at the White House. As the nation watched, there was a revulsion. The moral courage of those demonstrators in Selma was astonishing.

KRISTEN CLARKE, President, Lawyers' Committee For Civil Rights Under Law: For many of us who do this work, the Voting Rights Act, I think, is the most important and remarkable piece of federal civil rights legislation ever passed by Congress. And what's remarkable is that it came about in the '60s. Today, I don't think you could see a law like this emerge from our Congress, which is just so broken and deeply polarized and blind to so much of the discrimination that remains rampant today.

Over the next five decades in which the Voting Rights Act was fully in place, it did incredible and important work to push back against a lot of the voting discrimination that remained rampant in many parts of the country. The Section 5 preclearance provision was the heart of the Voting Rights Act. It was the part of the law that applied to states like Alabama and Mississippi and Louisiana — states that had the longest and most egregious histories of voting discrimination. It required, essentially, that before they could put in place a new law impacting voting, they had to get federal review of that voting change to make sure it wasn't one that would worsen the position of African American voters and other minority voters in those states. It blocked hundreds of laws that would have turned the clock back.

But people have had their eyes set on tearing down and gutting the Act throughout the decades. The law is not permanent, and Congress had to periodically go back to the drawing board to determine whether or not it remained necessary. The last time they did that was in 2006.

Remarkably, the case that really did gut the Act came out of Alabama. Alabama is both the birthplace of the Voting Rights Act and the state that put the death knell in the law. Shelby County, Alabama, filed a case arguing that the law was unconstitutional. It was no longer necessary. Discrimination was a thing of the past. Justice Roberts issued a ruling five years ago that said that part of the Voting Rights Act, which identified those 16 states, was unconstitutional. It brought Section 5 to a grinding halt and essentially put the ball in Congress's court to come up with a new formula that would allow the country to move forward with this Section 5 preclearance provision. Five years have passed and we're still waiting. There's been no action. We are still waiting for Congress to restore the Voting Rights Act.

MYRNA PÉREZ, Brennan Center for Justice: There has been a wave of restrictions passed across the country trying to make it harder for people to register and vote. The Brennan Center is one of a number of groups that have been fighting back. We've been successful, but it has been an enormous drain on resources.

A really good example of why Section 5 of the Voting Rights Act is still needed is my own home state of Texas. Texas passed a strict photo ID law. It was famously known for making it possible for you to vote if you carried your concealed gun license but not if you had your University of Texas student ID. This was a classic example of a case that preclearance would have dealt with. In fact, preclearance was in the process of dealing with this matter before the Voting Rights Act was gutted, so we are now left litigating under a different provision of the Voting Rights Act.

CLARKE: I think what's happening around the country is really remarkable. For the first time in a long time, people are really paying attention to elections at the local, state, and federal level. And I think people get it—that elections do matter, that they do shape our lives. And I'm excited about the women's march and a lot of the mass mobilization efforts we're seeing that are working to activate young voters, women, and college students to ensure that we've got some new voices participating in our democracy this cycle.

PÉREZ: Keep voting and participating. Keep encouraging your people — the friends you know, your neighbors, your church members — to vote and participate, because otherwise the bad guys win, and I don't want to give my country to them.

ELECTION INTEGRITY

Getting Foreign Funds Out of America's Elections

Ian Vandewalker and Lawrence Norden

Throughout 2018, we learned just how extensive Russia's attacks on American democracy had been. Hacked Democratic National Committee emails were just the start. Moscow had mounted an extensive digital media campaign to impact the election and support Donald Trump. Our loophole-ridden campaign laws, it turns out, created openings for abuse. National security experts joined election reformers in alarm. "We, as a nation, can be forgiven for not having rules and regulations that would have prevented this Russian interference," explained Richard Clarke, the former top anti-terrorism official, in a preface to a Brennan Center report. "We have no excuse, however, if we let it happen again."

In the months leading up to Election Day in 2016, a hostile foreign power attacked the United States with a multifaceted campaign designed to influence the election. Among other things, this election interference included covert Russian spending on online political ads designed to sway public opinion. In February, a grand jury indicted 13 Russian nationals and three business entities with ties to the Kremlin for their part in this effort. Their scheme relied on internet ads to fuel divisive controversies, drive attendance at rallies held in the United States, and attempt to influence the outcome of the presidential election. Yet even after the indictment, we still do not know the full extent of Russia's online influence effort.

As the amount of time Americans spend online has jumped, so has the importance of the internet as a medium for political advocacy.

The menace is only likely to intensify in upcoming election cycles. The 2018 "Worldwide Threat Assessment of the US Intelligence Community," presented to Congress in February, predicted that Russia will "continue using propaganda, social media, false-flag personas, sympathetic spokespeople, and other means of influence to try to exacerbate social and political fissures in the United States." We must also be ready for potential copycat interference from other states like China, Iran, or North Korea, or even non-state terrorist groups like ISIS.

Regardless of whether it affected the outcome of the election, the Kremlin's activity represents a threat to national security and popular sovereignty — the exercise of the American people's power to decide the course their government takes. Yet despite the decades-old federal ban on foreign spending on elections, 21st-century upheavals — namely the rapid development of the internet and the drastic deregulation of campaign finance — have created huge weaknesses in the legal protections against foreign meddling. These loopholes must be closed to make the ban work as intended.

Excerpted from the Brennan Center report *Getting Foreign Funds Out of America's Elections*, published April 6, 2018.

There are three key areas where American elections are most vulnerable to political spending directed by foreign powers: the internet, dark-money groups that do not disclose their donors, and corporations and other business entities with substantial foreign ownership.

The first vulnerability stems from the quick rise of the internet as a mass medium and the failure of regulation to keep up. As the amount of time Americans spend online has jumped, so has the importance of the internet as a medium for political advocacy. Campaign spending online has increased dramatically; the $1.4 billion spent online in the 2016 election was almost eight times higher than in 2012. It's not surprising that foreign powers would look to the internet to meddle.

Corporations and other business entities are currently allowed to spend on American elections even when their owners would be prevented from doing so by the foreign spending ban.

The second key weakness comes from the ability of some political spending groups to hide their donors' identities. These dark-money organizations have flourished since a series of Supreme Court rulings invalidated many campaign finance regulations and the Federal Election Commission has become dysfunctional due to partisan stalemate.

Third, corporations and other business entities are currently allowed to spend on American elections even when their owners would be prevented from doing so by the foreign spending ban. There are various examples of foreign nationals using domestic companies to engage in secret election spending.

This report offers practical solutions to make it far more difficult for any foreign power to engage in political spending in American elections in each of these three areas. All these reforms are permissible under current Supreme Court doctrine. Most important, the Brennan Center recommends lawmakers take the following steps:

- **Update political spending laws for the internet** with the framework used for television and radio ads, requiring disclosure of funding sources and explicitly banning foreign spending for ads that mention candidates before an election.
- **Eliminate dark money** by requiring any organization that spends a significant amount on elections to disclose its donors.
- **Extend the ban on foreign spending** to domestic corporations and other business entities that are owned or controlled by foreign interests.
- **Invigorate enforcement** in all these areas by reforming the Federal Election Commission.

Although the danger of interference by foreign governments is our primary motivation, the reforms we propose address expenditures by all foreign nationals, meaning all foreign citizens (including corporations they control) other than lawful permanent residents living in the United States. This is the line American law has drawn to protect U.S. sovereignty for 50 years.

This report focuses on federal policy, but state governments should also act. State elections warrant protections similar to those we recommend at the federal level. And large states have the potential to set de facto nationwide standards for internet companies, analogous to the way California's environmental regulations have induced companies to change their behavior nationwide.

The private sector also has a role to play through voluntary action. Even if Congress and the states fail to act, internet companies can and should voluntarily adopt the policies we recommend for legislation, such as maintaining a public database of all online political ads. Private action would be most effective if the platforms come together to agree on industry-wide standards.

In this report, we offer a comprehensive set of reforms that answers these calls to strengthen America's defenses against foreign powers spending on political messages.

When Elected Officials Control Secret Cash

Chisun Lee, Douglas Keith, and Ava Mehta

"Dark money" describes the flood of funds into American politics through nonprofit organizations that do not have to disclose their donors. Unknown to most Americans, politicians themselves often control such organizations. This blind spot in campaign finance law poses a severe threat to the integrity of our democracy.

The White House has a secret weapon. It's an army of donors able to pour unlimited dollars into ad campaigns promoting the president and his agenda without having to publicly disclose who they are or how much they gave. For elected officials, whose political success is closely tied to policy success, donors who fund these ads can be especially valuable.

With the advantage of nonprofit status, these groups can collect donations of unlimited size without having to disclose their donors.

Last fall, donors fueled a blitz of TV and radio spots by America First Policies — a 501(c)(4) social welfare nonprofit helmed by former Trump campaign and administration officials — to get the sweeping tax bill passed in December. "Americans need to get behind President Trump's plan to get our economy moving again," former campaign manager Corey Lewandowski urged in one ad, between shots of President Donald J. Trump working in the Oval Office and waving to the crowd at a rally. "Call your congressmen. Go to our website. Stand with President Trump to cut taxes, now," he said. As *The New York Times* reported, on the day Congress passed the tax bill, Lewandowski and others working for America First Policies met with top staffers at the White House to strategize about upcoming issues. The nonprofit also took over the expensive polling that informs messaging strategies — traditionally a task of campaigns and parties that have to disclose their donors — a CNBC investigation revealed.

But it was the Trump administration's predecessor that wrote the playbook for turning tens of millions of outside dollars into a publicity juggernaut. The Obama White House worked closely with Organizing for Action (OFA), a 501(c)(4) nonprofit that President Obama's closest former campaign and government advisers created and led. The nonprofit raised nearly $50 million to promote what OFA's own ads embraced as "Obamacare" and other signature policies of the then-president. Officials at OFA decided early on to voluntarily disclose its donors, because, former Obama campaign manager and OFA chair Jim Messina said, they wanted to be "open and transparent." But there was no legal requirement that they do so.

Excerpted from the Brennan Center report *Elected Officials, Secret Cash,* published March 15, 2018.

It is well documented that in the years since the *Citizens United* decision in 2010, election spending by groups backed by high-spending donors has skyrocketed. The risk that wealthy sponsors will corrupt or coopt the candidates they support and undermine the democratic process has drawn extensive attention. But during this same period, a less noticed yet potentially more pernicious trend, not directly tied to *Citizens United*, has emerged.

Typically, a key adviser to an elected official will create such a group in the form of a charitable or social welfare nonprofit. With the advantage of nonprofit status, these groups can collect donations of unlimited size without having to disclose their donors.

Though a few elected officials in the past have used nonprofits to raise money for causes — notably President Franklin D. Roosevelt and the March of Dimes foundation to fund creation of the polio vaccine — the officeholder-controlled nonprofits of today more often focus on promotional activity that would qualify as campaign advertising during an election cycle. And there are many more of these nonprofits doing it. Even the limited records of these groups' activity show they have raised at least $150 million since 2010.

Permitting elected officials to solicit support from secret donors, including those with actual business before them, creates a serious risk of conflicted loyalties and corruption and undermines the integrity of public service.

The lack of oversight of officeholder-controlled nonprofits may have to do with the fact that they have only recently flourished to directly promote their affiliated officeholders. By contrast, in the context of election spending, many states and cities have increased transparency requirements and strengthened limits for outside groups that coordinate with candidates, even after the deregulatory *Citizens United* decision.

Another reason for the inattention to officeholder-controlled nonprofits may be that it's tougher to address spending that could span many years rather than one election cycle. But with every indication that postelection spending to benefit elected officials will only grow, the need for a legislative response is clear. This paper offers a road map for creating a law to limit the corruptive potential of officeholder-controlled nonprofits.

The problem likely will spread. Just as buddy PACs (unlimited spending groups that support a single candidate) eventually became a must-have accessory for political candidates, officeholder-controlled nonprofits have proliferated in recent years at every level of government. Our review found that no fewer than two presidents, seven governors, several prominent mayors, and other elected officials, hailing from both major parties, have in the past few years partnered with promotional outfits that are able to take unlimited amounts from wealthy donors who may remain anonymous to the public. Often these donors hold economic interests that the officeholder they support has the power to affect.

Permitting elected officials to solicit support from secret donors, including those with actual business before them, creates a serious risk of conflicted loyalties and corruption and undermines the integrity of public service. The recent guilty plea by Rick Gates, a founder of America First Policies and

deputy manager of President Trump's 2016 campaign, in the special counsel's investigation of Russian interference in that election raised the possibility of an unusually acute risk: secret foreign influence over U.S. politics. Gates, a longtime political consultant to pro-Russia businesses, faces up to six years in prison for financial fraud and lying to the FBI and has agreed to cooperate in the investigation.

The risks to ethical governance are no less urgent in more routine contexts. The public should be confident that official decisions about who will build a bridge, treat drinking water, or be trusted with government data are based on who is best qualified, not who gives the most to support the official. This is why campaign contributions are closely regulated. With the increasing reliance of elected officials on private donors, even outside of campaign season, constituents need additional safeguards to protect their government from the hidden influence of wealthy sponsors.

Yet addressing these dangers involves special challenges. For one, officeholder-controlled nonprofits may operate for much longer periods than political action committees and other groups that traditionally spend in elections. The anti-coordination and transparency laws that apply to election spenders — as interpreted by the perennially gridlocked Federal Election Commission — are mostly time limited, kicking in for a relatively short stretch before Election Day. That makes compliance with rules seem less burdensome. What's more, political advocacy rightfully enjoys a robust tradition of expression free from government regulation unless an urgent public concern demands otherwise. Thus, any answer to the problem of officeholder-controlled nonprofits needs to strike a careful balance between the critical public interest in deterring government corruption and the constitutional mandate not to overburden private advocacy.

This paper proposes a solution that strikes this balance, identifying those entities that pose the most serious risk of corruption and narrowly tailoring a legal solution to address them. Our approach begins with a straightforward threshold test for identifying the highest-risk entities. The test involves two factors. First, it asks whether the elected official or a close associate created and/or controls the group. Second, it asks whether the group spends more than a certain significant sum on public communications that carry the elected official's name or image. Borrowed from longstanding campaign finance law, this latter factor ensures that oversight will be content-neutral, not leaving it to regulators to decide whether to apply anti-corruption rules based on their judgments about an officeholder-controlled nonprofit's social value or political benefit to the officeholder. In reality, policy advocacy and self-promotion overlap when it comes to elected officials. The best approach is to apply the same anti-corruption rules to all structurally similar groups operating in partnership with an elected official that are able to take unlimited money from private donors.

Under this threshold test, only those groups posing the greatest risk of corruption would be subject to new regulation. For these groups, we propose two key safeguards that are well-established components of anti-corruption law: donor transparency and, for donors with a concrete business interest before the elected official in question, donation limits.

These safeguards are an important starting point. If the risks of corruption and conflicts of interest turn out to exceed the protections that donor transparency and limits for donors with business before the elected officials in question can provide — or as the use of officeholder-controlled nonprofits continues to spread — additional responses may prove necessary. For now, implementing the proposal in this paper would constitute an important and straightforward step to promote ethical and merit-based government in a time of unlimited political spending.

Small Donors and the 2018 Wave

Walter Shapiro

Big money plays an outsize role in our politics. Far too often, funds from PACs and big donors determine the winners and losers in elections. But not in 2018. A midterm lesson: When enough small donors band together behind a candidate, they can win.

The cover of the current issue of the *New Yorker* memorably captures the diversity of gender, race, religion, and life background of the incoming Democratic House class of 2018. In an illustration by Barry Blitt reminiscent of the switch from sepia to Technicolor when Dorothy lands in Oz, the *New Yorker* depicts a rainbow collection of Democrats opening the door of a room in the Capitol filled with doughy middle-aged men in suits drawn in Black and white.

What many of these upstart House Democrats have in common is that their victories were partly powered by small donations. Now, the question is whether they can withstand the inevitable pressure to adapt to business as usual in Washington by resisting the traditional advice to court big-money contributors.

A prime example is Democrat Sharice Davids, who knocked off a four-term House Republican incumbent in the third district of Kansas (the western Kansas City suburbs). Davids, whose biography is a fascinating amalgam (lawyer, White House fellow under Barack Obama, Native American, lesbian, and former mixed martial arts fighter), had raised nearly $1 million in contributions of $200 or less by mid-October. That was close to 30 percent of her total haul from individual giving.

From Antonio Delgado in New York's Hudson Valley to Abigail Spanberger in the Richmond, Virginia, suburbs to Kim Schrier in suburban Seattle, the ability to raise seven-digit sums from small donors emerged in 2018 as the new normal for victorious Democrats. The online fund-raising platform ActBlue was used by Democratic donors this year to funnel well over a half-billion dollars to Senate and House candidates. In fact, at a postelection meeting with GOP high rollers last week, Senate Majority Leader Mitch McConnell complained that the Republicans had nothing like ActBlue to spur donations from Americans of modest means.

Walter Shapiro is a Brennan Center fellow, journalist, and lecturer in political science at Yale. This piece appeared on the Brennan Center website, November 14, 2018.

For decades, one of the most compelling arguments for encouraging small-donor financing in politics is that it would dramatically expand the pool of candidates likely to be elected. No longer would the ability to appeal to special interests and to reach out to locker-room buddies at the country club represent the only path to political success.

That theory has now been vindicated by the dramatic results of the 2018 House elections. By virtually any measure, the incoming 116th Congress will be the most variegated in American history. This burst of diversity — powered by a record level of citizen engagement in midterm voting, volunteering, and contributing — may be Donald Trump's most surprising contribution to American political life.

But there is another argument for small-donor fund-raising that has yet to be tested on Capitol Hill. And that is that receiving a significant proportion of campaign funds from small givers, who are motivated by idealism and ideology, changes the behavior of fledgling legislators once they are in Congress.

Receiving a significant proportion of campaign funds from small givers, who are motivated by idealism and ideology, changes the behavior of fledgling legislators once they are in Congress.

Do they maintain their independence by spurning the check-writing, fund-raiser-organizing blandishments of Washington lobbyists, fixers, strategic consultants, and politically connected lawyers? Or do they follow the course of least resistance by going the traditional route on Capitol Hill?

Taking the well-trod path would mean fighting to get on committees like Ways and Means, Financial Services, and Appropriations that automatically attract generous contributions from business interests. Another element would be spending long hours in a cubicle at the Democratic National Committee calling well-heeled strangers begging for $2,700 contributions (the current maximum) to a 2020 reelection campaign. And the final ingredient would be tailoring congressional voting records to keep future donors happy.

It is tempting to say that most members of the Class of 2018 have too much integrity to abandon their ideals in the quest for campaign cash. But that glib response fails to consider the heavy countervailing pressures that these new House members will face.

This week, with the newly elected legislators in Washington for orientation sessions, strategic discussions about holding their seats in 2020 will be a major topic. With many new Democratic House members narrowly winning traditionally Republican suburban districts, party leaders and campaign consultants are likely to issue stern warnings about the need to prepare for deep-pocketed GOP challengers in 2020.

The standard political calculus is that a hefty bank account is the best preparation for the next election. With 2018 campaign spending levels in both parties obliterating previous midterm records, newly elected Democrats in competitive districts will probably be told that they need

to have something like $2 million to $3 million in the bank by the end of 2019 as re-election insurance. This advice will be accompanied by the stark reminder that any incumbent who lags in early fund raising is, in effect, holding up a sign that reads, "Beat Me, I'm Vulnerable."

The problem is that online fundraising is likely to offer limited help in 2019 as these first-term House incumbents struggle to reach their ambitious campaign finance goals. Small-donor giving tends to be driven by news events rather than guaranteeing a set amount each quarter. With the 2020 Democratic presidential race overshadowing everything else in politics, the campaign cash needs of congressional incumbents will not immediately be at the top of the political agenda of most online campaign contributors. As a result, the Class of 2018 will be under heavy pressure to do things the old-fashioned way — with regular fund raisers featuring lawyers and lobbyists at Capitol Hill restaurants.

Some concession to political reality is unavoidable, since no one goes to Congress with the deliberate intention of losing the next election. But the hope is that the Class of 2018 will regard future fund raising as a character test — and spurn political money that comes with long, dangling strings on it. And, as small donors get used to giving regularly to congressional candidates, the reward for integrity may ultimately be a gusher of online giving in 2020.

Federal Dollars to Secure State Elections

Lawrence Norden, Liz Howard, and Shyamala Ramakrishna

Nearly a year and a half after Russia's attacks on our election infrastructure, Congress acted and approved $380 million for states to buy new voting machines. But American federalism can pose a daunting obstacle: States run their own elections. After most states requested their share of the funds, members of the Brennan Center's election security team suggested ways to use them effectively.

Earlier this year, the federal government set aside $380 million for states to spend on shoring up the country's aging election machines and computers. With the threats of foreign hacking and equipment breakdowns looming, the money is a critical down payment on securing our elections (though it's not quite enough to replace all the country's most vulnerable equipment).

Two months since, most states have requested their share. Here are five ways they can spend those funds to best protect the vote this November.

Replace paperless voting machines

Thirteen states still use electronic voting machines that have no voter-verifiable paper record. Security experts warn against continued use of these machines, which do not allow election officials and the public to confirm electronic vote totals. If officials discover that voting machine software has been corrupted or data have been lost, it may be impossible to recover the lost votes without a paper record.

Of the 13 states that continue to use paperless equipment, seven have not yet requested their share of the federal money made available this year. Of the five states that use such systems statewide, only one has done so. This might be in part because, in most states, the money will not be enough to replace all their outdated voting equipment. But even these states could replace at least some paperless systems in 2019.

For example, in New Jersey, the recently proposed Elections Security Act would replace all paperless voting equipment across the state over a four-year period, starting with just three counties in the first year. New Jersey's $9.7 million grant could cover year one of the state's estimated equipment transition costs — roughly $5.8 to $9.1 million, depending on which

This piece appeared on the Brennan Center website, June 15, 2018.

counties the state chooses. It may now be too late to replace equipment before the 2018 general election, but anything a state can do between now and November matters.

Conduct Postelection Audits

Even among states that use equipment with paper ballots, many do not conduct postelection audits to check the electronic totals and make sure the vote was counted properly.

Thirty-two states and the District of Columbia mandate postelection audits. Most of these states require traditional postelection audits in which only ballots from a set percentage of precincts are reviewed. Only two of these states — Colorado and Rhode Island — mandate "risk-limiting" audits, designed to provide a high level of statistical confidence that a software hack or bug did not produce the wrong outcome. In comparison with traditional audits, risk-limiting audits not only detect a broad array of intentional bad acts and errors that result in inaccurate election outcomes but also greatly improve audit efficiency. These audits are now considered the gold standard of postelection audits.

Congress and the Senate Select Committee on Intelligence have endorsed risk-limiting audits, as did the Congressional Task Force on Election Security.

Not surprisingly, several jurisdictions around the country are planning to stage pilots of this critical security measure. In May, Marion County, Indiana, completed a successful risk-limiting audit pilot. Separately, multiple localities in Virginia and California and across the country plan to conduct pilots this summer and after the November elections. More states should use federal grants to conduct postelection audit pilots, with an eye to making this practice widespread by 2020.

Upgrade and secure voter registration databases

Approximately 40 states are using voter registration databases that were initially created at least a decade ago. Many of these aging databases were not designed to withstand 21st century cybersecurity threats and desperately need to be upgraded and strengthened.

The Minnesota secretary of state identified upgrades to his state's voter registration database, built in 2004, as the election system's greatest security need and requested $1.4 million in the state budget even before the federal government offered grant money for election security improvements. But last month, Gov. Mark Dayton vetoed the bill that could have authorized the $6.6 million grant from the federal government to pay for these improvements.

The number of national security experts who identify state voter registration databases as one of the biggest security risks of the 2018 election cycle continues to grow. Recent election day pollbook failures in states like California and South Dakota highlight the importance of securing voter registration databases to protect voters' information.

Secure election websites

Election websites are high-profile targets for cybercriminals, foreign governments, and hackers. These attackers are becoming increasingly sophisticated and have successfully targeted election agencies and infrastructure around the world, as well as state and local election authorities here in the United States.

Just last month, hackers associated with non-U.S. IP addresses successfully attacked the Knox County, Tennessee, elections website on election night and, at minimum, caused the website to crash. More recently, a cybersecurity firm uncovered vulnerabilities in the state election websites of Alabama and Nevada while doing research for marketing purposes. Though Nevada election authorities discovered this vulnerability back in December 2017, the state has yet to fix the problem, citing "budgetary concerns."

But given the near certainty of future attempts to interfere in U.S. elections and the grave consequences of a successful cyberattack, states should make website security a top budgetary priority. As John Bennett, deputy chief of staff for Alabama's secretary of state, said, "[W]e're at the point with elections where we are acknowledging that one of the biggest battles is to protect perception."

Hire additional cybersecurity staff

In Florida, Gov. Rick Scott announced the hiring of five cybersecurity specialists to assist with this year's election. Illinois is engaging cybersecurity specialists, referred to as "cyber navigators," to assist counties directly with their efforts to "defend against cyber breaches and detect and recover from cyberattacks."

States that haven't asked for their money need to do so — now.

While states may have good reasons to wait on spending their security grant funds, such as time-intensive procurement policies or hiring procedures, it's not clear why 17 states and the District of Columbia have not yet requested the funds when submitting a one-page form is all that's necessary.

The Election Assistance Commission (EAC) and the federal government made the funds available just 30 days from the date the bill was signed. To further expedite the process, the EAC gave the states until July 16 to submit their detailed plan for spending the money. In moving so quickly, the EAC highlighted the urgency of threats to election security across the United States. Every state can make immediate and high-impact expenditures that will make their elections more secure, and we encourage state leadership to do so as soon as possible.

Stay tuned to find out how states decide to improve election security across the country as we approach the 2018 November general election.

GERRYMANDERING

The Supreme Court Punts on Partisan Gerrymandering

Thomas Wolf and Wendy R. Weiser

Extreme partisan gerrymandering is toxic. It worsens polarization, entrenches incumbents, and silences voters. The Supreme Court has expressed its contempt for the practice. But it has yet to rule on its constitutionality. For more than a decade, it hinted it was ready to do so. In Gill v. Whitford, *the justices had the opportunity to give voters an answer. The Brennan Center coordinated 25 friend of the court briefs urging action. But instead of ruling, the justices punted. Then swing Justice Anthony Kennedy retired, dashing hopes for an immediate, bold ruling.*

The Supreme Court once again passed up a historic opportunity to finally put some limits on partisan gerrymandering. In a pair of cases from Wisconsin and Maryland, the court declined to take on the big question: When does gerrymandering, the drawing of districts to benefit the political party in control, go so far as to be illegal? The result is disappointing but not devastating: The cases will continue, and the Court has left open several paths to rein in gerrymandering. For the sake of our democracy, the Court needs to act soon.

Legislators cross the line when they use redistricting to entrench artificial majorities in power and shield their party from accountability to voters.

There are good reasons to be optimistic. The justices did not throw the cases out of court or say partisan gerrymandering is legal. Either or both would have been easy options if the court didn't ultimately want to tackle the big issue.

Instead, the cases were sent back to the lower courts to iron out technical legal issues or to go to trial. In essence, the Court is saying that before it takes a major step on partisan gerrymandering, it wants to ensure it has followed accepted legal principles, dotting all the I's and crossing all the T's. In these cases, that means requiring the Wisconsin plaintiffs to meet the requirement for "standing," proving that they are the right people to bring their claims, and requiring the Maryland plaintiffs to prove their case in court before requesting a change in the map.

The Court told us years ago in *Vieth v. Jubelirer* that extreme partisan gerrymandering is unconstitutional. What has repeatedly vexed the justices is how to identify when, exactly, partisanship in mapmaking crosses into extreme territory. Maps like those in Wisconsin and Maryland offer an easy-to-understand answer: Legislators cross the line when they use redistricting to entrench artificial majorities in power and shield their party from accountability to voters.

This kind of gerrymandering is deeply, fundamentally wrong. Extreme gerrymanders wreak havoc on voters' ability to elect the kind of representative and accountable legislatures that the Constitution guarantees them.

Even big electoral waves are often not enough to overcome rigged maps. Wisconsin, Maryland and

This op-ed was published by the *Los Angeles Times*, June 19, 2018.

other states waiting in the wings — such as North Carolina — offer the court stunning examples of the problem, and they beg for the justices to step in.

Wisconsin Republicans won just 48.6 percent of the statewide vote for the state's general assembly in 2012 but scored 60 out of the assembly's 99 seats. The GOP in Wisconsin has maintained its majority ever since. Meanwhile, Maryland Democrats have had a decadelong grip on seven of their state's eight congressional seats, courtesy of a gerrymander that moved around hundreds of thousands of voters to maximize Democrats' advantage.

Add North Carolina's 2016 congressional gerrymander to that list. By any measure, North Carolina Republicans crossed the line when they flat-out proposed — in the words of Rep. David Lewis — "to draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats" and then proceeded to do just that, brazenly declaring the end result a "political gerrymander." This purple state, which voted in 2016 for a Republican president and a Democratic governor, is now stuck with a hard-right legislature that is trying to undermine any checks on its power.

Even more intractable maps are just around the corner. As Justice Elena Kagan noted in her concurring opinion, citing leading political scientists, because of advances in data and technology, gerrymanders have "become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides," and "the 2020 cycle will only get worse."

The Court is well aware of the seriousness of the issue, and that it is uniquely situated to solve the problem of partisan gerrymandering. Time is short. A "merits" decision in this term would already have been too late to fix maps for the 2018 elections. But there is still a chance for change before 2020 if the Court queues up more cases for its coming term. Action is especially needed before 2021, when every congressional and state legislative map in the country will be redrawn following the 2020 census.

The next best opportunity to limit partisan gerrymandering is in the case challenging North Carolina's 2016 congressional gerrymander, which is sitting on the court's doorstep. Kagan's concurrence in Monday's Wisconsin decision lays out a road map for how the court could tackle the problem (indeed, more than one road map). Drawing on the writings of Justice Anthony Kennedy (the swing justice on this issue), she suggested that the court could focus on how partisan gerrymandering burdens voters' First Amendment freedom of association, weakening their right to band together in a party to elect the candidates they want.

This approach would enable either voters or their party to challenge a state's whole redistricting plan. All that is left is for the Court to follow that map.

There is no question what 2021 holds for us if partisan gerrymandering goes unchecked. The only remaining question, we hope, is when will the court finally declare what every American already knows: It is unconstitutional for politicians to lock their party into power, and we can tolerate it no longer.

In 2018, Gerrymandering Still Mattered

Michael Li

Last November, Democrats won back the House of Representatives despite gerrymandered districts favoring Republicans. Still, there was a significant gap between their share of the vote and their share of seats, due to particularly extreme partisan maps in states like Ohio and North Carolina. This should deeply trouble proponents of democracy in both parties. The practice silences the voice of voters, and next time around, the shoe could be on the other foot.

As the partisans clear the rubble, the results of the 2018 midterm elections should deeply disturb all Americans who care about representative democracy, no matter their politics.

That's because despite the Democrats' approximately seven-point win of the percentage of votes cast, Democrats look likely to win only 37 new seats. This is a mockery of the notion held by John Adams and the founding fathers that Congress should be an "exact portrait, a miniature" of the people as a whole.

Contrast that to the Tea Party wave of 2010, when a seven-point win by Republicans gave them 63 seats. Democrats may have the satisfaction of a majority, but it is by modern standards a razor-thin one. It's also a majority that may be hard to hold in 2020 if the highly unusual wave dynamics of 2018 don't repeat themselves.

This unrepresentative outcome has to do in large part with aggressive gerrymandering in a handful of key states like North Carolina, Ohio, and Michigan. In North Carolina, Democrats won half the congressional vote but less than a quarter of seats. In fact, not a single congressional seat in North Carolina changed parties in 2016 and 2018. The results are equally stark for Ohio, where the two major parties regularly split the vote nearly 50–50, but Republicans have maintained a lopsided 12–4 advantage in the Ohio congressional delegation since 2012.

Never have maps been more gerrymandered. But also never have there been so many massive wave elections to test the strength of gerrymanders. So far in the four elections of the decade, gerrymanders are undefeated, producing with rare exception exactly the results they were designed to do.

The slim majority that Democrats won this year, in fact, rests not so much on overcoming gerrymandering as on racking up wins in districts in states like New York, California, and Minnesota, where maps were drawn after the 2010 census by commissions, split-control governments, or courts. Of the 37 seats that Democrats have picked up (or look likely to pick up when the counting is done), just 19 percent were drawn by GOP-controlled legislatures. By comparison, 30 percent were drawn by commissions, and 43 percent were drawn by courts. (The latter includes four districts that Democrats picked up in Pennsylvania because last spring a court replaced the state's aggressively gerrymandered map — which gave Republicans 13 of 18 congressional districts — with a more neutrally drawn map.) In contrast to politically

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calculated maps that strategically slice and dice voters with the goal of locking in the advantage of one party over the other, maps drawn through these less politically charged processes give far more weight to things like keeping communities and political subdivisions together. And they also are far more responsive to shifts in voter sentiment. As Democrats win more votes, they win more seats. The same is also true in reverse: As Republicans win more votes, they win more seats.

That is how our democracy was meant to function. We shouldn't have to depend on tsunami-level wave elections to bring about political change.

In North Carolina, Democrats won half the congressional vote but less than a quarter of seats.

The good news is that Americans of all political persuasions increasingly seem to understand this. These midterm elections, voters also handed victories to measures in four states — Colorado, Michigan, Missouri, and Utah — that will create a more transparent and independent process for drawing the next set of maps. In Colorado, the reform measures won more than 70 percent of the vote. Measures in Michigan and Missouri weren't far behind, outperforming both Democratic and Republican candidates (and in Michigan, outpacing a marijuana referendum). Robust citizen-led reform efforts also are underway in states like Virginia, Arkansas, and Oklahoma.

Less certain is whether courts understand how much gerrymandering is undermining American democracy. For three decades, the Supreme Court has tried and failed to create a workable formulation for policing gerrymandering. Most recently, this past June, it punted and sent partisan gerrymandering cases from Wisconsin and Maryland back to lower courts on technical grounds. The justices will have another chance this spring when they are expected to hear a challenge to North Carolina's badly gerrymandered congressional map, and several other partisan gerrymandering cases are not far behind. State courts might also be inclined to follow the example of the Pennsylvania Supreme Court and get involved by providing a critical check and balance when maps go too far.

But time is running short. The next round of map-drawing takes place in early 2021. If fairer processes aren't in place by then, and if courts continue to be unwilling to do their job in safeguarding American democracy, there is every indication that the next round of gerrymandering will be even more pernicious than those of this decade. Indeed, increasingly robust map-drawing technology and voter-specific big data technology will make it possible to draw maps with a degree of micro-precision that was undreamed of when this decade's maps were drawn in 2011.

There is a lot that can be done to ensure that representation in the House is fairer and closer to the Framers' vision of a body that looks like America. But time is running out. If we are to save our democracy, we have to act now.

In North Carolina, Extreme Maps Subvert the Will of Voters

Thomas Wolf and Peter Miller

Democrats won the House, gaining 40 seats. The "blue wave" was high enough to wash over some of the structural obstacles created by gerrymandering. But there was a lesson hidden in the results. States with fair maps, drawn by courts or commissions, saw seats switch. Heavily gerrymandered states, on the other hand, showed the cost of inaction.

Democrats will pick up at least 26 seats and take a majority in the House of Representatives if preliminary results from Tuesday's midterm elections hold. But partisan gerrymandering is still a major issue. Our analysis of one state's results shows that the party would almost certainly have won more if Republicans hadn't deliberately drawn districts to limit Democratic chances.

North Carolina's congressional district lines are already the subject of federal litigation claiming they give Republicans a systematic, unconstitutional advantage in winning seats. Tuesday's results bear those claims out. Democrats won roughly 50 percent of the vote in North Carolina, their best performance in almost a decade. But despite an extraordinary year, they netted just three of the state's 13 congressional seats — the same as in 2014 and 2016. That happened because a promising Democratic wave crashed against one of the country's most extreme gerrymanders, a congressional map that Republican legislators brazenly stated on the record that they carefully crafted "to give a partisan advantage to 10 Republicans and 3 Democrats."

To engineer this advantage, the leaders of the Republican caucus worked in secret with a consultant to pack likely Democrats into three super-blue districts. In each of these districts, Democrats would win by very large margins. The Republican mapmakers then spread the rest of the state's Democrats more thinly across the remaining 10 districts, ensuring Republican candidates would win by small, but safe, margins. They made many of these districts safe for the GOP by giving each one just enough Republican voters to win elections in normal years.

The only way to put a stop to this is to remake North Carolina's map and the state's redistricting process.

With this scientific slicing and dicing of voters, it didn't matter if Democrats got 30 percent of the statewide vote or 50 percent, as they did this year. The figure below shows the share of the statewide vote at which the Democrats would be expected to win each of the districts. They are guaranteed wins in three districts but then face a tremendously steep climb to win any additional seats. In fact, they didn't stand a chance of picking up a fourth seat unless they could net 52.5 percent of the statewide vote, something they achieved only once since 2000, in the 2008 election.

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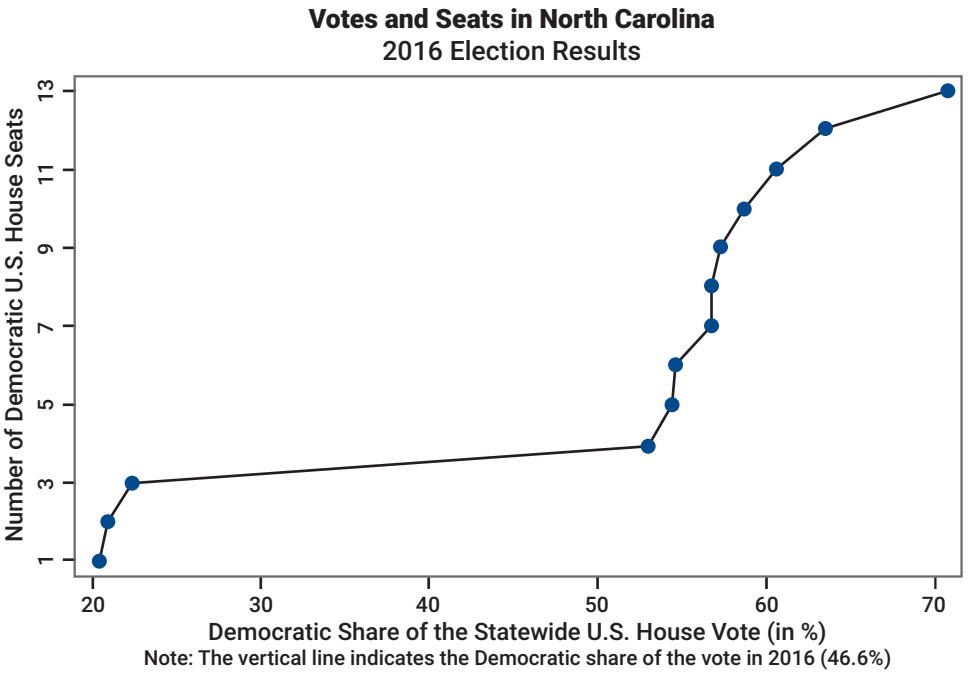


In 2016, the Republicans' map handed 10 seats to the GOP despite a strong Democratic year that saw Roy Cooper win the governor's mansion and Democrats sweep to other statewide wins.

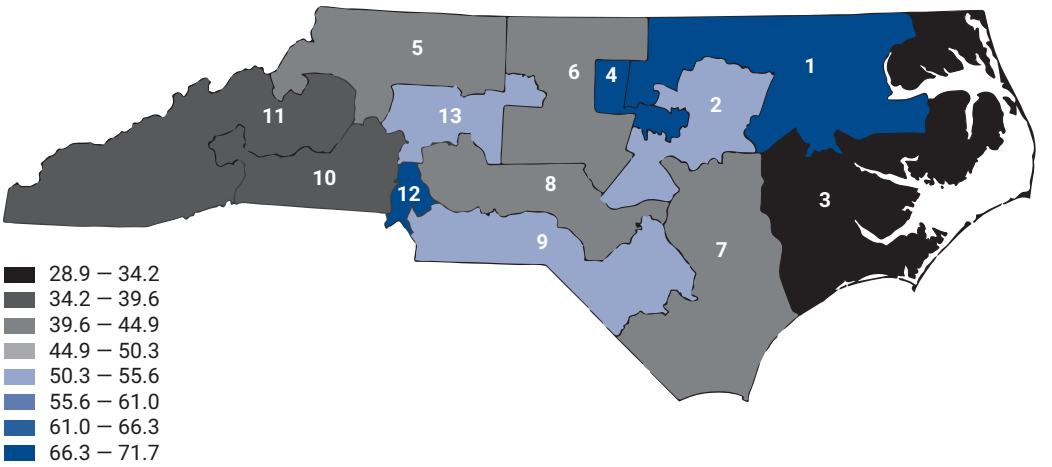
At first, the 2018 midterms looked as though they could have been a more formidable test to the gerrymander, with as many as four Republican-held districts in play heading into Election Day. In the end, however, the gerrymander held.

Increased Democratic votes were mostly wasted in the state's three reliably blue districts. Indeed, the Democrats' average margin of victory in these three districts rose from 18 percentage points in 2016 to an astonishing 23 points in 2018. Still, running up the vote in those districts didn't send any more Democrats from North Carolina to Congress. The Republicans' packing strategy worked just as they'd planned.

Meanwhile, in the state's Republican districts, Democrats were spread too thin for even a robust increase in support to help. All in all, Republicans won their districts with an average margin of six points, showing the Republicans' cracking strategy also playing out as intended. The map below shows the average vote share won by Democrats in North Carolina districts in the past two congressional elections.

All of this has continued to leave North Carolina Democrats with only 23 percent of the congressional delegation even though they won roughly half of the state's votes in House races. Indeed, despite North Carolina's well-established purple-state status — with hotly contested elections for statewide offices and a vibrant, diverse collection of voices and interests — its congressional delegation remains overwhelmingly Republican. And that goes back to the basic design of the map.

Average Democratic Vote Share
(2016 and 2018)



The only way to put a stop to this is to remake North Carolina's map and the state's redistricting process. The Supreme Court can help do both this spring by striking down the map as an unconstitutional partisan gerrymander and putting some laws in place to limit the worst redistricting abuses. A strong ruling from the court would not only require the legislature to draw a new, fairer map for 2020 but also set the ground rules for the next round of redistricting in 2021. If the Supreme Court refuses to rule, the North Carolina Supreme Court might.

And while North Carolinians don't have access to the kind of ballot initiatives that put independent redistricting commissions in place in California and Michigan, there might be some hope for legislative reforms ahead of 2021, if Republicans become sufficiently scared that a blue tsunami in 2020 could sweep away their long-standing majority in the state legislature and, with it, their control over the state's next redistricting process. The threat of a Democratic gerrymander in 2021 might be enough to put the state's Republicans in a bargaining mood. Certainly in the long run, the demographics of this fast-changing state don't favor Republicans.

However, until courts or civic-minded legislators step in to fix a broken redistricting process, the gerrymander is still very much threatening American democracy.

MASS INCARCERATION

After Congress's First Step on Reform

Inimai M. Chettiar and Ames C. Grawert

In December 2018, Congress enacted federal criminal justice reform — a rare show of bipartisan progress. The Brennan Center played a central role in fighting to ensure that the measure included strong sentencing reform. Citing our support, the New York Times *editorial board called the bill "a major step forward." What comes after the FIRST STEP Act?*

Years of collaboration and compromise have finally produced some good news on Capitol Hill.

Last night, the Senate passed the broadest criminal justice reform bill in a generation — even in the face of attempted sabotage from Senators Tom Cotton (R-Ark.) and John Kennedy (R-La.), who tried but failed to push through amendments that would have killed the bipartisan effort.

But the FIRST STEP Act is just that: a first step that will, among other things, give judges more leeway at sentencing and adjust mandatory minimums for some crack cocaine charges.

This effort, while worth celebrating, will be incomplete without more aggressive (and progressive) reforms.

Going beyond FIRST STEP

While strong on its own, more broadly, FIRST STEP misses the mark when it comes to significantly reducing the incarcerated population in the United States. Around 40 percent of prisoners are incarcerated today without a valid public safety reason. A prior incarnation of criminal justice reform, the Sentencing Reform and Corrections Act, would have put a much more significant dent in the federal prison population by limiting the reach of other mandatory minimum provisions.

And the federal prison system holds only about 12 percent of America's prisoners. We can't truly end mass incarceration without addressing the remaining nearly 90 percent.

Altogether, that means we need to start thinking about what the nation's second step should look like.

One option is a bill that would use federal dollars to encourage states to reduce their prison rates. Congressional grant programs helped build mass incarceration. Legislation like the Reverse Mass Incarceration Act of 2017, introduced by Sen. Cory Booker (D-N.J.), could help unwind it. The bill would have provided billions in grant funding.

This effort, while worth celebrating, will be incomplete without more aggressive (and progressive) reforms.

A second option would be to eliminate prison as a sanction for lower-level crimes and slash sentences across the board. To end mass incarceration, every state would have to adopt its own reforms. But the federal government can show the way, by either providing incentive funding or leading by example and making even more drastic cuts to incarceration than the FIRST STEP Act provides.

This op-ed was published by *USA Today,* December 19, 2018.

Now that this moderate sentencing reform effort has been branded "the Trump criminal justice bill," politicians committed to justice reform will need to bring on much bolder and broader proposals. With an election year rapidly approaching, Democratic candidates can and arguably must compete to improve on the FIRST STEP Act. Anything less risks ceding a bipartisan issue that advances key progressive priorities — like racial and economic justice — to Republicans.

And conservatives looking to make a name for themselves, and court centrist voters, should be looking for every opportunity for even more bipartisan victories.

That said, we can't afford to miss any opportunity to make progress, no matter how incremental. Lives are literally on the line.

A good compromise leaves everyone angry, and the FIRST STEP Act is no exception.

Massive support for change

The bill started as a meek prison reform bill earlier this year. It focused on improving conditions in prison, rather than rethinking who goes there in the first place. Since the first draft lacked any changes to outdated federal drug sentences, it was a nonstarter, especially considering that broader sentencing reduction is one of the few areas where lawmakers and advocates across the political spectrum have common ground. Not surprisingly, progressive Democrats along with Sen. Chuck Grassley (R-Iowa), a leading voice for comprehensive reform and chairman of the Judiciary Committee, also withheld support.

After months of negotiations, Grassley and advocates formulated a bill that both improves conditions in prison and reduces the time people spend in them. Law enforcement groups like the Fraternal Order of Police, Law Enforcement Leaders to Reduce Crime & Incarceration, and the National District Attorneys Association also support it.

But securing that support came at a price.

Key to the FIRST STEP Act are a series of long-overdue reductions of draconian mandatory minimums for federal drug sentences. But some of the sentencing reduction provisions of FIRST STEP are forward-looking only — even though they were initially intended to help people already in prison, too. Once the bill is passed, thousands of people will continue serving time under the very outdated laws the Senate just revised.

The federal prison system holds only about 12 percent of America's prisoners.

To be sure, Congress is going to have other priorities in the next session. But with a divided government, criminal justice reform is one of the few areas of bipartisan agreement on Capitol Hill.

Leaders in the House and Senate, looking to burnish their trans-partisan bona fides, should take up the mantle of criminal justice reform to extend the promises of FIRST STEP. It's the right thing to do, and the public wants it done.

Mass incarceration took decades to build. It won't be unwound any faster. While the FIRST STEP Act marks real progress toward that goal, its lasting legacy should be to encourage the second and third steps necessary for finally securing our national promise of "justice for all."

Law Enforcement Leaders to Congress: Pass Sentencing Reform

Peter Newsham and Ronal Serpas

Safety and justice go hand in hand. We don't need to rely on unwise, punitive policies to protect communities from violence. That's the message of Law Enforcement Leaders to Reduce Crime & Incarceration, organized in 2015 by the Brennan Center. The group of police chiefs and prosecutors pushed for change at the national and state level. Senate Judiciary Committee Chairman Charles Grassley (R-Iowa) called members of the group his "best allies." Here, two of the group's leaders urge Congress to tackle sentencing reform as it considers criminal justice policy. Tinkering with prison conditions would not be enough.

Every day in America, public safety is jeopardized by some of the very policies meant to protect it. Our country's overuse of incarceration is one of them. It may come as a surprise to hear two police chiefs say that our approach to incarceration makes us less safe, but this is a more common belief in the law enforcement community than many might expect.

Too often, ineffective and outdated federal mandatory minimum sentencing laws send people to prison who don't need to be there at all.

We both have dedicated our lives to public safety. Fighting crime has always been our paramount concern, first as beat cops and then as police chiefs in three major cities: Washington, New Orleans, and Nashville. That same duty to public safety compels us to speak out about the urgent need for comprehensive federal criminal justice reforms. Our long careers on the front lines in America's fight against violent crime have taught us that keeping our communities safe requires a broader response than arrest and incarceration alone. We have to be smart on crime.

Tough-on-crime policies borne out of the failed "war on drugs" often leave police with no option but to spend their time arresting people, many of whom are struggling with addiction or mental health issues, for nonviolent offenses. The law demands we put them behind bars for a lengthy sentence, even as we know full well that prison will do nothing to solve the underlying issues driving these low-level offenses. We know that long prison sentences for low-level or nonviolent drug offenders do not decrease recidivism. All they do is ensure that these people will end up in the back of someone else's squad car down the line.

Harsh mandatory minimum sentences are at the root of this cycle. As police and prosecutors are forced to spend their time on low-level or nonviolent offenses, and taxpayers have to foot the bill for that unnecessary incarceration, we miss the opportunity to go after the most serious

This op-ed was published by *The Hill,* July 17, 2018. Peter Newsham is Chief of the Washington, D.C. Metropolitan Police Department. Ronal Serpas, a professor at Loyola University, was Superintendent of the New Orleans Police Department.

threats to public safety. Law enforcement resources are finite, and we should put them toward going after dangerous and violent offenders. To get serious about public safety and fully break the cycle of recidivism, we must rethink who we send to prison in the first place.

Space in prisons should be reserved for violent offenders. Too often, ineffective and outdated federal mandatory minimum sentencing laws send people to prison who don't need to be there at all. Using incarceration as a knee-jerk response to low-level or nonviolent drug offenses is one salient example. Now more than ever, with an opioid crisis devastating both rural and urban communities across the nation, there is an urgent need to change the default solution.

That is why we, along with more than 60 other police chiefs and prosecutors in a group called Law Enforcement Leaders to Reduce Crime & Incarceration, have written a letter urging Congress to fix harsh mandatory minimum sentences that drain resources away from fighting violent crime. Some in Washington have proposed a more piecemeal approach of passing prison reforms to address this problem on the back end and tackling sentencing reforms at some point in the future.

However, our decades in law enforcement have shown that an approach that focuses only on helping people coming out of prison is only part of the solution. Prison reform matters, but we will never fix this issue unless we also tackle the front end of the problem by changing the laws that send too many people to prison in the first place.

Police and prosecutors need Congress to take meaningful action, like moving forward with a bipartisan solution hammered out by Sen. Charles Grassley (R-Iowa) and Sen. Dick Durbin (D-Ill.). The Sentencing Reform and Corrections Act would shorten unnecessarily long sentences for low-level offenses while also improving prison conditions and reentry services for men and women coming home from prison.

Congress should not miss this opportunity to pass more comprehensive change. States like Florida and South Carolina have already proven that strategic sentencing reform can safely reduce nonviolent crime and incarceration at the same time. States like California have used the savings from reducing unnecessary incarceration to invest in community crime prevention, mental health services, and drug treatment. Congress should follow their lead. It will help us continue to keep crime at current historic lows, save taxpayer dollars, and ensure that law enforcement has the tools to concentrate on preventing future violent crime.

Crime Continues to Decline

Ames C. Grawert, Adureh Onyekwere, and Cameron Kimble

False claims of soaring crime aim to stoke fear and create the conditions for harsh policies. In fact, crime continues to fall. The Brennan Center's research on crime rates is a respected counterweight to misinformation from the Trump administration. Even then-Attorney General Jeff Sessions took to citing the research done by "our good friends at the Brennan Center."

This report analyzes available crime data from police departments in the 30 largest U.S. cities. It finds that across the cities where data are available, the overall murder and crime rates are projected to decline in 2018, continuing similar decreases from the previous year. This report is based on preliminary data and is intended to provide an early snapshot of crime in 2018 in the 30 largest cities. The data will be updated in later reports.

Declines in homicide rates appear especially pronounced in cities that saw the most significant spikes during 2015 and 2016. These findings directly undercut claims that American cities are experiencing a crime wave. Instead, they suggest that increases in the murder rate in 2015 and 2016 were temporary, rather than signaling a reversal in the long-term downward trend.

This report's main findings are explained below and detailed in Tables 1 and 2:

- Murder: The 2018 murder rate in these cities is projected to be 7.6 percent lower than last year. This estimate is based on data from 29 of the nation's 30 largest cities. This murder rate is expected to be approximately equal to 2015's rate, near the bottom of the historic post-1990 decline. Especially sharp declines appear in San Francisco (-35.0 percent), Chicago (-23.2 percent), and Baltimore (-20.9 percent). These estimates are based on preliminary data, but if they hold, the number of murders in Chicago could fall by year's end to the lowest since 2015. In Baltimore, homicides could drop to the lowest since 2014. While the city's murder rate remains high, this would mark a significant reversal of the past two years' increases.

- While the overall murder rate is estimated to decline this year in these cities, a few cities are projected to experience increases. For example, Washington, D.C.'s murder rate is expected to rise 34.9 percent. Several cities with relatively low murder rates are also seeing increases, such as Austin (rising by roughly 30 percent). Since the city has relatively few murders, any increase may appear large in percentage terms.

- Overall crime: At the time of publication, full crime data —covering all Part I index crimes tracked by the FBI — were available from only 19 of the 30 largest cities. (Past Brennan Center reports included, on average, 21 cities.) In these cities, the overall crime rate for 2018 is projected to decrease by 2.9 percent, essentially holding stable. If this estimate holds, this group of cities will experience the lowest crime rate this year since at least 1990. These findings will be updated with new data when available.

Excerpted from the Brennan Center report *Crime and Murder in 2018: A Preliminary Analysis*, published September 20, 2018.

This report does not present violent crime data because the authors could not collect sufficient data by the time of publication.

While the estimates in this report are based on early data, previous Brennan Center reports have correctly estimated the direction and magnitude of changes in major-city crime rates.

Table 1: Crime in the 30 Largest Cities (2017-2018 Est.)

	1990 Crime Rate (per 100,000)	2017 Crime Rate Est. (per 100,000)	"2018 Crime Rate Est. (per 100,000)"	Percent Change in Crime Rate Est. (2017-2018)
New York	9,656.40	1,922.90	1,899.20	-1.20%
Los Angeles	9,167.40	3,153.70	3,033.80	-3.80%
Chicago	11,062.30	4,308.10	4,162.30	-3.40%
Houston	11,255.90	5,011.70	Unavailable	Unavailable
Philadelphia	7,145.50	3,942.60	3,970.00	0.70%
Las Vegas	7,070.70	Unavailable	Unavailable	Unavailable
Phoenix	10,704.40	4,439.00	Unavailable	Unavailable
San Antonio	12,430.80	5,424.50	6,278.20	15.70%
San Diego	9,105.90	2,153.20	1,626.00	-24.50%
Dallas	15,386.50	3,869.80	Unavailable	Unavailable
San Jose	4,816.10	2,732.80	2,822.90	3.30%
Austin	11,653.90	3,485.60	3,306.70	-5.10%
Charlotte	12,496.50	4,440.90	Unavailable	Unavailable
Jacksonville	10,352.80	Unavailable	Unavailable	Unavailable
San Francisco	9,604.30	6,820.40	6,006.20	-11.90%
Indianapolis	6,637.20	Unavailable	Unavailable	Unavailable
Columbus	9,804.90	Unavailable	Unavailable	Unavailable
Fort Worth	14,880.50	3,281.30	2,993.00	-8.80%
El Paso	11,189.70	Unavailable	Unavailable	Unavailable
Seattle	12,507.70	5,925.90	6,067.80	2.40%
Denver	7,676.10	4,210.80	3,914.30	-7.00%
Louisville	Unavailable	4,711.00	4,361.30	-7.40%
Detroit	12,030.30	6,354.70	5,989.10	-5.80%
Washington, D.C.	10,724.30	4,938.00	4,778.20	-3.20%
Boston	11,756.90	2,684.80	2,559.40	-4.70%
Nashville	7,768.20	4,883.10	4,906.60	0.50%
Memphis	9,736.30	Unavailable	Unavailable	Unavailable
Oklahoma City	10,516.30	4,397.40	Unavailable	Unavailable
Baltimore	10,502.80	6,660.80	5,492.90	-17.50%
Portland	11,003.60	6,385.30	6,304.60	-1.30%
TOTAL				-2.90%

Table 2: Murder in the 30 Largest Cities (2017-2018 Est.)							
	2017 Total Murders	2018 Total Murders	Percent Change in Murder	1990 Murder Rate (per 100,000)	2017 Murder Rate Est. (per 100,000)	2018 Murder Rate Est.	Percent Change in Murder Rate Est. (2017-18)
New York	292	307	5.10%	30.7	3.4	3.5	4.50%
Los Angeles	282	267	-5.30%	28.2	7	6.5	-6.40%
Chicago	671	515	-23.20%	30.5	24.6	18.9	-23.20%
Houston	256	289	13.00%	34.8	10.7	11.8	10.30%
Philadelphia	310	313	0.90%	31.7	19.7	19.8	0.60%
Las Vegas	199	143	-28.20%	12.8	12.3	8.6	-29.60%
Phoenix	161	195	20.80%	13	10	11.8	18.70%
San Antonio	125	137	9.80%	22.2	8.2	8.7	7.30%
San Diego	34	26	-25.00%	12.2	2.4	1.7	-26.20%
Dallas	168	184	9.60%	44.4	12.5	13.4	7.70%
San Jose	32	32	0.00%	4.5	3	3	-1.60%
Austin	27	36	33.30%	9.9	2.7	3.5	29.30%
Charlotte	85	47	-44.70%	23.5	9.3	5	-45.90%
Jacksonville	119	Unavail.	Unavail.	27.6	13.4	Unavail.	Unavail.
San Francisco	56	37	-34.10%	14	6.3	4.1	-35.00%
Indianapolis	153	194	26.80%	12	17.5	22.1	26.10%
Columbus	123	111	-9.80%	14.1	14	12.4	-11.50%
Fort Worth	69	57	-17.90%	29	7.9	6.3	-20.20%
El Paso	16	17	7.70%	6.6	2.3	2.5	7.20%
Seattle	27	33	23.10%	10.3	3.7	4.5	19.70%
Denver	58	65	12.80%	14.3	8.1	8.9	10.10%
Louisville	107	79	-26.10%	Unavail.	15.5	11.4	-26.50%
Detroit	261	241	-7.60%	56.6	39.6	37	-6.50%
Washington, D.C.	116	159	37.20%	77.8	16.7	22.6	34.90%
Boston	57	59	3.00%	24.9	8.3	8.5	1.50%
Nashville	112	81	-27.50%	13.4	16.5	11.7	-28.70%
Memphis	177	166	-6.00%	31.9	27	25.3	-6.10%
Oklahoma City	81	49	-40.00%	15.3	12.4	7.3	-41.10%
Baltimore	342	270	-21.20%	41.4	55.4	43.8	-20.90%
Portland	22	24	9.10%	7.5	3.5	3.8	9.10%
TOTAL							-7.60%

Menstrual Equity is Central to Justice for All

Jennifer Weiss-Wolf and Kathy Hochul

When incarcerated women are denied access to affordable, safe menstrual products, their health and dignity are compromised. In an essay for City and State, the Brennan Center's Jennifer Weiss-Wolf, author of Periods Gone Public, *and New York Lieutenant Governor Kathy Hochul explain why menstrual equity matters.*

An all-male committee in the Arizona state Legislature recently debated whether incarcerated women should have free access to tampons and pads. The policy being challenged allocated only a dozen pads per person, per period – or, just about two per day for a five-day flow.

Some members of the committee expressed palpable discomfort with women's testimony about what it really means to not have adequate menstrual coverage, the impact on one's health and dignity. Still others balked at having to even contemplate menstruation. "I'm almost sorry I heard the bill," one legislator said, expressing his disgust at having to hear talk of "pads and tampons and the problems of periods."

It is hard to imagine that a normal bodily function for half the population – including the committee members' own mothers, daughters and spouses – should be cause for any agitation at all.

#TimesUp on period stigma, Arizona.

Here in New York, we understand that periods and policy often need to go hand in hand. In 2016, Gov. Andrew Cuomo signed a law to scrap the much-maligned "tampon tax." And New York also tackled the issue of incarcerated populations when Cuomo directed all state prisons to ensure that tampons and pads are freely available to those who need them. The U.S. Department of Justice has followed New York's lead, issuing a guidance last summer requiring the same in federal prisons.

New York has since further stepped to the fore of the menstrual equity movement with the governor's 2018 Women's Agenda for New York, which includes a call on the Legislature to require free menstrual products in public schools for grades 6-12, a low-cost requirement with significant impact and implications. Similar campaigns have seen rapid success in a short time, with surprisingly robust bipartisan support and interest. In addition to New York City, new laws recently went into effect in California and Illinois requiring the same.

It is simply not acceptable for the bodies and lives of women and girls to be treated as the exception, not the rule.

It's a policy that both sides of the aisle are behind. New polling research from the Justice Action Network, a criminal justice reform advocacy organization, shows that a whopping 90 percent of voters agree that providing menstrual products in prisons is a necessary reform, crossing partisan lines (85 percent of Republicans, 91 percent of independents, and 94 percent of Democrats).

Jennifer Weiss-Wolf is the Brennan Center's Vice President for Development and inaugural Women and Democracy Fellow. This op-ed was published by *City and State,* February 27, 2018.

Despite all this progress and popular support, though, all too often the experience in Arizona is what makes headlines. It is simply not acceptable for the bodies and lives of women and girls to be treated as the exception, not the rule. The inevitable result: Even basic necessities like menstrual products are considered outside of the scope of what our laws provide. (Don't forget, free toilet paper is a given!)

And the disparate impact is real. Girls report skipping school when they can't afford tampons or pads; homeless women resort to using brown paper bags or discarded socks; women in jails or prisons often must beg for products, or reuse the same one for days.

This has been the reality right here at home. But we are working to ensure that all New Yorkers can learn, work and live with basic human dignity, without the economic challenges posed by menstruation.

Menstrual equity can no longer take a back seat in our political discourse. It is appalling that lawmakers anywhere are too embarrassed to talk about periods in public. Here in New York, we refuse to put the lives and needs of women into the shadows. Periods have gone public – and our state will lead the charge for change. Period.

Private Prisons: Lessons From Down Under

Lauren-Brooke Eisen

In the United States, private prison firms are often incentivized to house more incarcerated people in order to make more money. Two private prisons, one in Australia and one in New Zealand, are paid more if they can reduce recidivism rates better than government prisons. With support from the Pulitzer Center for Crisis Reporting, Senior Fellow Lauren-Brooke Eisen visited these facilities. The world would be better off with far fewer prisons, both public and private, she found, but asked whether these innovations make a difference.

About 35 years ago, America began turning prisons over to the private sector. The idea was that private prisons would be better and cheaper than government-run ones. "The great incentive for us, and we believe the long-term great incentive for the private sector, will be that you will be judged on performance," Thomas Beasley said on 60 Minutes in 1984. Mr. Beasley was president of the newly created Corrections Corporation of America.

Today about 9 percent of those behind bars in 28 states and in federal prisons — more than 128,000 people — are in prisons run by the private sector.

Today about 9 percent of those behind bars in 28 states and in federal prisons — more than 128,000 people — are in prisons run by the private sector. More than half of all private prison beds are owned by CoreCivic, the new name for Mr. Beasley's company. In addition to prisoners, about 70 percent of detainees in Immigration and Customs Enforcement custody are in private facilities.

But private prisons have turned out to be neither better nor cheaper. They have about the same recidivism rates as their government-run counterparts — nearly 40 percent. And the Government Accountability Office has concluded time and again that there is simply no evidence that private prisons are more cost-effective than public prisons.

Private prisons have come under tremendous political scrutiny because the more people they house, the more they profit. Most corrections contracts with the private sector merely ask the private operator to replicate what the government is doing.

Given how entrenched the private sector is in American corrections, the private prison industry is here to stay. But there are ways to improve these institutions. Currently they are rewarded according to the number of prisoners they house. What if private prison contracts were structured so that they made more money if they treated prisoners humanely with policies that helped them stay out of trouble once released? Prisons exist to lower crime rates. So why not reward private prisons for doing that? Judge them on performance, as Mr. Beasley said.

This article was published by *The New York Times*, November 14, 2018.

America doesn't use performance-based contracts. But Australia and New Zealand are experimenting with these models. Two relatively new private prisons have contracts that give them bonuses for doing better than government prisons at cutting recidivism. They get an even bigger bonus if they beat the government at reducing recidivism among their indigenous populations. And prison companies are charged for what the government deems as unacceptable events like riots, escapes, and unnatural deaths.

Although the contracts set specific objectives, they do not dictate how prison operators should achieve them. "If we want to establish a prison that focuses on rehabilitation and reintegration, we have to give the private sector the space to innovate," said Rachael Cole, a former public-private partnership integration director for the New Zealand Department of Corrections. "If we don't give them the opportunity to do things differently, we will just get back what we already have."

I recently visited New Zealand's Auckland South Corrections Facility, a low-lying yellow and white brick structure in the shadow of the local airport. It houses 970 men and avoids many of the dehumanizing elements typical of prisons. Prisoners are called by their first names instead of by number, and corrections officers are called reintegration officers.

Serco, a British company that operates prisons globally, manages the facility for the New Zealand Department of Corrections under the country's first public-private prison partnership. Men who follow the rules, complete educational and vocational programs, and keep a positive attitude can move from the more traditional housing units into six-room cottages designed to prepare them for life outside prison. The residences, which house almost a quarter of the prison's population, resemble dorm room suites with desks and bookshelves in the bedrooms, carpeted living spaces, couches, windows without bars, microwaves, refrigerators, cooking utensils, and a flat-screen TV. The men cook their own meals and do their own laundry.

Even those who live in more conventional cells manage their own affairs through a computer system to schedule family visits, medical appointments, and their daily responsibilities. Each prisoner has a résumé and is expected to apply and be interviewed for jobs at the facility. The prison also responds to the job market. Noticing the growth in barista careers, Serco opened two cafés in the prison to provide on-the-job training.

New Zealand's prison population has soared in recent years, reaching an all-time high of more than 10,600. The country also struggles with racial disparities, with an overrepresentation of Maori — the nation's indigenous Polynesian people — in their prisons. Maori make up only about 15 percent of the country's population but half of New Zealand's prisoners. Aiming to reduce the Maori's recidivism rate, Serco and its partners worked with indigenous groups to build a cultural center for the Maori prisoners at the Auckland South prison. When I visited, one Maori prisoner, a bald, bearded man dressed in the prison uniform of gray shorts and a burgundy shirt, was cleaning the cultural center to prepare it for a meeting. He said that the center hosts events like the Maori New Year celebration and that family members frequently join.

"The prison is designed for rehabilitation," said Oliver Brousse, chief executive of the John Laing Investment Group, a member of the consortium that built Auckland South. "The strength of these public-private partnerships is that they bring the best practices and innovation from all over the world, allowing local authorities to benefit not only from private capital but also from the best people and best practices from other countries."

In Australia, the Ravenhall Correctional Center near Melbourne is a 1,000-bed medium-security facility with 51 buildings spread across six acres. There is no razor wire. The prison is operated by the GEO Group, a global prison firm (with most of its facilities in the United States), under a partnership with the Victoria state government. Men live in five communities in small buildings similar to college dorms.

Social workers and other clinicians meet with the men inside the communities; overall, the prison has more than 70 clinical programs. When I visited, a group of men whose good behavior had allowed them to progress to living in four-bedroom suites were making sandwiches for lunch and contemplating stir-fry for dinner.

"What makes Ravenhall different is that I didn't think of it much as a jail," said a man named Cameron, who was released in April and now works as a landscaper for Rebuild, a Y.M.C.A. program that trains prisoners in construction work and hires some of them when they leave the prison. "It is a place to be if you really want to change. You had to be either in a program or in education. You can't just stay in the cottage and do nothing."

Even the men who haven't yet made it to these cottages live in more humane quarters than exist in most American prisons. Instead of bars on windows, there is thick glass, providing more natural light and a better view of the outside.

As in New Zealand, indigenous people in Australia are overrepresented in the prison system. Aboriginal and Torres Strait Islanders are only 2 percent of the adult population but account for more than a quarter of the incarcerated population. Ravenhall has six staff members who work primarily with indigenous prisoners to reconnect them with their cultural heritage. The programs also help the men to be better fathers and to recover from trauma.

The GEO Group decided that to cut recidivism, it needed to continue working with prisoners once they were out. At the Bridge Center, families meet with social workers to discuss what life could be like when their loved ones leave prison and return home. And those released from Ravenhall can meet with the same clinicians they might have bonded with while incarcerated, work with staff to find housing, and in some cases receive vouchers to cover three months' rent.

These prisons are so new — Ravenhall opened less than a year ago — that we don't yet know if the system works, but corrections departments in both countries are optimistic. Auckland South opened in 2015, and an evaluation of Auckland South's initial success in reducing recidivism will likely be released later this year.

If the prisons in Australia and New Zealand prove successful, could a similar approach work in the United States? It would require getting beyond simplistic views of private prisons, recognizing that their failures could be a result of the incentives they receive. And it would involve a leap of faith to allow the private sector some flexibility in how it chooses to reduce recidivism.
"This partnership is about moving away from the prescribed way of doing things," Jeremy Lightfoot, deputy chief executive of the New Zealand Department of Corrections, told me in his office in Wellington in July. "This prison is in our network. If it is succeeding, then we are succeeding."

In America, the government tends to rely on the private sector only when it needs capital. In Australia and New Zealand, governments partnered with private industry to design the contracts themselves and fashion innovative practices to reduce recidivism.

"What you have to realize is that we are human beings as well," Cameron said. "If you put the boys in the cage and treat the boys like an animal, they will think they are animals. But if you put them in an environment where things are peaceful and they are treated like humans, they can change."

Fresh Ideas to End Mass Incarceration

Lauren-Brooke Eisen and Inimai M. Chettiar

America's criminal justice system is broken. Fixing it will require new ways of thinking and political courage. In this policy agenda, part of a series of affirmative solutions to our country's greatest challenges, the Brennan Center examines ways to significantly reduce the number of people in prison.

This report sets forth an affirmative agenda to end mass incarceration in America. The task requires efforts from both federal and state lawmakers.

Today, criminal justice reform stands on a knife's edge. After decades of rising incarceration and ever more obvious consequences, a powerful bipartisan movement has emerged. It recognizes that harsh prison policies are not needed to keep our country safe.

The United States has less than 5 percent of the world's population but nearly one-quarter of its prisoners.

Now, that extraordinary bipartisan consensus is challenged by the Trump administration through inflammatory rhetoric and unwise action. Only an affirmative move to continue reform can keep progress going.

The United States has less than 5 percent of the world's population but nearly one-quarter of its prisoners. About 2.1 million people are incarcerated in this country, and the vast majority are in state and local facilities. Mass incarceration contributes significantly to the poverty rate. It is inequitable, placing a disproportionate burden on communities of color. It is wildly expensive, in some cases costing more to keep an 18-year-old in prison than it would to send him to Harvard. Our criminal justice system costs $270 billion annually yet does not produce commensurate public safety benefits.

Research conclusively shows that high levels of imprisonment are simply not necessary to protect communities. About four out of every ten prisoners are incarcerated with little public safety justification. In fact, 27 states have reduced both imprisonment and crime in the last decade. A group of over 200 police chiefs, prosecutors, and sheriffs has formed whose founding principles state: "We do not believe that public safety is served by a return to tactics that are overly punitive without strong purpose … we cannot incarcerate our way to safety."

In cities, states, and at the federal level, Republicans and Democrats have joined this effort. They recognize that today's public safety challenges

Excerpted from the Brennan Center proposal *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, published March 22, 2018.

demand new and innovative politics rooted in science and based on what works. The opioid epidemic, mass shootings, and cybercrime all require modern responses that do not repeat mistakes of the past.

Crime is no longer a wedge issue, and voters desire reform. A 2017 poll from the Charles Koch Institute reveals that 81 percent of Trump voters consider criminal justice reform important. Another, from Republican pollster Robert Blizzard, finds that 87 percent of Americans agree that nonviolent offenders should be sanctioned with alternatives to incarceration. And according to a 2017 ACLU poll, 71 percent of Americans support reducing the prison population — including 50 percent of Trump voters.

But the politician with the loudest megaphone has chosen a different, destructive approach. Donald Trump and Attorney General Jeff Sessions falsely insist there is a national crime wave, portraying a country besieged by crime, drugs, and terrorism — "American carnage," as Trump called it in his inaugural address. But crime in the United States remains at historic lows. While violent crime and murder did increase in 2015 and 2016, new data show crime and violence declining again in 2017. The national murder rate is approximately half of what it was at its 1991 peak.

To continue the progress that has been made, it is up to candidates running for office to boldly advance policy solutions backed by facts, not fear.

Those who seek to use fear of crime for electoral gain are not just wrong on the statistics. They are also wrong on the politics.

To continue the progress that has been made, it is up to candidates running for office to boldly advance policy solutions backed by facts, not fear. This report offers reforms that would keep crime low while significantly reducing incarceration. Most solutions can be enacted through federal or state legislation. While most of the prison population is under the control of state officials, federal policy matters too. The federal government's prison population is larger than that of any state. Further, Washington defines the national political conversation on criminal justice reform. And although states vary somewhat in their approach to criminal justice, they struggle with similar challenges. The state solutions in this report are broadly presented as models that can be adapted.

Eliminate Financial Incentives for Mass Incarceration

- **End the Federal Subsidization of Mass Incarceration.** Federal grants help shape criminal justice policy at state and local levels. For decades, these grants have subsidized the growth of incarceration. To reverse that flow, Congress can pass the Reverse Mass Incarceration Act. This bill would dedicate $20 billion over 10 years to states that reduce both crime and incarceration, reshaping state and local policy. It is the biggest step the federal government can take to end overincarceration.
- **Abolish State Cash Bail.** The decision on whether a defendant should be jailed while awaiting trial is often based on a defendant's wealth, not on public safety. Rich offenders can literally buy their way out of jail, while poor people charged with nonviolent crimes

remain incarcerated for want of a few hundred dollars. This is unfair and unsafe. States can abolish cash bail and instead make detention decisions based on an objective analysis of whether a defendant will return to court or poses public safety risks.

- **Calibrate State Fines to Defendants' Ability to Pay.** Courts also continue to levy fees and fines on people convicted of crimes and civil violations. While doing so, they fail to consider someone's ability to actually pay the debt demanded of them, often causing people to cycle through modern-day debtors' prisons. To end this practice, states can require courts to calibrate their fees and fines to a defendant's income and ability to pay.

Enact Sentencing Reform

- **Pass the Federal Sentencing Reform and Corrections Act.** Federal prison sentences are far too long, saddling offenders with punishments that bear little relationship to public safety or deterrence. The Sentencing Reform and Corrections Act, backed by a powerful bipartisan coalition, would cautiously reduce federal sentences in some cases, a first step toward broader sentencing reform.
- **Eliminate State Imprisonment for Lower-Level Crimes.** Incarceration is too often the punishment of first resort. It is expensive, often counterproductive, and should be used consistently to meet the overarching goals of enhancing public safety and rehabilitation. Sentencing laws can be reconstructed to fit these parameters and eliminate prison as a punishment in more cases. If implemented nationwide, it would lead to a 25 percent reduction in the national prison population — while preserving public safety.
- **Make State Sentences Proportional to Crimes.** Like federal sentences, state prison sentences are also excessively long. A growing volume of research shows that there is little or no relationship between length of incarceration and recidivism. Recalibrating state prison sentences around commonsense factors, rather than simple retribution, would safely cut another 14 percent of the prison population.
- **Cut State Imprisonment by 40 Percent.** Better yet, the foregoing two solutions combined would net a 40 percent reduction in incarceration, as explained in a 2016 Brennan Center report. This is the first comprehensive plan to safely and significantly cut mass incarceration. It would save more than $180 million over the next decade — the equivalent of 270,000 police officers, or 360,000 probation officers.

Pass Sensible Marijuana Reform

- **Prevent Federal Interference in State Laws.** Most Americans — around 60 percent — support marijuana legalization. Thirty states and the District of Columbia have decriminalized marijuana in some fashion — either easing penalties for marijuana use or legalizing the drug outright, while keeping down crime. Yet federal laws still punish marijuana harshly. Worse, the Justice Department has taken steps to increase federal prosecution of marijuana even in states that have decriminalized it. As more states look to decriminalize marijuana, Congress can halt this contradictory approach by prohibiting federal interference in state marijuana policy, eliminating prison as a sanction for marijuana offenses, or classifying marijuana as a less serious drug.
- **Reform State Marijuana Laws.** More states can bring their marijuana laws in line with what voters want. They can eliminate imprisonment for marijuana offenses or ease restrictions on the drug — especially as Washington heads in the opposite direction.

Improve Law Enforcement

- **Create a Federal Police Corps.** The relationship between police and communities of color has grown increasingly tense. To rebuild this important bond while increasing the ability of police to fight crime, Congress can fund the recruitment and training of a new generation of

police officers, trained in 21st-century techniques such as conflict de-escalation, community policing, and reducing unnecessary arrests and incarceration. This program could help reshape American law enforcement to better fight crime without exacerbating mass incarceration.

- **Pass State Laws Encouraging Police to Divert Individuals to Social Services.** Police often lack appropriate pathways to send individuals they encounter — whether or not they are suspects — to necessary social services. As a result, police arrest and book people when unnecessary. This has turned America's jails and prisons into de facto drug and mental health treatment facilities, as people with profound health problems are sent to prison instead of receiving the help they need. Police departments across the country have developed innovative programs that divert individuals to social services and treatment instead of arresting and jailing them. States can increase funding for such programs.
- **Change Federal Prosecutor Incentives.** There is an increasing awareness of the role of prosecutors in mass incarceration. Current metrics for evaluating prosecutors reward them for pursuing more cases, winning more convictions, and garnering longer sentences. Congress can provide bonus dollars to federal prosecutors' offices that reduce crime and incarceration in their districts. This will encourage prosecutors to use incarceration only when necessary and to shift their practices to a more modern and equitable model. Alternatively, a similar reform can be implemented by a more amenable Justice Department.
- **Reform State Prosecutor Incentives.** States can similarly incentivize local prosecutors to change their practices. They could pass legislation that would charge counties for their share of the prison population, or reward prosecutors' offices that reduce crime and incarceration in their jurisdictions.
- **Adopt New Practices for Local Prosecutors.** A large coalition of mainstream prosecutors and police has formed across the country to call for an end to unnecessary incarceration. Dozens of reform-minded prosecutors are being swept into office. These leaders can advance justice reform through hiring and training a new generation of prosecutors, changing incentives for line prosecutors, and declining to prosecute minor offenses, among other reforms.

Respond to the Opioid Crisis

- **Advance a Sensible National Response to Opioids.** Opioid overdose deaths are at a record high. But the White House's new "war on opioids" is not the answer. Conservatives, progressives, and law enforcement officials agree that the original war on drugs did not work. Congress can offer modern solutions without repeating mistakes of the past. It can start by reducing the flow of opioids, expanding resources for prevention and treatment, and encouraging the Justice Department to focus enforcement on major traffickers and abusive marketers.
- **Reduce State Opioid Deaths.** Similarly, states can regulate opioid prescriptions, expand prevention and treatment resources, and divert those struggling with addiction to treatment instead of prison.

Reduce Female Incarceration

- **Pass the Federal Dignity for Incarcerated Women Act.** For the last 40 years, the growth rate of incarcerated women has been double that of men. One in four women is pregnant or has a child under the age of 1 when she enters prison. The prison system was not built to respond to the needs of women. The Dignity for Incarcerated Women Act would expand visitation policies for mothers, eliminate shackling, and enhance access to female health care.
- **Curb the Number of Women Entering State Prisons.** The solutions throughout this report would help free women who are unnecessarily incarcerated. As an additional measure, states can ensure that female defendants, especially mothers of young children, are diverted to alternatives to prison when possible.

Crime and Punishment in Black America

James Forman Jr., Nia-Malika Henderson, and Theodore R. Johnson

Critics have assailed the rise of mass incarceration, emphasizing its disproportionate impact on people of color. As James Forman Jr. points out in his book, Locking Up Our Own, *many African American leaders in the nation's urban centers supported the war on crime that began in the 1970s. In a conversation with CNN Senior Political Reporter Nia-Malika Henderson and the Brennan Center's Ted Johnson, the Pulitzer Prize–winning author discussed this complicated aspect of the history of mass incarceration.*

NIA-MALIKA HENDERSON: In *Locking Up Our Own*, Forman tries to explain the how, the why, and the who of mass incarceration. What he found was that in the face of skyrocketing murder rates and the proliferation of open-air drug markets, Black pastors, elected officials, and city council members believed that they had no choice and that they were essentially responding to the pleas of their constituents who were beset by crime in their communities. A half-century later, we now know that the policies they adopted have had particularly devastating consequences for residents of poor Black neighborhoods.

The criminal justice system, especially when we talk about mandatory minimums, was never really about rehabilitation and fixing communities. It was about punishment.

JAMES FORMAN JR.: My parents met in SNCC, the Student Nonviolent Coordinating Committee, in the 1960s. My dad was the executive secretary, my mom was a member of the organization, and their generation changed America. They transformed this nation and made it possible for African Americans of my generation to have opportunities unimaginable to earlier generations.

Yet at the same time, with all that progress, I could see graduating from law school that the legal system was the place where the unfinished business of the civil rights movement sat. We didn't have the term mass incarceration, but we already knew that one in three young Black men was under criminal justice supervision. We knew that Black women were the largest single growing portion of the prison system. We knew the United States had passed Russia and South Africa to earn the dishonor of being the world's largest jailer.

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One of the arguments in my book is that when we think about how we got mass incarceration and how we're going to have to respond, it's tempting to look at statements of presidents or particular acts of Congress. And those are important. But it's also critical that we look at these tiny, small decisions, made across 50 states, 3,000 counties, over a 50-year period. These tiny little

Excerpted from remarks given at: *Crime and Punishment in Black America* at NYU D.C., May 17, 2018. Johnson is a senior Brennan Center fellow.

decisions that escape our notice, like the decision made by the head of a government agency about which other agency to enlist when they get a citizen complaint about an addict in public space, collectively, over time, are the bricks that together built the prison nation that the United States has become.

THEODORE R. JOHNSON: What research shows is that even though Black folks generally are compassionate about what happens to people in their community, when they are victims of crime, they throw the book at the person who committed a crime against them. So, our policy essentially became a series of interpersonal interactions where we threw the book at people that had this outsize, cumulative effect codified in law.

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When you're working within a system of racism, the discretion of prosecutors and judges, of everyone, is sort of constrained. If you're in this system that's imperfect but you have this mandate from your community to do whatever you can to clean it up, you try to use the system you have to do the best you can for your folks. I don't think people think about "What will this mean in 20 years?" I think they see it as "The harder we are on these folks, the more likely they are to get their life together." But the criminal justice system, especially when we talk about mandatory minimums, was never really about rehabilitation and fixing communities. It was about punishment. Increased punishment doesn't often make things better. Clearly, what we saw in the war on drugs is that it's not even a good deterrent.

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What's fascinated me most is the narrative about why people believe criminal justice reform is now necessary. On the conservative side of the aisle, prisons are an inefficient use of taxpayer funds. Prisons are overcrowded, which means they're stretching budgets, which means taxpayer dollars aren't being used wisely because the recidivism rate is very high. It's just a bad use of dollars. Then on the liberal side, it's all the racial injustice that's happening and there's a sense that our communities are not safer and that the government's not doing everything it can to make it so. Those two competing narratives have managed to find some harmony and I think that's the only way we get reform done. As soon as criminal justice reform becomes a way of undoing the racial disparity that was created in the war on drugs, then it seems like a handout to black folks who didn't know how to act, and it's no longer supportable. If it's just about saving money, then you lose the compassionate aspect of it, and you can save money on prisons without erasing racial disparities. You can't find harmony there either.

FORMAN: There's a small but, I think, powerful and growing restorative justice movement that needs to be better funded and better supported. This is one of the problems, that all of the alternatives get funded on a one-year grant for $200,000. Meanwhile, the budget line for the police, the prosecutors, and the corrections officers is dedicated and going on forever. So, we really have to sustain some of these programs.

THE COURTS

Beyond Judicial Elections

Alicia Bannon

State judicial selection processes are broken, swamped with private money and hyperpartisan elections. For the first time, the Brennan Center came out in opposition to all supreme court elections. It proposed reforms that would protect judicial independence and promote public trust.

Fair and impartial justice is under threat in state supreme courts across the country. Less than a generation ago, state supreme court elections were subdued affairs. No longer. Today, special interests routinely pour large sums into supreme court races. As of January 2017, 20 states had at least one justice on their supreme court who had been involved in a $1 million election. And during the 2015-16 election cycle, more justices were elected in $1 million-plus elections than ever before. Outside spending by special interest groups — most of which do not disclose their donors — also shattered previous records. Perhaps unsurprisingly, nearly 90 percent of respondents to a 2013 poll said they believed that campaign cash affects judicial decisions.

We recommend that states do away with state supreme court elections completely.

While the U.S. Supreme Court usually grabs the headlines, state supreme courts play a powerful role in American life. Ninety-five percent of all cases are filed in state courts, and state supreme courts are typically the final word on state law. Their decisions can have profound effects on our lives and on states' legal and policy landscapes — from whether an Ohio town can regulate fracking, to whether Kansas must increase public education spending by hundreds of millions of dollars, to whether Massachusetts officials can detain people based on a request from federal immigration authorities. At a time when the broken process for confirming justices to the U.S. Supreme Court is in sharp focus, safeguarding state courts as a backstop to defend our rights should be urgent business.

A judge's job is to apply the law fairly and protect our rights, even when doing so is unpopular or angers the wealthy and powerful. But the reality of competing in costly, highly politicized elections is at odds with this role. If a judge rules against a major donor, will that donor still fund her next campaign? If she angers a powerful political interest, will she face an avalanche of attack ads? These electoral pressures create a morass of conflicts of interest that threaten the appearance, and reality, of fair decision-making. They're also a roadblock for aspiring judges who can't tap million-dollar networks.

Excerpted from the Brennan Center report *Choosing State Judges: A Plan for Reform*, published October 10, 2018.

Left unchecked, these trends can undermine the integrity of state supreme courts and the public trust that undergirds their legitimacy. The implications for American justice are acute.

That's why the Brennan Center is urging states to reform their systems for choosing judges. We recommend that states do away with state supreme court elections completely. Instead, justices should be appointed through a publicly accountable process conducted by an independent nominating commission. Furthermore, to genuinely preserve judicial independence, all justices should serve a single, lengthy term. No matter the mechanism by which they reach the bench, be it an election or an appointment by the governor or legislature, justices should be freed from wondering if their rulings will affect their job security.

We are not the first to consider reforms to state judicial selection. Over the past 20 years, numerous bar associations, academics, judges, advocates, and other experts have offered ideas about how to mitigate special interest influence in judicial elections, including public financing for judicial races and stronger ethics rules for judges. Many have called for eliminating contested judicial elections. But states have been slow to act. Meanwhile, recent trends — including the increased prevalence of high-cost elections and the growing role of outside interest groups — have created both heightened urgency and new policy challenges.

Our proposals are the result of a three-year project taking a fresh look at judicial selection. We focused on state supreme courts, where the rise of politicized elections has been most pronounced. We studied how each state selects its justices, including individual case studies and an in-depth examination of judicial nominating commissions. We spoke to dozens of experts and stakeholders, reviewed the extensive legal and social science literature on judicial selection, and considered reform proposals from bar associations, legislatures, and scholars.

Brett Kavanaugh and Presidential Power

Michael Waldman

Of all plausible Supreme Court nominees, Brett Kavanaugh stood out for an extreme view of presidential immunity from legal accountability. The topic was overshadowed by allegations of sexual assault that emerged during his confirmation process. The consequences of his confirmation could be significant, as cases head to the Court that test Donald Trump's legal liability.

"If the president does it, that means that it is not illegal." So said Richard Nixon after his resignation.

Nixon left office in August 1974, just two weeks after a landmark U.S. Supreme Court ruling, *United States v. Nixon*. The chief executive had argued he could not be investigated by a special prosecutor. He insisted his secret White House tapes were protected by executive privilege. He said the Supreme Court lacked the power even to hear the case.

But the justices disagreed. By a resounding unanimous vote, they ordered Nixon to obey a subpoena and turn over his tapes. Nixon's own choice as chief justice, Warren Burger, wrote the opinion. The president, it said, is not above the law.

Standing up to a lawless president — ruling for the Constitution — is one of the top jobs of a Supreme Court justice. And at a time of scandal and investigation, the nomination of a new justice poses stark questions. Will Brett Kavanaugh, President Trump's nominee, stand up to presidential abuses? Or will he roll over? With a supine Congress and a president who increasingly flouts the law, an independent and strong Supreme Court is more important than ever.

That's why Kavanaugh's views on this very issue have drawn increasing scrutiny. Any Trump nominee before a Republican Senate would tilt rightward. We know where they'd stand on *Roe v. Wade* and *Citizens United*. But of all the possible nominees, Kavanaugh has the longest record on the very issues of presidential power and executive abuse that are likely to rush to the fore in the near term.

It's hard to avoid noticing that he was nominated by the same Donald Trump who attacks the FBI and Justice Department, rails against "witch hunts," and dangles pardons to potential witnesses. As *Slate*'s Dahlia Lithwick has written, Trump chose the justice most likely to say he could not be indicted. That will push the Mueller probe of Russian interference in the 2016 election to the center of the court debate.

But Kavanaugh's views on this subject run deeper, and thus are more potentially troubling. Much of his glittering career has been devoted to the project of freeing the presidency from legal constraint.

Not at first, though. I remember hearing his name for the first time when he was a top deputy to Whitewater independent counsel Kenneth Starr. I worked in the White House throughout those years. It is hard to fully capture the relentless, sensational, and, it felt to us, utterly partisan nature of the permanent investigative apparatus that was aimed at Bill Clinton.

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A probe that started in 1993 looking at a long-ago land deal in Arkansas ended up five years later with the impeachment of the president over lying about his sexual relationship with an intern.

Kavanaugh investigated the suicide of a top White House lawyer who conservative conspiracy theorists insisted had been murdered. (It was, he concluded, a suicide.) He urged fellow prosecutors, according to historian Ken Gormley in the book *The Death of American Virtue*, to grill Clinton in almost pornographic detail about the precise nature of his sexual interactions with Monica Lewinsky.

Kavanaugh wound up being an author of the infamous Starr Report, which set out the details of the affair in leering, footnote-laden detail. Bob Woodward reported that the young lawyer wanted to omit the smut. But some of the legal theories were pretty lurid, too. Clinton could be impeached, the report argued, for trying to delay an interview with prosecutors and for lying to the public. These amounted to obstruction of justice.

Impeachment for lying? Presidents obstructing justice? Let's assume that Trump's research team never told the boss about that one.

The episode is remembered as a partisan probe run amok. Kavanaugh quickly began to express second thoughts. He soon called for an end to the independent counsel law of the time, which had led to a swarm of prosecutors circling the White House.

In 1998, writing in the *Georgetown Law Review*, Kavanaugh wrote — correctly — that the question of whether a president could be indicted had not been resolved. He publicly said he thought the answer was no. He's hardly alone in that view; in fact, it's longstanding Justice Department policy. But Kavanaugh went further, urging Congress to pass a law ensuring that a sitting president could never stand criminal trial. That's what the Constitution implied, he wrote.

Standing up to a lawless president — ruling for the Constitution — is one of the top jobs of a Supreme Court justice.

Then he spent six years as a top aide to President George W. Bush. That administration's guiding force was Vice President Dick Cheney, who once praised the presidency's "monarchical notions of prerogative."

Most unnerving was a law review article Kavanaugh wrote a decade ago, as Bush was finishing his term (it was published the next year). Stripped to its essentials, Kavanaugh's article is a cogent brief for a presidency above the law.

He described traveling the world with the president, how important the job was, how unique its duties:

"Even the lesser burdens of a criminal investigation — including preparing for questioning by criminal investigators — are time consuming and distracting. Like civil suits, criminal investigations take the President's focus away from his or her responsibilities to the people. And a President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President."

Kavanaugh proposed that Congress actually pass a law giving the president wide immunity. "We should not burden a sitting President with civil suits, criminal investigations or criminal prosecutions," he explained. Not even investigations should touch the great man at the desk in the Oval Office.

Wouldn't that leave the chief executive rather, um, free to go wild? The judge gave a glib response. "If the President does something dastardly, the impeachment process is available." True, as some have noted, Kavanaugh did not say the Constitution required this approach. He said Congress should pass a law. But he didn't say the

Constitution shouldn't be read in this way, either. Plainly he thinks it would be the best outcome.

When it comes to the presidency and its power, this is far out of the mainstream of legal thinking. Since Watergate, we've understood that even presidents can be caught up in criminal investigations, that the law requires multiple channels of accountability. At times this has led to the criminalization of politics, in which everything turns into a legal case, giving courts and prosecutors too much power.

Conservative activists have pushed the idea of a "unitary executive," meaning that the president can hire, fire, and direct everyone in the executive branch regardless of legal constraint.

But most of us have understood the lesson taught by history: It's dangerous to let presidents evade the law.

Much of his glittering career has been devoted to the project of freeing the presidency from legal constraint.

These are not just academic or philosophical concerns about a president being caught red-handed for, say, murder. The Supreme Court may well have to decide key legal and constitutional issues revolving around Donald Trump and his scandals.

To start, there is the imminent battle over whether a federal grand jury can subpoena the president to testify. Trump plainly does not want to answer Robert Mueller's questions. Rudy Giuliani, one of the president's lawyers, claims he has broad constitutional immunity from having to do so, because that's what "the Founding Fathers" wanted. In the Nixon case, the Supreme Court required the president to obey a subpoena — but for documents, not in-person testimony.

If Mueller presses the matter, this could be a major Supreme Court case within months.

Then there are the civil suits against Trump, filed by Stormy Daniels and Summer Zervos. The Supreme Court ruled that Bill Clinton could be sued while in office but predicted that it wouldn't take much time or have much impact. (Oops.) If suits pile up against this president, it won't be a surprise if the Supreme Court has to rule on whether they proceed.

If Trump fires Mueller, an idea he has floated multiple times, there could be legal challenges. A grand jury charged Nixon with being an unindicted co-conspirator in Watergate. Could it do the same to Trump? What about status of the special counsel — is it constitutional? Is he overreaching his authority?

And there's the possibility, however remote, that the president would be indicted. Lawful? The Supreme Court would decide all these, and more.

Then there's the scope of executive privilege, used to avoid answering questions. Kavanaugh, interestingly, once proposed that Congress pass a law to make it clear that presidents could not invoke executive privilege except for national security.

Some have said that Kavanaugh should decline to hear these cases because he spoke out on these matters, or because Trump is under a cloud. But that seems unworkable. These don't add up to bad legal ethics, but bad legal ideas. A Justice Kavanaugh would rule guided by this approach, for good or ill.

That's why it is utterly vital for the Senate to grill the nominee and scour his record on these topics. This nomination fight takes place amid a crisis in our democracy. Trump's conduct adds up to an assault on constitutional norms. How will each branch of government respond to that out-of-control executive?

In arguing to cloak the president in immunity from criminal probes, Kavanaugh says the job of accountability first and foremost belongs to Congress, even when Congress is controlled by Republicans with no stomach to challenge the president.

He's right that many of these problems would be avoided if Congress did its job, asked questions, dug deep, and showed independence. When it comes to Trump, Congress has failed. When it comes to Kavanaugh, let's hope it does its job far better.

Kavanaugh Rushed Through Without Real Investigation

Rudy Mehrbani

Dr. Christine Blasey Ford gave gripping testimony to the Senate Judiciary Committee on alleged sexual assault by Supreme Court nominee Brett Kavanaugh. A roaring national controversy followed, a debate over whether there should be further investigation into Kavanaugh's background. President Obama's director of personnel, now a Brennan Center fellow, explains that this was eminently achievable. Kavanaugh was later confirmed by a vote of 50 to 48.

The FBI does not complete background investigations of its own volition. The White House is its customer in this process — the president asks, and the FBI investigates. The White House can ask for further investigation even after a nomination is made. The Judiciary Committee, in particular, was notorious for demanding follow-up on even mundane issues, such as discrepancies in a candidate's résumé, or verifying the year a nominee graduated from college. Simply put, President Trump's claim that the FBI "doesn't do" investigations like this is only true because, in this case, he hasn't asked them to.

Often, even in complex cases, follow-up inquiries can be completed in a matter of days. We had cases involving allegations of sexual and domestic violence in which we immediately asked the FBI to supplement an initial background inquiry. The FBI has field agents across the country, and many of them are trained to deal specifically with questions of sexual violence.

So Sen. Grassley (R-Iowa) is just wrong to assert to Ford's attorneys that the FBI has no further role in investigating the account Ford has given. And the Senate can, and regularly does, use its power to halt a nomination until this kind of investigation is complete. Or at least it used to. These days, Senate Republicans, the White House, and Trump, in particular, appear to have no willingness to direct the FBI to actually get to the bottom of these allegations.

Simply put, President Trump's claim that the FBI "doesn't do" investigations like this is only true because, in this case, he hasn't asked them to.

Trump is no stranger to nominating individuals of dubious suitability. Long before Kavanaugh's nomination was announced, Trump already appeared to be casting aside the tradition of White House staff members fully and dutifully vetting nominees, even when they may get answers the president may not want to hear. (See, e.g., former Trump EPA administrator Scott Pruitt, former labor secretary nominee Andrew Puzder, and Trump's former Veterans Affairs nominee Rear Adm. Ronny L. Jackson.)

When I was in the White House, though, we subjected each and every one of Obama's nominees to a grilling. We asked uncomfortable questions. More than once, a nominee said the

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only equivalent to going through our process was getting a colonoscopy.

Often, we asked questions that we knew would reveal information that could jeopardize an individual's nomination prospects. That was not just because we wanted to avoid political distractions that could harm the president's agenda but also because we believed that we owed it to the president and the American people to uncover everything we could about a nominee's background, even when we knew there would be consequences. And we would raise these issues with the background investigations unit at the FBI, where agents would take them seriously and pursue them to the best of their ability.

We subjected each and every one of Obama's nominees to a grilling.

Unlike partisan Senate investigators, who have an interest in shepherding Trump's pick through the confirmation process, FBI agents are specially trained to deal with accusations such as Ford's. They can do it quickly and in a way that respects her rights and Kavanaugh's. Rushing to subject Ford to questions from Senate staffers or from the Republican members (all of them men) of the Judiciary Committee, who have nothing close to the experience and training of career FBI agents, is totally backward.

Grassley's offer to conduct any inquiry behind closed doors is also a transparent attempt to pay lip service to the complications of a sexual violence inquiry without any real due diligence. Lacking a full accounting of what occurred, interviews from witnesses, or the additional information that an FBI investigation could yield, such testimony would be nothing more than a farce, pretending to take seriously accusations of a grave offense.

To be sure, we made our mistakes in the Obama White House. FBI background investigators are human and make mistakes, too. There were instances when we knew background checks by the FBI were incomplete, though we always raised those gaps within the White House and with FBI investigators. But a Trump White House and a Senate committee that will stop at nothing to hustle a nominee onto the nation's highest court appear to have no such scruples. They are not even interested in the truth.

Dark Money Sells the New Justice

Laila Robbins

More than any nomination before, the Kavanaugh fight spurred massive spending by private organizations. In his angry testimony before the Senate Judiciary Committee, Kavanaugh said he had been targeted by "outside left-wing opposition groups." The numbers tell a different story: Most of the spending, by far, came in support of his nomination.

The dust may have settled on Brett Kavanaugh's nomination to the nation's highest court — at least for now — but the tally of money spent on the fight reveals how special interests, particularly on the right, fueled his rise.

We tracked television ad spending in connection with Kavanaugh's nomination, with data provided by Kantar Media/CMAG. The data show that nearly $10.4 million was spent on ads supporting or opposing Kavanaugh's nomination.

These ad buys highlight how the Supreme Court confirmation process looks increasingly like a political campaign — and the outsize amount of money spent just before the midterms, particularly in states with vulnerable Democrats, could impact the balloting next month.

Pro-Kavanaugh groups dominated the airwaves

Despite Kavanaugh's characterization of the major spenders in the nomination fight as "outside left-wing opposition groups" and Republican Sen. Susan Collins's claim that "[i]nterest groups have … spent an unprecedented amount of dark money opposing this nomination," our data show that conservative groups supporting Kavanaugh overwhelmingly dominated the TV ad battle.

Pro-Kavanaugh groups ran a total of $7.3 million in ads. Much of that cash came from the Judicial Crisis Network (more on them below), along with $1.2 million from the National Rifle Association and nearly $1.1 million from America First Policies, a group led by President Trump's senior campaign advisers. Groups opposing the nomination spent less than half that amount, with $2.9 million in total spending on TV ads. (Nearly $160,000 was spent by groups who only aired ads before Brett Kavanaugh's nomination was announced.)

Even after Dr. Christine Blasey Ford's allegations, pro-Kavanaugh groups outspent anti-Kavanaugh groups $1.3 million to $860,000.

Major spenders: Judicial Crisis Network, NRA, and Demand Justice

The Judicial Crisis Network (JCN), a conservative organization that has worked to influence who sits on state and federal benches for years, dominated the airwaves. With a total of $3.9 million in pro-Kavanaugh television ads, the group spent three times as much as the next-biggest spender. In fact, JCN's ads were worth over $1 million more than those by all anti-Kavanaugh groups combined.

Like most groups supporting and opposing Kavanaugh, JCN does not report its donors. JCN's past funders are reported to be linked to the

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conservative Federalist Society — whose executive vice president, Leonard Leo, has advised the Trump administration on judicial nominees, including assisting with the Kavanaugh and Gorsuch selection processes — and to a single opaque mega-donor.

The second-largest spender, the NRA, spent over $1.2 million on ads supporting the nomination, while the largest opposition group, Demand Justice Initiative, ran $1.1 million in ads, less than a third of JCN's total ad spending.

Targeted senators

Nearly half of all TV ads — 40 percent, or $4.1 million — aired in West Virginia, North Dakota, and Indiana, the home states of three Democrats with tough election battles this November: Senators Joe Manchin, Heidi Heitkamp, and Joe Donnelly, respectively. Heitkamp and Donnelly ultimately voted against Kavanaugh, while Manchin was the lone Democrat who voted to confirm him.

In addition, groups spent $2.8 million, or 27 percent of all TV ad spending, on ads aired in the home states of Senators Susan Collins (R-Maine) and Lisa Murkowski (R-Ak.), two critical Republican votes. Ultimately, Murkowski was the lone Republican to vote against Kavanaugh, while Collins voted to confirm him. Days after Kavanaugh's confirmation, JCN launched an ad asking viewers to "thank Susan Collins for being a reasonable voice in Washington." JCN has already spent $78,640 on this ad, although Collins is not even up for re-election this year.

Tone of ads shifted following sexual assault allegations

After attempted rape and sexual assault allegations emerged against Kavanaugh, the tone and substance of ads shifted. All but one of the 22 new ads that aired after that point centered on those claims. Pro-Kavanaugh ads switched from emphasizing Kavanaugh's "integrity" and qualifications to attacking his accusers and their allegations against him.

Multiple new ads supporting Kavanaugh dismissed these allegations as merely a politically motivated "smear" campaign. Mirroring Kavanaugh's strikingly partisan testimony before the Senate Judiciary Committee, several ads blamed Democrats: For instance, one ad alleged "liberal Democrats will stop at nothing to smear him." Another ad claimed, "Democrats don't care about protecting women — and they never have," featuring images of Bill Clinton and Harvey Weinstein and concluding, "Democrats have just one goal — expanding their power."

Several pro-Kavanaugh ads dismissed the allegations as "unproven," "disgusting," or "unsubstantiated," and one said explicitly, "It never happened."

Several pro-Kavanaugh ads dismissed the allegations as "unproven," "disgusting," or "unsubstantiated," and one said explicitly, "It never happened." One ad even attacked Dr. Ford herself, saying she "can't recall key details, and no one can substantiate the claims — it's time to move on."

Perhaps to limit the appearance that their ads were dismissive of the women making the accusations, JCN, the largest spender post-allegations, only aired ads featuring female narrators after allegations of sexual misconduct surfaced, while a majority of their previous ads had featured male narrators.

Ads opposing Kavanaugh's nomination also refocused on the allegations against him. The ACLU, which announced its opposition to Kavanaugh after the Judiciary Committee hearings on Ford's claims, spent $529,000 on the most expensive anti-Kavanaugh ads released after the allegations. The ads featured videos of Bill Clinton and Bill Cosby and concluded, "We've seen this before — denials from powerful men … Integrity matters."

RACIAL JUSTICE

Overcoming Racism Through National Solidarity

Theodore R. Johnson

In the Trump era, the number of hate crimes has risen dramatically. White nationalism has gained a new foothold. Left unaddressed, this sudden rise in racial bigotry threatens to undo the progress of the last 50 years. But what is the solution? A political scientist and Brennan Center fellow suggests that the answer is a recommitment to the nation's founding principles of justice and equality, and engagement in collective action to move steadily forward together.

Racism is an existential threat to our democracy and the American idea. At first blush, such a claim may seem alarmist — after all, framing an intractable issue as a threat to our existence has become so common in our political rhetoric that it borders on cliché. But the dangers that racial inequality pose to the stability of our system of government and the principles which undergird it are clear, present, and well chronicled.

At the inception of the United States, racist views of the enslaved Black population threatened to derail the American experiment before it got off the ground. Racial hierarchy was at the core of the only event to successfully break the Union — a civil war that resulted in more than a million casualties. And racism explains the historical oppression and exclusion experienced by racial minorities in the United States, from the violent removal of Native Americans and the internment of Japanese Americans to anti-Black Jim Crow laws and racial profiling of Hispanic and Arab Americans.

The nation has undoubtedly made steady and significant racial progress, so much so that explicit racial prejudice is now socially unacceptable and a political taboo. But a closer examination of the more commonly discussed contemporary threats to our democracy — hyperpartisanship, economic inequality, and illiberal populism — reveals that racism is a common thread.

Racial sorting has accompanied the extreme polarization of our political parties, an electorally expedient occurrence due in large part to the implicitly racialized political rhetoric used to divide the citizenry into white and nonwhite blocs. This phenomenon is facilitated by playing on the fears of white citizens anxious about the nation's changing racial demographics, a development perceived as a threat to their status in society and their attendant access to resources. Racial anxieties create conditions conducive to the rise of illiberalism and serve as an effective distraction from expanding economic inequality.

Overcoming racism, of course, does not mean that these other issues will simply fade away — they will require substantial attention on their own. Leaving racism unaddressed, however, does mean there is little hope that these other threats can be met successfully.

Racism, then, is a cudgel that beats back notions of a fully inclusive democracy responsive to the public, thereby clearing the path for political and economic elites to hoard power. It presents white America with a Faustian bargain in which maintaining its place in the racial hierarchy is exchanged for a government that is not truly of the people, by the people, or for the people — simply because more of those people are of color. In this way, though the United States may indeed endure as a geopolitical entity, racism

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reduces our democracy and the American ideals of liberty and equality to be little more than hypocritical doublespeak.

Given this present state of affairs, what can be done? Our best hope is the formation of a national solidarity. The word solidarity can sometimes be troublesome since it's been used to describe several disparate concepts, from sympathy and friendship to labor protests and social unity. National solidarity is distinct; it is a combination of what philosophy scholar Sally Scholz describes as political and civic solidarities. In its civic interpretation, solidarity refers to "the obligations the state as a collective has to each citizen," under the premise that a society suffers when some of its individuals are denied basic rights and necessities. The political conception of solidarity is characterized by the unity of individuals that arises in response to an injustice or oppression. As such, national solidarity is the political unity of a democratic people demanding, on moral and principled grounds, that the state address wrongs suffered by some of its members so that liberty, justice, and opportunity are equally accessible to all.

In effect, by each of us agreeing to become parishioners of sorts of the American civil religion, we have agreed to fight for a common vision of the future.

National solidarity is especially suited to the challenge of mitigating the impacts of racism in the United States. Properly functioning democracies require trust and a sense of mutual obligation to exist among citizens and between the state and the citizenry. Such trust can be more difficult to establish in multiracial and multiethnic societies, especially when historical and extant racial hierarchies erect barriers and ignite tensions within the citizenry. In her book *Race and the Politics of Solidarity*, political scientist Juliet Hooker notes that race creates physical and moral distance between citizens in a racialized polity such that the perspectives of groups are harmfully divergent. She argues that solidarity can be realized in these instances only when political obligations transcend the limits established by racial hierarchies. National solidarity is oriented toward this aim. It creates solidarity bonds between citizens across racial stratifications in order to ensure that a fuller, more complete experience of the American ideal is available to all.

The problems with creating national solidarity, however, are immediately evident: Solidarity requires sacrifice by everyone in the constituency, both those subjected to injustice and those who benefit from it. Moreover, the incentive to establish this solidarity is inextricably tied to who is deemed responsible for redress and reconciliation. This latter point is instructive for the first. Today's divisive racialized political rhetoric exploits the ruinous frame that racism in America is deliberately and maliciously perpetuated by white citizens against racial minorities, casting Americans of color as victims while shifting the sole responsibility of "fixing" racism to white people. In this construct, a gaping fault line emerges between white and nonwhite Americans — with the former feeling unfairly maligned for historical actions and the latter taking umbrage that those harmed by racism should be responsible for its eradication. Assigning blame is often a prerequisite for assigning responsibility, but this exercise is often so contentious and divisive that any notions of solidarity are blotted out by tribal bickering.

National solidarity enables a two-pronged attack on this blame-burden quandary. First, national solidarity declares racism is a crime of the state against the citizenry, and as such, the state is responsible for the remedy. It reframes racism from a white infraction of the rights and opportunities of people of color to one where the state is culpable. This shift moves the divisive debate of responsibility out of the citizenry and into the social contract space between the state and the public. In a political sense, it pronounces the whole of the American public has been exposed to the crime of racism and adversely impacted, to widely varying degrees.

But how, exactly, have white Americans been victimized by racism? This is explained by the second feature of national solidarity, which asserts that a united citizenry compels a more responsive democracy. As long as racism is permitted to set citizens against one another, everyone in the polity is harmed. There is little incentive for government to facilitate better schools, more affordable healthcare, more economic and employment security, more advanced and secure infrastructure, or any of the public's costly policy priorities if they can be averted by simply exploiting racial divisions.

Various studies have noted that government is much more responsive to political elites and corporate interests than to the general public. So public policy tends to favor the former at the expense of the latter, which means the majority of white Americans' expectations of government are largely unmet, too. Racism, however, mutes this dissatisfaction by reassuring white citizens of their relative position in society while also placing the blame for all that ails the country at the feet of citizens of color. National solidarity disrupts that sleight of hand by exposing the injustice and the losses that racism causes each of us to experience and that national power structures exploit.

There is one last major hurdle that must be cleared if national solidarity is to have a chance at creation: Exactly what is the unifying principle that will establish bonds of kinship between citizens across racial lines? Being opposed to injustice is insufficient — there must also be a vision for the future.

Sociologist Robert Bellah's exploration of an American civil religion fills this void. Civil religion is a sociological theory that suggests there's a religious dimension to American civic and public life expressed in a set of beliefs, symbols, sacraments, and rituals that serve to bind unlike people together. In effect, by each of us agreeing to become parishioners of sorts of the American civil religion, we have agreed to fight for a common vision of the future. The high-minded ideals of equality, liberty, justice, and opportunity become the basis for a shared identity consecrated in American cultural cornerstones — in documents like the Declaration of Independence and the Constitution, in rhetoric like Abraham Lincoln's Gettysburg Address and Martin Luther King Jr.'s "I Have a Dream" speech, in observances like Independence Day and Memorial Day, and in political rituals such as the peaceful transfer of power on Inauguration Day.

As in traditional religions, civil religion is aspirational. It doesn't require that practitioners adhere to every tenet without fail, only that each of us is oriented to the same goal and that we engage in collective action to move steadily in the same direction.

This is a lot. National solidarity demands a level of honesty, commitment, and forbearance that can feel unnatural to American sensibilities grounded in individualism, self-determination, and a bootstrapping work ethic. And it is far from straightforward — sociologist Philip Gorski notes that solidarity and civil religion can be hijacked for nefarious purposes. He cites radical secularism and religious nationalism as two especially dangerous variants that remove shared purpose and compassion from our liberal democracy and excuse violent and exclusionary ethnocentrism, respectively. We can certainly see this in our current political environment, from the use of public policy to deny rights and dignity to racial minorities to an increasingly visible current of white nationalism.

But racism is a wicked problem. There is no easy way through it or away from it. If left to fester, it will ultimately consume the nation and us along with it. Either we devise a way to achieve national solidarity, or our chapter in history will be a fable about the ephemerality of multiracial liberal democracies and naiveté about human nature.

Whatever the future of the United States holds, we have our say in what its next iteration will be. The nation does not benefit from permitting racial revanchism to take root and blossom along its political landscape. The work ahead is substantial, but the prospect of proving the possibility and viability of a multiracial, multiethnic democracy — as much for posterity as for our mark in the annals of history — should energize the nation's continued progress toward overcoming the effects of racism.

A Transformative Step for Democracy in Florida

Kevin Morris

Last November, voters in Florida from both parties voted overwhelmingly to pass Amendment 4, a ballot measure to restore voting rights to citizens with past felony convictions. Since 1868, anyone convicted of a felony had been permanently banned from casting a ballot in the state, even after completing their sentence. The Brennan Center began work on this issue 20 years ago and helped draft the amendment. As a result of its passage, nearly 1.4 million more people will be eligible to vote in the next election

This election, voters in the Sunshine State achieved a major win for American democracy. By passing Amendment 4, they changed the state constitution and restored the right to vote to citizens with felony convictions in their past who have finished serving their sentences. This is no small number — some 1.4 million individuals living and working in the state will now have the opportunity to have their voices heard in their communities. Changes to voting rights of this magnitude are few and far between. Not since the 26th Amendment lowered the voting age to 18 in 1971 has a single change in the law extended the franchise to so many in the United States at once.

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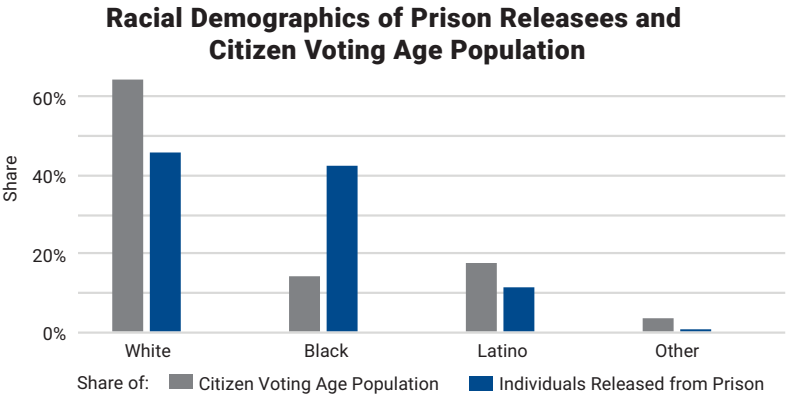
Racial Impacts of Florida's Old System

By linking voting rights to racist criminal laws known as the "Black Code" during the Reconstruction era, Florida's felony disenfranchisement law, written into the state's 1868 constitution, was originally intended to disenfranchise Black citizens. That is exactly what it did, even 150 years later. Although Black individuals make up just 14 percent of the citizen voting-age population in Florida, they constituted 42 percent of individuals released from prison between 2016 and 2017. Researchers have estimated that nearly one in four Black males was permanently disenfranchised due to a felony conviction, compared with fewer than one in 10 white men.



This piece appeared on the Brennan Center website, November 6, 2018.

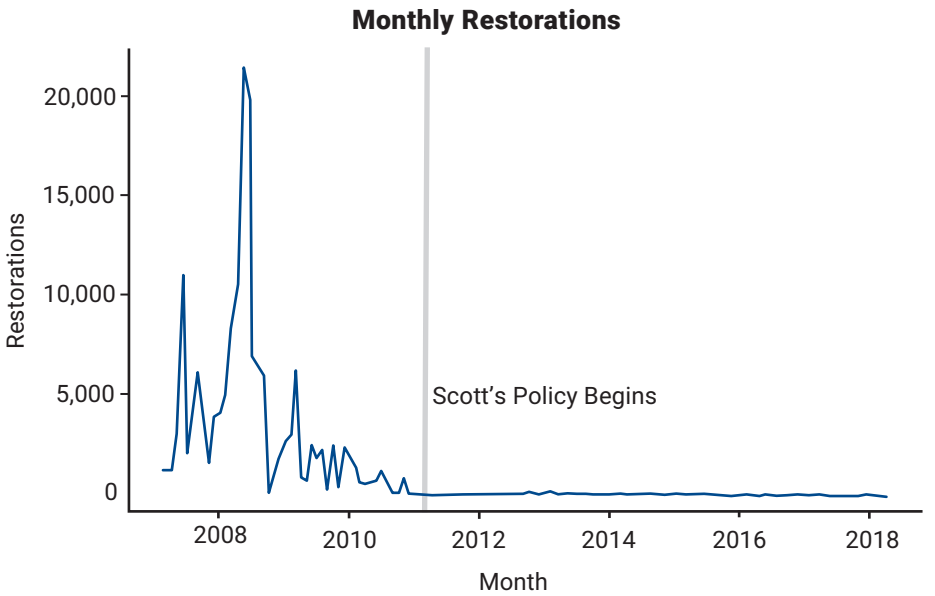
This had enormous ramifications for Florida's electorate: Just 75 percent of Black men are registered, versus 89 percent of white men. There are, of course, other factors at play — on average, Black men graduate from college at lower rates and earn less money than white men, both of which are correlated with lower registration rates. But that's true for Black women vis-à-vis white women, too, and their registration rates are much closer. Since women of all races are less likely to be impacted by felony disenfranchisement rules, there is good reason to believe that much of the registration gap among men was driven by these rules.

Problems With Discretionary Re-enfranchisement Policies

Disparities in the criminal justice system weren't the only way in which felony disenfranchisement laws had outsize consequences for Florida's Black voters. Gov. Rick Scott's discretionary process for rights restoration further exacerbated these consequences.

Gov. Charlie Crist (Scott's predecessor) instituted a policy automatically restoring voting rights for some of Florida's returning citizens. This policy, based largely on the severity of the crime committed by an individual, was in place from April of 2007 until it was ended by Rick Scott in March of 2011. During that period of just under four years, more than 150,000 Floridians with felony convictions had their voting rights restored. There are no publicly available data on the race of all those people. But using data from the voter file, we know the race of the formerly incarcerated people (but not people sentenced to felony probation) whose rights were restored and who went on to register. Of those individuals who eventually went on to register, more than half were Black, and 37 percent were white. Although exact numbers about the demographics of the disenfranchised population in Florida are hard to come by, these shares are broadly reflective of the disenfranchised population as a whole.

In 2011, Scott ended the automatic process for rights restoration. Instead, returned citizens were required to apply to the Clemency Review Board for restoration of their voting rights. There was a backlog of more than 10,000 applications, and even when the board got around to reviewing an application, its decision-making process was arbitrary and opaque. Scott effectively bragged that he could issue pardons to whomever he wished, and that any oversight was an unconstitutional curtailment of his prerogative. As he himself put it, "There's absolutely no standards, so we can make any decisions we want."



Intentional or not, Scott's discretionary system of rights restoration exacerbated the racist impacts of felony disenfranchisement. Scott restored the right to vote to very, very few people — between 2011 and April of 2018, just 3,000 individuals. Again, our data on race are limited to individuals who were formerly incarcerated and went on to register. Of those, less than a third (20) were Black. Thirty-one of them were white.

While we're of course dealing with a very small sample here, it is remarkable that previously incarcerated individuals who had their rights restored under Crist and registered to vote were substantially more likely to be Black than under Scott.

Scott's discretionary system also skewed the impact of rights restoration along partisan lines. Those who had their rights restored by Scott were twice as likely to register as Republicans as individuals who had their rights restored by Crist. Moreover, the process set up by Scott certainly created reason to question whether clemency decisions were made for political reasons. In one instance, Scott asked an applicant for clemency during his hearing why he had voted illegally while disenfranchised. The applicant attempted to explain himself and then noted that he had cast the illegal ballot for Scott. Just seconds later, Scott granted his application and restored his voting rights.

None of this should come as a shock; we know that systems that depend on personal discretion are likely to further marginalize disadvantaged communities, regardless of the intent of the person making the decision.

Looking Forward

We should all be celebrating the passage of Amendment 4 in Florida, but our work is far from finished. Certainly, securing the right to register to vote is an important and significant first step. But that's what it is — a first step. Our research shows that previously incarcerated individuals in Florida who have had their rights restored register and vote at very low levels. Currently, just 14 percent of those who went to prison and have had their rights restored are registered to vote. And, in August's primary, turnout among registered returned citizens was just three-quarters that of the statewide average.

There are a host of structural reasons why these folks might not register or cast a ballot: lack of transportation, hourly-wage jobs that make taking time off to vote difficult, candidates who don't represent their interests, and a lack of familiarity with the process. Some of these can be addressed through policies such as automatic voter registration, which makes getting on the rolls in the first place easier. But truly creating a system in which our returned neighbors' voices are heard will require much hard work. And so, while we celebrate tonight's win in Florida, let's steel ourselves for the work to come.

Fifty Years Later, Dr. King's Revolution Is Unfinished

Theodore R. Johnson, Donna Edwards, and Michael Steele

During the last years of his life, Rev. Dr. Martin Luther King Jr.'s activism expanded from civil rights to human rights, focusing intensely on the eradication of poverty and militarism. More than changing particular policies, he aimed to bring about a radical revolution of values that would restructure the architecture of American society. Fifty years after his assassination, former Rep. Donna Edwards and former Republican National Committee Chairperson Michael Steele joined the Brennan Center's Ted Johnson to discuss this tumultuous and controversial period of King's life.

MICHAEL STEELE: By the point King is making his last speech, America's looking at him and going, "I thought he was the good Negro. I thought he was OK but he's calling for boycotts." He's upsetting the system. He's pushing back. "I don't mind a march, you all can go sit down at the lunch counter, but this is something different."

THEODORE R. JOHNSON: King was very deliberate in how he approached the civil rights struggle. He understood that he had to be respectable. He had to appear comfortable to the nation or they would have shut him down before a lot of his work got going.

STEELE: While he's talking about the plight of the Negro in the South, he's also looking at a broader picture and he's seeing and hearing a response from around the country and around the globe about what the U.S. is doing. So, while the U.S. may have his thumb on the Negro here in the South, globally the U.S. seems to have his thumb on what's going on in Vietnam and elsewhere. So, King made that connection as a part of, I think, the general course of enlightenment and the maturity of his own philosophical view about these things. Not just looking at it from the very local issue of police brutality, racism, and lynchings, but how that is translated more broadly on a global stage by the government.

DONNA EDWARDS: I think if you go back and listen to Dr. King's first speech in Montgomery, where he is then this anointed young leader, he talks about his root in faith and his Christianity. And that Christianity isn't anything if it's not about justice. In his last speech in Memphis he says the same thing as he does in his speech on Vietnam at Riverside Church. He talks about the call for democracy and justice and that they are twin calls, rooted in his faith. I don't think that it was much of a stretch for him to go from the anointed civil rights leader to Vietnam and then on to being anti-poverty.

Excerpted from remarks given at *Revolution Unfinished: Remembering MLK's Vision for a Nation Transformed* at NYU D.C., April 3, 2018. Johnson is a senior Brennan Center fellow.

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Because I was in a military family, I can actually remember when Dr. King made that speech on Vietnam and the conversation that ensued among service members who were my dad's friends. You know what? They were totally with him, because they knew what the sacrifice was. They knew what was going on, and then shortly after Dr. King's assassination, we moved to the Philippines, to the center of the Asia theater. And those conversations that were happening were around Dr. King's message about Vietnam. And even though they served bravely and proudly, they were not happy with the direction the United States had taken in the course of the war.

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I think people in power often try to have folks fighting among themselves, and King talked about that. He talked about unity and about the need for connection between the economic circumstances of ruling and working-class white folks with Black folks. That was a very powerful and dangerous message to people who had power. I think that was the point at which King's presence became more challenging to the political establishment and status quo than it ever had been.

Attention FBI: Black Identity Extremists Do Not Exist

Michael German

In 2017, the FBI coined a new phrase: "Black Identity Extremists." The problem? There is no such thing. Rather than address an existing threat, the Bureau's intelligence assessment may cause much more harm than good. In testimony before the Congressional Black Caucus, senior Brennan Center fellow Michael German, a 16-year law enforcement veteran who twice infiltrated white supremacist terrorist organizations, discussed the dangers of the FBI's new classification.

Chairman Richmond and members of the Congressional Black Caucus, thank you for inviting me to speak to you today about the FBI's August 2017 intelligence assessment describing a purported threat posed to law enforcement officers by "Black Identity Extremists" (BIE). The assessment is of such poor analytic quality that it raises serious questions about the FBI's purpose in producing it. What is most troubling about the BIE assessment is its potential to incite irrational police fear of Black political activists. Irrational fear, unfortunately, too often in the past translated into unnecessary police violence against unarmed and unthreatening Black men and women.

What is most troubling about the BIE assessment is its potential to incite irrational police fear of Black political activists.

As a former FBI agent, civil rights advocate at the ACLU, and now fellow at the Brennan Center for Justice, I have reviewed hundreds of terrorism intelligence products like the BIE report, and I am sorry to say it isn't unusual. In 2011, the ACLU exposed bigoted FBI training materials that demonstrated bias against Arabs, Muslims, and Asians. In 2012, I wrote articles criticizing FBI intelligence materials on "Black Separatist Extremists," "American Islamic Extremists," "Animal Rights Extremists," and "The Chinese," which I provided to CBC staff. Since the BIE report came out, I have seen training materials produced by state and local law enforcement agencies adopting its language. The problem is much bigger than one report.

The FBI's BIE assessment never mentions Black Lives Matter, but as the most prominent group protesting police violence, it certainly seems to be in the crosshairs. Understanding how the FBI's investigative authorities work may provide insight into the purpose of this report. The FBI's investigative authorities are governed by the Attorney General Guidelines for Domestic FBI Operations (AGG), which prohibit investigations based solely on First Amendment activities. This is an extremely low standard, and the BIE assessment may be intended to provide the additional element necessary to justify monitoring, questioning, investigating BLM or other African American protest groups.

Excerpted from testimony before the Congressional Black Caucus, March 20, 2018.

Last modified by Attorney General Michael Mukasey in December 2008, the AGG authorizes a new type of investigation called an "assessment," not to be confused with an "intelligence assessment" like the BIE report or the "threat assessment" authorized under a previous version of the AGG for national security investigations.

The AGG authorizes FBI agents to open assessments without a factual basis to believe someone has violated the law or poses a threat. Instead, agents simply certify that their purpose is to investigate violations of federal criminal laws or threats to national security, identify the individuals or organizations involved, or collect foreign intelligence to authorize their inquiry. Assessments are intrusive. They can involve physical surveillance, recruiting and tasking informants, trash covers, overt and covert interviews, commercial database searches, and grand jury subpoenas for telephone and email subscriber information. Under the AGG, assessments can be opened for the purpose of recruiting, or coercing, a person to become an informant. Again, no factual predicate suggesting wrongdoing is required. The FBI has claimed the AGG authorizes it to collect and map racial and ethnic demographic information and track "ethnic behaviors," which is basically neighborhood profiling. The reason the FBI draws these maps is so it can treat people on one side of the line differently from those on the other.

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THE CONSTITUTION

The Dangers of a Constitutional Convention

Wilfred U. Codrington III

Since its ratification 230 years ago, the U.S. Constitution has been amended just 27 times. That number could increase dramatically, however, if political operatives are successful in their efforts to convene a constitutional convention. While the Constitution certainly needs improvement, such a move would likely be disastrous.

American politics today is extremely polarizing, and citizens seem to feel it. But despite the partisan divide, Republicans and Democrats across the country still agree on some things. For one, there is broad agreement in the United States that the pillars of our democracy are under attack.

According to a recent poll by the Democracy Project, an initiative of Freedom House, the Bush Institute, and the Penn Biden Center, 68 percent of Americans believe that our democracy is getting weaker. Fully half of Americans believe that the country is in "real danger" of becoming an authoritarian country. Even in the midst of this uncertain political climate, there is a campaign to open up the Constitution to "edits" that could threaten the country with far more unpredictability and instability.

Over the decades, there have been growing efforts to use Article V of the Constitution, which governs how to amend the document, to hold a new constitutional convention. Extremists on both sides of the aisle have pushed for an unprecedented convention, usually claiming that their delegates would propose only slight alterations to the Constitution. But an Article V convention would open the floodgates. It would expose the Constitution to any number of sweeping changes, putting the basics of our democracy at risk. Shockingly still, it is close to becoming a reality.

One campaign is actively pushing for a balanced budget amendment to the Constitution, and its advocates claim to have gathered 28 state resolutions, just six shy of the number needed for Congress to call an Article V convention. The catch? More than half of these resolutions date back 30 years or more. State legislatures passed them either without expiration dates or as "continuing applications" so they remained in effect generations later. This is a sincere effort to exploit the lack of time limits on these stale measures to change the Constitution today.

An Article V convention would open the floodgates. It would expose the Constitution to any number of sweeping changes, putting the basics of our democracy at risk.

But popular sovereignty dictates that the Constitution can be altered only with the "sanction of the people" acting through "representative assemblies," at least according to a unanimous Supreme Court. The justices explained that proposing and ratifying a constitutional amendment are not separate processes but "succeeding steps in a single endeavor" with the "natural inference being that they are not to be widely separated in time." As such, this attempt to revive a failed effort from the 1970s and 1980s,

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without putting it before the American people and their elected representatives today, raises serious legal questions. More important, it raises fundamental concerns for democratic legitimacy.

What makes this even more confounding is the fact that there is a standard in place for a reasonable time limit for amending resolutions. With very few exceptions, Congress included a seven-year ratification deadline in the constitutional amendments proposed after the Civil War. Indeed, seven years may seem like a perfectly reasonable limit.

It gives legislators ample time to consider problems of constitutional magnitude and to vote for or against proposed solutions. Constitutional change forged in this way may rest on the shakiest of legal grounds and, from a political vantage, be wholly illegitimate. Even still, it is possible because the scant text in Article V offers no guidance. Moreover, because states have yet to meet the threshold of 34 resolutions, courts have never been faced with a case challenging a constitutional convention.

Given that Article V contains no safeguards to restrain delegates, or instructions for choosing delegates, no part of the Constitution would be off-limits. While some advocating for a convention may claim to care only about one issue, invoking Article V in this way would put the most basic parts of our democracy at risk. Extremists would have free rein to everything from our systems of checks and balances to our most cherished rights, such as freedom of speech and voting for our leaders.

Our politics today may very well be crazy. But it would be even crazier if legislators who failed to secure a constitutional convention in one generation could bind their states, and the country, generations later. This would not just be crazy, but would be dangerous. The majority of Americans are already worried about our democracy. Legislators across the country must not give them any more reasons to be afraid.

The Equal Rights Amendment: A Century in the Making

Melissa Murray, Cary Franklin, Carol Jenkins, Carol Robles-Román, Jamia Wilson, Steve Andersson, Caroline Frederickson, and Jennifer Weiss-Wolf

A robust national campaign for the Equal Rights Amendment conceded defeat in 1982 when it fell short by 3 of the 38 states needed to prevail. But in 2017, the Nevada legislature cast its vote to ratify the ERA, followed by Illinois in 2018, marking a revival. Now, at a time of surging activism and civic engagement, the long fight to enshrine gender equality in the Constitution has taken on new significance. At a Brennan Center symposium, scholars, lawmakers, and movement leaders examined the renewed push for ratification. What lessons can we learn from the initial campaign? What is the current state of gender equality under the law? And how could constitutional change advance the cause of equality?

MELISSA MURRAY: The Constitution, as originally drafted and ratified, says nothing about gender, women, or the concept of sex equality. The Reconstruction amendments, which were ratified in the wake of the Civil War, did much for the cause of equality and liberty, but they did not explicitly contemplate the question of sex equality or the rights of women. In fact, it wasn't until 1919, when the 19th Amendment was introduced, that constitutional text began to contemplate the rights of women, and it did so in the very narrow context of women's suffrage.

For many, giving women the vote was not animated by an interest in women's equality, but rather by the view that women, the virtuous sex, had the potential to purify and uplift American politics.

The original Equal Rights Amendment was very much rooted in the same ethos and logic of the 14th Amendment, to provide equal rights, but then also to provide the state, and specifically Congress, with the authority to pass legislation to enable the amendment and further its aims.

...

For many, giving women the vote was not animated by an interest in women's equality, but rather by the view that women, the virtuous sex, had the potential to purify and uplift American politics. This vision of women as passive and virtuous has often justified laws that distinguish between men and women on the theory that women required the state's protection and solicitude while men did not.

Excerpted from remarks given at T*he Equal Rights Amendment: A Century in the Making,* November 27, 2018. Murray, a professor at NYU School of Law, is a member of the Brennan Center Board of Directors. Weiss-Wolf is the Brennan Center's Vice President for Development and inaugural Women and Democracy Fellow.

CARY FRANKLIN: As you know, there was a renewed push for the ERA in 1970. Michigan Representative Martha Griffiths introduced the ERA on the floor of the House in August of 1970. That was also the month of the Women's Strike for Equality, the biggest demonstration for women's rights since the women's suffrage movement. Thousands of women organized in cities throughout the country and made a number of demands regarding women's equal citizenship, including education, employment, reproductive rights, and childcare. One of the demands they made was passage of the ERA, and they collected signatures on petitions in support of it. In Washington, D.C., the strikers presented an ERA petition to the Senate and demanded that equal citizenship be encoded in the Constitution.

When the ERA was introduced on the House floor in 1970, Shirley Chisholm, the first African American congresswoman, stood up and gave a speech about why we needed the ERA and why it was important to recognize and protect women's equal citizenship. One of the things she pointed to was women's exclusion from the draft. She said: It's not fun for anybody to be drafted, but it is one of the burdens of citizenship, and we're not just asking for the benefits. A number of other legislators echoed her and there was a strong sense that ending the exclusion of women from the draft was an important thing the ERA would do.

Part of our fight now is making sure that people know we're close. It is a possibility.

CAROL JENKINS: When I first began work with the ERA coalition, our biggest fight was that the news media was simply not interested. We had been cultivating fabulous reporters for years to do a story on the ERA, and they would always say, "I'd love to do that story but my editor doesn't want to do it. It's not the right time." Part of our fight now is making sure that people know we're close. It is a possibility.

The woman who started all of this, State Senator Pat Spearman of Nevada, a woman of color, almost singlehandedly got that state to pass the ERA. And everybody said, "What?" And then in Illinois, a Black woman, Julianna Stratton, who is now the lieutenant governor there, was extremely influential in getting it passed. And now in Virginia there are women of color, including chief sponsor Jennifer Carrol Foy in the House of Delegates, who are engaged in ratification efforts. Look at us here today—this is a completely different picture from what the old ERA looked like. Part of that was inclusion in the media. They found it convenient to eliminate and ignore the women of color who were actually involved and who made progress possible.

CAROL ROBLES-ROMÁN: There has been a lot of work in media companies to diversify the lens—to have more women, people of color, and people from working class backgrounds in the journalism pool. I know that if the ERA were passed, employers, including the media, would know that they had a legal responsibility, a moral responsibility, and a cultural responsibility to make journalism look like the people they're covering.

JAMIA WILSON: There's a lot of work we have to do to disrupt cultural norms of what leadership looks like. We have to give people a chance to be

at the table who have skills and strengths that might be different from what we have been conditioned to think are the strengths and skills needed to lead us. Because the problems look different now. You need different approaches and solutions.

STEVE ANDERSSON: As a legislator, I am certain that the vote I took to pass the Equal Rights Amendment in Illinois is the most historic vote I will ever take. How often do you get to vote to amend the U.S. Constitution? For me, I think this will be the only time.

In Illinois we have a supermajority requirement for any constitutional amendments. In my chamber, the House of Representatives, which has 118 people, that means I had to find 71 people to agree with me. There were 67 Democrats and 51 Republicans. I, by the way, was one of those Republicans. As we looked at the vote tallies going into it, we realized we had approximately 61 solid Democrats who would vote for the ERA. There were 6 Democrats who were solid "no" votes. Beyond that we didn't know. This wasn't a partisan issue but rather a rural-urban divide in a lot of ways.

As I struggled to look for votes, the question became how to convince 9 or 10 of my colleagues on the Republican side to vote for this. That was a tough question. I had to look at what their objections were, because that was key—what were they going to have to explain to their district? I had to give them soundbites, answers to keep in their head that were easily understood so that their constituents could accept their support for the Amendment.

In the end, there were 72 votes on the board. Somebody jumped in at the last minute. That person was a Republican leadership individual. Afterwards, I asked him why he voted "yes," because I thought he was going to vote "no." He said, "You know, Steve, my daughter never forgave me for voting against gay marriage. I wasn't going to make that mistake again."

CAROLINE FREDERICKSON: What's going on in Virginia, California, and Nevada is a wonderful opportunity for us to reinvigorate not just the constitutional dialogue, but also the statutory and regulatory common law traditions that can and should protect women better than they do. That process of conversation in the law leads us to reinterpret the Constitution itself.

Some have neglected to think about how the 19th and 14th Amendments actually reflect back on earlier parts of the Constitution, and how the protection of women and people of color needs to inform all of our Constitution. Some of us like to think that this is a living Constitution, that our Constitution must be understood not only to reflect all the Amendments, but also the changing understanding of what something like due process or equal protection means to us today.

JENNIFER WEISS-WOLF: The line that has been ringing through my head all day was something Jamia Wilson said: "The tools are not agnostic." That's certainly what I've discovered in the advocacy, research, and writing I've done on the treatment of menstruation in the law in the United States and globally. That is also why the Brennan Center has been so excited to launch a Women and Democracy fellowship. Because the tools are not agnostic. Our own mission is to reform and revitalize the systems of democracy and justice. But what if those systems of democracy and justice are not actually agnostic? We all know that, in many ways, they're not. They were not created with women at the table.

The Second Amendment Allows for More Gun Control Than You Think

Eric Ruben and Joseph Blocher

A decade has passed since the Supreme Court handed down its ruling in District of Columbia v. Heller. *The case established, for the first time, an individual right to bear arms. Many people across the political spectrum believe* Heller *shut the door on further gun restrictions. But research by the Brennan Center's Second Amendment fellow shows that the infamous ruling allows for more regulation than meets the eye.*

Ten years ago, when a divided Supreme Court ruled in *District of Columbia v. Heller* that the Second Amendment includes a right to individual possession of firearms, dissenting Justice John Paul Stevens lamented that it was "a law-changing decision" that would cause "a major upheaval."

Heller is a landmark case in many ways, not least of which for Justice Antonin Scalia's majority opinion, one of his most discussed and most quoted. But a close look at decisions over the past decade indicates that the case has not revolutionized judicial treatment of gun laws in quite the way that Stevens and others might have feared or gun rights supporters might have hoped.

Our research confirms that most Second Amendment claims fail.

Some gun rights advocates have suggested that's because lower courts have been thumbing their nose at Scalia's opinion in an act of massive resistance akin to the South's refusal to desegregate after *Brown v. Board of Education*.

But Scalia's opinion made clear that the decision would leave untouched many "longstanding prohibitions" on the use of guns. In practice, courts have concluded that these prohibitions and others like them pass constitutional muster. Our research confirms, as other research has suggested, that most Second Amendment claims fail. We also find that most fail precisely because of limitations that *Heller* itself places on the right to bear arms.

This finding has new relevance as Americans debate yet another school shooting, this time in Santa Fe, Texas. Many politicians, advocates, and commentators have suggested that the Second Amendment prohibits further gun regulation. But hundreds of judicial decisions from across the country indicate otherwise.

The Second Amendment, as courts have come to interpret it, undoubtedly protects a fundamental constitutional right, but it also leaves room for a potentially wide range of regulation.

This article was published by Vox, June 14, 2018. Joseph Blocher is a professor at Duke University Law School.

The decision remains a big deal, but it didn't overturn the entire gun-control regime

Justice Stevens was right to call *Heller* a "law-changing decision," and it has undoubtedly had an impact on some types of gun regulation, for example by limiting some highly restrictive public carry regulations, including public carry bans. The Court's decision might also have had a deterrent effect on gun regulation, as it gives a powerful rhetorical tool to those seeking to prevent or roll back gun laws through the political process.

Courts are finding ways to accommodate both the new individual right as well as compelling interests like public safety.

But as a matter of law, gun jurisprudence has not been turned upside down, as Justice Stevens feared. Rather, courts are finding ways to accommodate both the new individual right as well as compelling interests like public safety.

It's not the world that gun control advocates would wish for. But it looks a lot like "normal" constitutional law. In the decade since *Heller*, the justices have declined dozens of opportunities to expound on the right to keep and bear arms, choosing not to grant certiorari (that is, agree to hear cases), with only two exceptions.

In 2010's *McDonald v. City of Chicago*, the Court made the Second Amendment applicable to state and local regulations — a significant decision in practical terms, since state and local laws constitute the bulk of firearms regulation. And in a short, unsigned 2016 opinion, the Court vacated the Massachusetts Supreme Judicial Court's upholding of a stun gun ban.

The Court's unwillingness to hear another gun rights case recently led a frustrated Justice Thomas, who voted with the majority in *Heller*, to call the Second Amendment a "constitutional orphan."

But that's a misreading of the evidence. The Supreme Court does not have sole responsibility for the development of constitutional doctrine. Vastly more constitutional questions are resolved in lower courts, including the federal courts of appeals, than in the Supreme Court. And when those courts reach agreement on legal issues, the justices are generally less inclined to intervene.

Those lower courts have resolved more than 1,000 Second Amendment challenges in the past 10 years. This makes it possible, even as the Supreme Court stays above the fray, to say something about the law governing the right to keep and bear arms.

In our new study, we coded every available Second Amendment decision (state and federal, trial and appellate) from *Heller* through February 1, 2016. For each individual Second Amendment challenge, we asked roughly 100 questions about the content of the challenge, the result, and the court's methodology. We assembled more than 100,000 data points, allowing us to paint a picture of where Second Amendment law stands today.

Most Second Amendment claims fail

Any time a litigant raises a Second Amendment claim, he or she is arguing that a particular government action, typically a gun regulation, is unconstitutional. It is by now well recognized that the vast majority of these claims have failed, and our data confirm it. Gun rights and gun regulation groups both regularly note this fact — though they draw very different conclusions.

	Federal Trial Court	Federal Appellate Court	State Appellate Court	Total
Successful Challenges	38	29	41	108
	8%	13%	9%	9%
Total Challenges	491	221	441	1153

For advocates of strong gun rights, the low success rate is fodder for the view that courts are hostile to the Second Amendment. Scholars, too, sometimes suggest that lower courts are flouting Scalia's opinion or narrowing it from below.

Our data suggest alternative explanations, beginning with the objective weakness of many Second Amendment claims.

Most Second Amendment claims fail because of *Heller* itself

The merit, or lack thereof, of a Second Amendment challenge obviously correlates with success or failure. Strong claims should succeed at a higher rate than weak ones.

That may sound tautological, but a closer look at the data suggests that lower courts are using Heller to judge which claims are strong and which are weak. To be sure, "strength" and "weakness" will often be a matter of opinion, but the language of *Heller* makes it clear that some kinds of claims are flawed from the outset. Indeed, 60 percent of the judicial decisions in our data set quote, at least in part, the passage in Scalia's opinion in which he explains that the Second Amendment, "[l]ike most rights, … is not unlimited." Scalia went on to write:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

This language from *Heller* gives constitutional blessing to a potentially wide range of regulation. So it should be unsurprising that the vast majority of the cases citing it go on to reject the Second Amendment claim and uphold the challenged law. Even when courts do not explicitly cite this particular passage in upholding gun laws, they often rely on other precedents that do so. That explains why the percentage of cases citing it has been steadily declining, as courts start to cite their own prior decisions that incorporate *Heller*'s list of exceptions.

The frequency of citations of the "longstanding prohibitions" passage helps explain why the success rate for Second Amendment claims is so low. For example, 24 percent of the challenges in our set are to felon-in-possession laws, which Scalia specifically singled out as appropriate; of those, 99 percent are losers.

What's more, nearly three-quarters of the challenges in our data set — 742 of 1,153 — involve criminal cases, where the success rate of constitutional claims can be expected to be lower. Unlike civil litigants, who may have a choice of whether to be in court at all, and who are more likely to be paying their own lawyers, criminal defendants facing serious charges have every incentive to make whatever arguments they can get away with.

That kind of kitchen sink approach, combined with the fact that many criminal laws involving guns fall within the categories Scalia identified, lead to a low rate of success of Second Amendment claims in criminal cases: 6 percent overall.

Second Amendment doctrine incorporates tools commonly used throughout constitutional law

In much of the country, there are very few gun laws to challenge. That's a political as much as a constitutional issue.

Our data show that courts deciding Second Amendment challenges are drawing on tools common to other areas of constitutional law. This suggests that courts are normalizing the post-*Heller* Second Amendment and treating it like other constitutional rights: It's subject to exceptions, some of which are derived from history, and to regulations that further certain important government interests. Courts continue to give considerable weight to the undeniable public safety concerns that animate most gun regulation.

In the immediate aftermath of *Heller*, it was not clear what form of doctrine would apply to the Second Amendment. But the 1,000 cases since *Heller* show courts using the basic tools of analysis familiar to constitutional lawyers.

Borrowing in part from First Amendment doctrine, for example, almost every federal court of appeal has adopted a two-part test that first asks whether the relevant person, weapon, or activity falls within the scope of the Second Amendment. As noted above, hundreds of Second Amendment cases — those involving felons or people with mental illness, for example — lose at this step.

Concealed carry, too, has been excluded from constitutional coverage, in keeping with Scalia's observation in *Heller* that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."

If the case makes it past step one, the courts go on to ask whether the challenged law is constitutional in light of both the burden it imposes on the right to keep and bear arms and the public interest it furthers.

Even at this point, plaintiffs asserting a right to bear arms face a high hurdle because the public interest in these cases is almost always public safety: Weapons, and especially lethal weapons, pose an obvious risk if misused.

That's not to say that every law will be properly tailored to further that public interest, and the laws that have been struck down have tended to be those that are overbroad or otherwise go "too far." In *Moore v. Madigan*, for example, the U.S. Court of Appeals for the Seventh Circuit struck down Illinois's statewide ban on public carry.

But just as in other areas of law, judges in Second Amendment cases tend to give some deference to the policy choices and expertise of elected officials.

As a matter of methodology, then, the Second Amendment looks increasingly like "normal" constitutional law, which in turn can explain one reason so many challenges to weapons laws fail.

	Opinion Year									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Applies Two-Part Test	27 39%	28 25%	52 36%	84 47%	65 40%	61 42%	84 44%	66 46%	2 40%	469 41%
Does Not Apply Two-Part Test	43 61%	86 75%	91 64%	94 53%	96 60%	83 58%	109 56%	79 54%	3 60%	684 59%
Total Challenges	70 100%	114 100%	143 100%	178 100%	161 100%	144 100%	193 100%	145 100%	5 100%	1153 100%

In much of the country, there are very few gun laws to challenge. That's a political as much as a constitutional issue.

We have argued elsewhere, including at Vox, that discussions about the scope and strength of the Second Amendment should take account of local and regional variation when it comes to gun rights and regulation.

In keeping with those arguments, our data set shows that in the decade since *Heller*, Second Amendment challenges (and successes) are not evenly distributed throughout the country. Two courts, the Fourth and Ninth Circuits, account for about one-third of the challenges in the federal courts of appeal. Four states account for 68 percent of the state appellate challenges.

Gun rights advocates have had more success in those courts, both in absolute terms and proportionally. The most obvious cause of this regional variation is that the circuits and states with the most Second Amendment litigation, and the most Second Amendment successes, are those that already have comparatively stringent gun control. Federal laws apply nationally and impose some important restrictions (including the felon ban discussed above), but in many parts of the United States, there simply aren't many gun laws to challenge.

That again helps explain the low success rate of Second Amendment litigation; there simply isn't a lot of low-hanging fruit for gun rights litigators. The Second Amendment doesn't have much work to do, it appears, because gun politics prevent most stringent regulations from being enacted in the first place. When D.C.'s and Chicago's handgun bans were struck down in *Heller* and *McDonald*, for example, they were the only two such laws on the books in major American cities.

That suggests that gun laws in the United States face political hurdles as much as they do constitutional hurdles.

Second Amendment litigation shows no signs of slowing down

Despite the overall failure rate, litigation rates have not decreased in the 10 years since *Heller*. That's surprising in many ways. Since *Heller* represented a sea change in the law, one might expect an initial spike in litigation, as gun owners rushed to test the constitutionality of existing laws and the breadth of the Court's holding. (The lawsuit that led to *McDonald* was filed the day *Heller* was decided.)

That surge would establish the new contours of the law, after which lawsuits would decrease as regulators and litigants came to accept the new status quo. Similarly, one might expect a high rate of initial success in those challenges, as gun laws across the country first became subject to the "individual right" reading of the Second Amendment, followed by a tapering off of success as those laws were struck down.

However, litigation rates have remained consistent and high, and the rate of success increased during the period of our study. Our data alone cannot explain these counterintuitive trends, but it is possible that some litigants have failed to internalize consensus about what makes for a successful challenge, while others have adapted to bring better cases.

Others, perhaps, are content to fling themselves against *Heller*'s limitations and to hold up their failures as evidence that they must try harder — winning politically by losing in court.

Success Rate and Challenges by Year

	Opinion Year									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Successful Challenges	0	4	7	12	14	13	36	22	0	108
	0%	4%	5%	7%	9%	9%	19%	15%	0%	9%
Total Challenges	70	114	143	178	161	144	193	145	5	1153

The Second Amendment remains fertile territory for constitutional litigation and scholarship. The Second Amendment still faces foundational uncertainties with regard to a wide range of doctrinal and theoretical questions — far more so than the First Amendment, which has generated a century's worth of case law and scholarship. For lawyers and scholars interested in the Second Amendment, this is an exciting time.

But the Second Amendment is no longer "terra incognita," as one federal judge put it after *Heller*. Our data help to map the post-Heller territory, and our hope is that it might help bring some much-needed clarity not only to the law but to the broader gun debate.

Corporations and the Constitution

Adam Winkler and Dahlia Lithwick

The battle for corporate civil rights started long before Citizens United. *In 1809, the Supreme Court issued its first ruling extending constitutional protections to corporations. Since then, powerful corporations have gained our most fundamental rights. In a conversation with journalist Dahlia Lithwick, law professor Adam Winkler discussed his new book on how* Citizens United *transformed the Constitution and its relationship to big business.*

DAHLIA LITHWICK: How did corporations actually start in America?

ADAM WINKLER: We have this image of the pilgrims who come over around 1620. They land at Plymouth Rock. They're sort of the perfect embodiment of what we think about America. They're trying to escape from tyranny. They're trying to exercise their religious freedom rights. They represent what we think America would come to define itself as.

Jamestown was founded by a business corporation, the Virginia Company of London. It was not an outcast looking to escape tyranny. In fact, they named their town Jamestown after the king. The Virginia Company of London was one of the earliest joint stock corporations in England. It came to America specifically as a money-making venture.

The idea was to come here and to make money. It wasn't to come here and establish liberty. By the time the pilgrims got to our shores to bring a sense of religious liberty and fight against tyranny, the profit-seeking corporation had already latched its hooks into the New World.

LITHWICK: Another myth that you punctured fairly thoroughly in your book is the notion that corporations are always aligned with the fat-cat rich conservative interests, and that liberals are always opposed to them. There's this clean divide that we have come to accept — again, the narrative of *Citizens United* about corporations versus the little guy. That's also not accurate.

WINKLER: Well, again, it's more complicated. There are a lot of different kinds of corporations. Indeed, much of the 20th century, it was often liberals who were promoting the idea that corporations had rights. Now, they weren't necessarily framing it in those terms, but for instance, a real key turning point in freedom of the press law was a case in 1936 decided by the Supreme

Excerpted from remarks at *Corporations and the Constitution* at NYU School of Law, February 27, 2018. Winkler, a professor at UCLA School of Law, is a member of the Brennan Center Board of Directors. Lithwick covers the Supreme Court for Slate.

Court called *American Press Company v. Grosjean*. It was basically Louisiana newspaper companies trying to take on the demagogic governor and senator of Louisiana, Huey Long.

Huey Long, well before Donald Trump, was a populist who railed against fake news. He accused the Louisiana newspapers of lying. He hit them with an advertising tax and attacks on their advertising revenue. He said it should be called "a tax on lying, two cents per lie." The Louisiana news companies wanted to challenge that tax in court and argue that it was a violation of the freedom of the press clause. But at the time, the law really did favor Huey Long. One of the reasons why it favored Huey Long was because these were corporations that were asserting First Amendment rights, and the Supreme Court had previously said that corporations do not have these kinds of free speech rights.

That case is often remembered for its influence on freedom of the press law. Rarely remembered is how much of the argument was focused on whether corporations could even assert this right whatsoever. Ultimately, the Supreme Court ruled that they could. It's considered a great liberal decision for freedom of the press. Indeed, if we think about freedom of the press cases since then, almost all were brought by business corporations. Media corporations, yes, but business corporations nonetheless. *New York Times v. Sullivan* gave the right to criticize public officials.

We forget that with an awful lot of the sort of liberal giants — the Laurence Tribes, the Kathleen Sullivans — the issue for them, the real sticking point, was that *The New York Times* itself was a media corporation. It's not nearly as clean as the public story we were telling at the time.

•••

People think that *Citizens United* was because of corporate personhood, but nowhere in the opinion is there any discussion of corporate personhood. I think there's a lot of confusion about what corporate personhood is. Despite all the controversy, it's a very well-established legal principle in the law of business and the law of corporations.

This doesn't mean that corporations are just like me and just like you. If you prick them, they do not bleed. They are not human beings. Corporate personhood means that a corporation is its own independent entity in the eyes of the law. It's wholly separate from the people who compose it: the stockholders, the managers, the creditors. They are separate legal persons. That idea of corporate personhood is fundamentally about separation from the members of the corporation. It's an idea the Supreme Court has really lost sight of. In fact, the Supreme Court rarely treats the corporation as its own independent entity wholly separate from its stockholders.

More commonly, all the way back to the earliest corporate rights cases, we find the Supreme Court often saying not that a corporation is a person, but that a corporation is an association of people — that the corporation should be treated as a pass-through and that the corporation should basically be able to assert the same rights as its members. This violates the key principle of corporate personhood that separates a corporation from the rights and duties of its members. That's why in corporate law if you slip and fall at Starbucks, you have to sue the company. You can't sue individual shareholders. The shareholders have limited liability because they are separate legal persons with separate legal duties and separate legal rights.

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In 2016, the Brennan Center for Justice celebrated its 20th anniversary – marking its first two decades in the fight to reform and revitalize our systems of democracy and justice. Three years later, we are proud to have laid the groundwork for an even stronger future. Among the new initiatives we established to bolster the Center's long-term sustainability:

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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 and pays tribute to Milholland's leadership and legacy.

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The Brennan Legacy Circle recognizes leaders who have included the Center in their charitable estate planning – a meaningful way to ensure their memory lives on in the fight to protect the fundamental values of democracy, justice, and equality. For more information about the Circle and how to join, please contact Paulette Hodge at paulette.hodge@nyu.edu or (646) 925-8750.

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